



~~CUI~~

INSPECTOR GENERAL

U.S. Department of Defense

OCTOBER 21, 2021



Review of the Selection Process and Administrative Leave of the Former National Security Agency General Counsel

Controlled by: ~~DoD OIG~~
Controlled by: ~~Administrative Investigations~~
CUI Category: ~~Law Enforcement~~
Distribution/Dissemination Control: ~~FEDCON~~
POC: ~~Deleted~~

INTEGRITY ★ INDEPENDENCE ★ EXCELLENCE

~~CUI~~



**DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL
REVIEW OF THE
SELECTION PROCESS AND ADMINISTRATIVE LEAVE OF THE
FORMER NATIONAL SECURITY AGENCY GENERAL COUNSEL**

I. INTRODUCTION AND SUMMARY

This report presents the results of the DoD Office of Inspector General (OIG) review of the selection of Mr. Michael J. Ellis, then-Deputy Assistant to the President and Senior Director for Intelligence Programs, National Security Council (NSC), for the civil service position of the National Security Agency (NSA) General Counsel (GC). Specifically, our review examined the process to select Mr. Ellis as the NSA GC and the placement of Mr. Ellis on administrative leave pending an NSA inquiry into alleged security incidents involving Mr. Ellis by General (GEN) Paul M. Nakasone, U.S. Army, U.S. Cyber Command, Commander, and NSA Director.

In total, eight DoD officials evaluated Mr. Ellis's application in three levels of review. In the first level of review, Mr. Ellis made the list of qualified applicants. In the second level of review, all the DoD officials who evaluated Mr. Ellis's packet placed his application in the top 3 of the 29 applicants. In the third level of review, the selection panel interviewed Mr. Ellis and two other candidates. Mr. Paul C. Ney, then-DoD GC and the selecting official for the NSA GC position, had conversations with two then-White House administration officials who supervised Mr. Ellis, about Mr. Ellis's work performance and qualifications. We consider those conversations appropriate and consistent with a candidate's supervisors providing unsolicited references to selecting officials during the hiring process. Mr. Ney decided to select Mr. Ellis as the NSA GC. As required by DoD policy, Mr. Ney consulted with GEN Nakasone about the decision. None of the witnesses involved in the hiring process, including Mr. Ney, indicated that they were under any pressure by the then-White House administration or anyone else to select Mr. Ellis.

We concluded that there was no improper influence or failure to comply with DoD guidance in the process and decision to select Mr. Ellis as the NSA GC.

Regarding the events leading to the placement of Mr. Ellis on administrative leave, GEN Nakasone requested in a memorandum dated January 12, 2021, formal written authorization to proceed with the hiring action. Mr. Matthew P. Donovan, Under Secretary of Defense for Personnel and Readiness, responded by memorandum dated January 14, 2021, that the DoD reviewed and determined that Mr. Ellis's selection complied with applicable civil service laws and DoD policies. GEN Nakasone responded to Mr. Donovan by memorandum dated January 15, 2021, that he intended to wait for the results of the DoD OIG review of the hiring process before extending the final job offer. The Acting Secretary of Defense (Acting SecDef) signed a memorandum dated January 15, 2021, informing GEN Nakasone of his confidence that Mr. Ellis's selection complied with applicable laws and policies, and directed GEN Nakasone to appoint Mr. Ellis to his position no later than January 16, 2021.

On Sunday, January 17, 2021, Mr. George Barnes, NSA Deputy Director, informed GEN Nakasone of two alleged security incidents involving Mr. Ellis. GEN Nakasone placed Mr. Ellis on administrative leave on January 20, 2021, citing in part the pending results of an NSA security inquiry.

In a memorandum dated January 20, 2021, explaining his decision to place Mr. Ellis on administrative leave, GEN Nakasone also cited the DoD OIG review of the selection process as an additional reason for placing Mr. Ellis on administrative leave. When Mr. Barnes informed the DoD Office of General Counsel (OGC) of GEN Nakasone's decision, the DoD OGC informed Mr. Barnes that the DoD OIG review was not a sufficient reason to place Mr. Ellis on administrative leave. We determined that the DoD OIG review of the selection process was not a valid reason to place Mr. Ellis on administrative leave because there was no allegation against Mr. Ellis regarding his selection as the NSA GC. However, we also determined that the security inquiry was a sufficient reason for GEN Nakasone's decision to place Mr. Ellis on administrative leave.

We concluded that the actions by GEN Nakasone to initiate an inquiry into the alleged improper handling of classified information and, ultimately, to place Mr. Ellis on administrative leave during this inquiry were appropriate and within his authority.

On a related matter, DoD officials forwarded Mr. Ellis's hiring packet to the U.S. Office of Personnel Management (OPM) for review on January 4, 2021. The OPM declined to review the hiring action and returned the packet to the DoD. In a memorandum to the DoD dated January 8, 2021, an OPM official stated that a pre-appointment review was not required for appointment to NSA positions. However, we believe that the current OPM policies should be reviewed to determine whether they meet Congress's intent for OPM to review and provide oversight of the hiring of current and former political appointees. Accordingly, we recommend that the Office of the Under Secretary of Defense for Personnel and Readiness request that OPM review their decision not to conduct pre-appointment reviews of hiring actions of former political appointees to the NSA, National Geospatial-Intelligence Agency (NGA), National Reconnaissance Office (NRO), and Defense Intelligence Agency (DIA) to determine if they are meeting Congress's intent for oversight of the hiring of former political appointees.

We provide our analysis of these matters in Section III of this report.¹

We summarize the applicable standards throughout this report and present the applicable standards in full in Appendix A of this report.

Scope and Methodology of the Review

We interviewed 12 witnesses, including GEN Nakasone and Mr. Ney. The witnesses also included senior officials who reviewed and evaluated candidate applications for the NSA GC position. We also interviewed the three senior officials who served on the Executive Evaluation Panel (EEP) and the two senior officials who served with Mr. Ney on the selection panel.

We obtained and reviewed Mr. Ney's official unclassified e-mails and other electronic files, totaling 66,303 items, covering the period November 1, 2019, through January 20, 2021.

We reviewed the NSA GC position selection packet, which included, in part, the NSA GC vacancy announcement with associated position qualification criteria, all candidate resumes, the EEP score sheets of each candidate's application, and EEP panel recommendations. We also reviewed the governing regulations regarding the selection process for the NSA GC position.

¹ We based our conclusions on a preponderance of the evidence, consistent with our normal process in administrative investigations and reviews.

We also collected and reviewed information associated with GEN Nakasone's decision to place Mr. Ellis on administrative leave, including the two allegations that Mr. Ellis mishandled classified information. When Mr. Ellis resigned from his position as the NSA GC on April 16, 2021, the NSA closed its inquiry into the security incidents. Mr. Barnes told us that the NSA's investigation into the security incidents was not completed and no report of inquiry was prepared. Mr. Ellis's resume indicates that he maintains a status as a reserve officer in the U.S. Navy; as such, we recommend that the Office of the Undersecretary of Defense for Intelligence and Security review the allegation that Mr. Ellis improperly handled classified information on two occasions to determine, what, if any, further actions the NSA or another agency should take regarding this allegation.

II. BACKGROUND

The previous NSA GC departed his position on January 31, 2020. His departure led to the selection process reviewed and discussed in this report.

National Security Agency

The NSA is a member of both the DoD and the Intelligence Community, and leads the U.S. Government in cryptology that encompasses both signals intelligence and cybersecurity products and services. The NSA OGC is responsible for, among other things, ensuring that the legal authorities that the NSA has been asked to execute on behalf of the nation's security are properly and reliably discharged.

The NSA OGC is a component of the DoD Defense Legal Services Agency (DLSA). The NSA GC is supervised by the DoD GC and the DoD Deputy General Counsel for Intelligence.² In addition to providing legal services directly to NSA clients, the NSA OGC also coordinates closely with the Office of the Director of National Intelligence, the DoD, the Department of Justice, and its counterparts in the Intelligence Community across all three branches of Government.

The NSA GC supervises over 100 attorneys and directly advises the NSA Director and senior Agency leadership about a wide range of complex legal issues relating to the NSA mission. The NSA GC is both a Defense Intelligence Senior Executive Service (DISES) and DLSA civilian attorney position. DoD OGC and DLSA civilian attorneys are recruited, selected, appointed, and retained on the basis of merit and in accordance with applicable law and regulations. The DLSA operates under the authority, direction, and control of the DoD GC, who also serves as the DLSA Director.

The NSA personnel office, in coordination with the appropriate DoD Deputy GC, is responsible for preparing documents for the NSA GC hiring action under the direction of the DoD GC's office, including a job vacancy announcement with proposed technical qualifications. Candidates for the NSA GC position are not required to have Executive Core Qualifications approved by an OPM Qualifications Review Board (QRB), because the OPM QRB process only applies to title 5, United States Code (5 U.S.C.) appointments to SES.³ Appointments to DISES positions, such as the NSA GC, are made pursuant to 10 U.S.C. §§ 1601 and 1606.⁴

² The DoD GC is "dual hatted" as the DLSA Director. DLSA is a DoD agency that provides legal advice and services for the DoD Agencies, DoD Field Activities, and other assigned organizations. The DoD GC and the DoD Deputy GC for Intelligence supervised the NSA GC in accordance with DoDI 1442.02, "Personnel Actions Involving Civilian Attorneys," September 30, 2010.

³ 5 U.S.C., "Government Organization and Employees."

⁴ 10 U.S.C. § 1601, "Civilian intelligence personnel: general authority to establish excepted positions, appoint personnel, and fix rates of pay," and 10 U.S.C. § 1606, "Educational assistance for members of the selected reserve."

DoD Instruction (DoDI) 1442.02, “Personnel Actions Involving Civilian Attorneys,” September 30, 2010, states that the DoD GC, “in consultation” with the NSA Director, “shall select the candidate who will fill the [NSA GC] position.”

III. NSA GC SELECTION PROCESS AND ADMINISTRATIVE LEAVE REVIEW

Chronology of Significant Events

Table 1 lists the significant events related to this review.

Table 1. Chronology of Significant Events Related to Selection Process and Administrative Leave Review

Date	Event
Jan. 16, 2020	The NSA issues the vacancy announcement for the NSA GC position.
Feb. 13, 2020	In the first level of review, a DoD OGC attorney and an NSA OGC attorney evaluate and remove unqualified applicants, and forward 29 applicants to the EEP.
Apr. 8, 2020	In the second level of review, the three-member EEP evaluates Mr. Ellis in the top 3 of 29 applicants.
May 5-8, 2020	In the third level of review, the selection panel interviews Mr. Ellis and two other candidates.
Aug. 20, 2020	GEN Nakasone interviews Mr. Ellis and the other two candidates.
Aug. 27, 2020	Mr. Ney decides to select Mr. Ellis, but later agrees with GEN Nakasone’s request to defer the announcement of the selection until after the presidential election.
Nov. 3, 2020	The presidential election takes place.
Nov. 9, 2020	A DoD OGC official initiates the staffing process to hire Mr. Ellis.
Jan. 7, 2021	The NSA representative to the Department of State reports a security incident to the NSA regarding a controlled, classified NSA document obtained from a Department of State official who was not authorized to access the NSA document.
Jan. 8, 2021	An NSA employee advises Mr. Barnes about a security incident in which Mr. Ellis allegedly failed to return classified documents to the NSA.
Jan. 13, 2021	Regarding the January 7 security incident, NSA officials discover Mr. Ellis provided the classified document to the unauthorized Department of State official.
Jan. 15, 2021	GEN Nakasone pauses the hiring process pending the completion of a DoDOIG review of the selection process.
Jan. 15, 2021	Acting SecDef Christopher C. Miller directs GEN Nakasone to appoint Mr. Ellis to the NSA GC position no later than 6:00 p.m. on January 16, 2021.
Jan. 16, 2021	GEN Nakasone appoints Mr. Ellis as the NSA GC.
Jan. 17, 2021	Mr. Barnes informs GEN Nakasone of the two security incidents involving Mr. Ellis’s handling of classified information.
Jan. 19, 2021	Mr. Ellis reports for duty as the NSA GC.
Jan. 20, 2021	The new President is inaugurated.
Jan. 20, 2021	GEN Nakasone places Mr. Ellis on administrative leave.
Apr. 16, 2021	Mr. Ellis resigns from the NSA GC position.

A. MR. ELLIS’S SELECTION AS THE NSA GENERAL COUNSEL

The NSA GC is a member of the DLSA, assigned to the NSA by, and falls under the authority, direction, and control of, the DoD GC. In accordance with DoDI 1442.02, the DoD GC serves as the selecting official for the position and, in “consultation” with the NSA Director before finalizing the selection, selects the candidate who will fill the position. Otherwise, the NSA Director has no

prescribed role in the selection process.⁵ We discuss Mr. Ney's consultation with GEN Nakasone later in the report. Witnesses told us that the selection process used to hire Mr. Ellis was the same general process used to hire senior attorneys at the DoD OGC, the NSA, other Defense Agencies, and DoD Field Activities. One member of the EEP told us of her concerns with the process, but also told us that she agreed with the recommendation to forward Mr. Ellis and six other applicants to the selection panel for further consideration. We discuss her concerns in the following section.

In the following section we discuss the selection process, including the initial review of applications, the EEP's review of applications, the Selection Panel's review of and interview of three candidates, Mr. Ney's decision to select Mr. Ellis, and Mr. Ney's coordination with GEN Nakasone. Next, we discuss the staffing of the hiring action and GEN Nakasone's concerns about the selection. Finally, we discuss political concerns raised about Mr. Ellis's selection.

Selection Process

Initial Review of Applications

Mr. Brent C. Harvey, Senior Level, Attorney-Manager for the DoD OGC and DLSA, and Ms. Ariane E. Cerlenko, Defense Intelligence Senior Level, then-Acting NSA Principal Deputy GC and later Acting NSA GC, were responsible for coordinating the overall NSA GC selection process. The NSA opened the job announcement on January 16, 2020, and closed it on January 31, 2020.

Mr. Harvey and Ms. Cerlenko conducted the initial review of all 37 applicants to ensure they met the vacancy announcement minimum requirements and technical qualifications. They completed their review on February 13, 2020, and removed eight applicants from further consideration—two applicants were not attorneys and six applicants recently graduated from law school. Mr. Harvey and Ms. Cerlenko forwarded the remaining 29 applicants, including Mr. Ellis, to the EEP for further evaluation.

Executive Evaluation Panel's Review of Applications

The EEP consisted of three DoD senior career civilians—Mr. Paul Koffsky, SES, DoD Senior Deputy GC and Deputy GC (Personnel and Health Policy); Ms. Wendy Noble, DISES, NSA Executive Director; and Mr. William Gade, DISES, Defense Intelligence Agency GC. Mr. Harvey instructed the EEP members to evaluate the 29 applications and gave them a score sheet for their use.

The EEP reviewed the applications and recommended seven candidates, including Mr. Ellis, for further consideration by Mr. Ney and the selection panel. Mr. Harvey summarized the panel's results in an e-mail to Mr. Koffsky, Ms. Noble, and Mr. Gade, on April 8, 2020.

Three candidates were consistently rated highly **by all three panel members** [emphasis added]: **[Michael Ellis** and two other named individuals].

Four candidates were highly rated by at **least two panel members** [emphasis added]: [four named individuals].

Other candidates may have been rated well by one panel member but not others or were consistently rated low by each of you.

⁵ We discuss the NSA Director's authority regarding administrative leave in Section III B of the report.

Mr. Koffsky, Ms. Noble, and Mr. Gade concurred with Mr. Harvey's summary of their results. Only Ms. Noble told us that she had concerns about the process. We describe her concerns in the following paragraphs.

Although Ms. Noble concurred with the results, she told us that she had concerns about the EEP process. According to Ms. Noble, "there were no clear rules of the road established from the onset" regarding the evaluation of candidate packages. She told us, "I am used to setting out the roles and expectations of each individual and having a process." She said that she did not receive any instructions from Mr. Harvey or anyone else as to how to proceed; there was no communication between the panel members; and as a person with no legal experience, she wanted to speak to an attorney and discuss "what an attorney might look for in a package." She stated, "Not being an attorney, I thought that was a prudent way to go." Regarding the EEP process, Ms. Noble told us that the EEP members were instructed to evaluate the 29 candidates' application packets on a score sheet rated against six technical qualifications. The EEP members were to evaluate each candidate's application, resume, and optional ECQs. Ms. Noble also expressed a concern that there was an "inconsistency in scoring" between panel members for each criterion, leading to different levels of scoring among the panel members. However, she used the scoring sheet provided by Mr. Harvey and came to the same result as the other panel members.

Ms. Noble told us that although she had previous experience serving on selection panels, this was her first time going through this NSA GC EEP process. She told us that it "struck [her] as a bit odd" that Ms. Cerlenko informed her that the "DoD GC did not want the panel [EEP] conducting any interviews." Ms. Noble told us that it "struck [her] as strange" that there were no interviews, but this was the DoD GC's "prerogative." Ms. Cerlenko and Mr. Koffsky told us that previous EEP selection panels for the NSA GC position interviewed candidates. While Mr. Harvey and Mr. Ney denied providing such instruction, the fact remains that the EEP did not conduct interviews, and the EEP is not required to interview candidates.

Ms. Noble also told us that she did not raise her concerns to the panel members, Mr. Harvey, or anyone else until after the press reports about the selection process. She also believed that the six technical qualifications that the EEP evaluated "were wholly appropriate." Finally, she told us that she concurred with the high ratings of the three applicants as well as the next four applicants who were forwarded to the selection panel for further consideration.

The Selection Panel's Review of Applications

The selection panel convened between May 5 and May 8, 2020, consisting of Mr. William S. Castle, SES, DoD OGC Principal Deputy GC; Ms. Eliana V. Davidson, DISES, DoD Deputy GC, Intelligence; and Mr. Ney, the selecting official. Mr. Ney decided that the panel would interview three of the seven candidates recommended by the EEP. One of the three candidates was Mr. Ellis, and we refer to the other two candidates as Candidate 2 and Candidate 3. The selection panel asked the same questions of each candidate in a 1-hour interview. After each interview, the selection panel briefly discussed their respective views on the candidate's performance during the interview.

Mr. Castle told us that he had served on several agency level GC selection panels. He described Candidate 2's interview as "as good an interview as [he could] remember an applicant ever having," but he did not recall any details of Candidate 3's interview. Mr. Castle told us that Mr. Ellis's interview was very good.

Mr. Castle told us that he dealt frequently with Mr. Ellis, who often chaired a regular meeting of senior U.S. Government attorneys that included GCs of the Intelligence Community; “the finest minds of the Justice Department”; other senior attorneys with extensive resumes and law degrees from prestigious law schools; and one senior attorney who had clerked for a Supreme Court Justice. Mr. Castle described Mr. Ellis as “the most prepared of anybody in the room” and “did a very good job” to make sure that those meetings were productive. Mr. Castle said that he was frustrated that the press kept referring to “Mr. Ellis as a political hack.” Mr. Castle told us that he did not recall making a recommendation to Mr. Ney about who to select but that he told Mr. Ney, “[T]his one’s going to be a very tough, difficult decision.”

Ms. Davidson supervised and rated the NSA GC and other Defense Agency GCs, and she served on three previous NSA GC selection panels. She told us that this particular selection process was consistent with the others—specifically, she told us that the DoD GC serves as the selecting official, decides who to select, offers the NSA Director the opportunity to interview the selected candidate, and ultimately retains the authority to make the final selection. Additionally, Ms. Davidson told us that she did not find it unusual that Mr. Ney decided to interview only three of the seven candidates because he had discretion as the selecting authority.

Ms. Davidson told us that she recommended the selection of Candidate 2, who had a “stunningly spectacular” interview and had experience leading a large legal office. She told us that she was also very impressed with Candidate 3, who had experience managing a large legal office. Ms. Davidson also told us that Mr. Ellis performed “very, very good,” he was highly accomplished, and she had great respect for his professional competence. However, Ms. Davidson told us that she did not believe Mr. Ellis had the necessary experience for leading a large legal office.

When Ms. Davidson recommended to Mr. Ney that he select Candidate 2, she told us that Mr. Ney said that he preferred Mr. Ellis, although he did not offer Ms. Davidson any specific rationale for his preference. Ms. Davidson stated that Mr. Ney’s decision to select Mr. Ellis was within his authority as the selecting official. Ms. Davidson also told us that while serving on three previous NSA GC selection panels, one of her recommended candidates was also not selected by the DoD GC. Ms. Davidson told us that, despite her recommendation to select another candidate, the person selected by the DoD GC performed very well as the NSA GC.

Mr. Ney’s Decision to Select Mr. Ellis

Mr. Ney reviewed the files of the seven candidates referred by the EEP and determined that the selection panel would interview Mr. Ellis, Candidate 2, and Candidate 3. Mr. Ney told us that he did not recall Ms. Davidson or Mr. Castle giving him a specific recommendation to select a candidate, but that they all agreed they had three quality candidates and this was really a difficult decision. Mr. Ney described to us his deliberations on the selection:

The most important thing I could do in any job I’ve ever had in the Government was who I brought on board, who I appointed to positions of importance and responsibility. I read all those [applications]. I got a feel for them. You simmer. You think about them. You wonder if you’re going in the right path. And ultimately, you’ve got to make the decision though.

And I was very comfortable that from among [Candidate 2], [Candidate 3], and Mr. Ellis, we would have somebody quite capable of serving in the role of general counsel at NSA and I remain of that mind. And if Mr. Ellis had

declined after all that process, I'm still quite certain I would have made another good decision.

Mr. Ney told us that he worked with Mr. Ellis on a variety of issues while Mr. Ellis served on the NSC. Mr. Ney stated that Mr. Ellis had more experience in the intelligence world than the two previous NSA GCs had at the time of their selections. We asked Mr. Ney why he selected Mr. Ellis. Mr. Ney told us, "Of those three, Michael Ellis most closely fit the description and characteristics that Glenn Gerstell [the former NSA GC] gave me ... with his scope of experience on the hill, in the White House, in the Executive and legislative branches, and as a lawyer." We also asked Mr. Ney how he evaluated Mr. Ellis's experience level with the requirement as the NSA GC to manage an office of over 100 attorneys. Mr. Ney told us:

He would be able to do it and he would be supported by career personnel ... who had been doing it for years. ... Like for instance, I really wasn't managing 1,200 lawyers in the legal community before I became the GC, you know. How do you do it? You have fit people around you who know their jobs.

Mr. Ney told us that he believed the entire controversy over Mr. Ellis was an attempt to subvert the appointment process.

Consultation with the NSA Director

DoDI 1442.02 states that the DoD GC, "in consultation with" the NSA Director, "shall select the candidate who will fill the [NSA GC] position." We asked Mr. Ney to tell us how he met the requirement that he consult with GEN Nakasone. Mr. Ney told us the consultation requirement meant that he should discuss his ideas and exchange insights with GEN Nakasone. Mr. Ney stated that GEN Nakasone was not the selecting official and the term "consult" did not mean there had to be an agreement on the person chosen.

According to GEN Nakasone, he met with Mr. Ney in January 2020, telling him that historically the selection process for the NSA GC was a collaborative practice between the NSA Director and the DoD GC, as the selecting official, to find the right candidate. GEN Nakasone also told us that he did not tell Mr. Ney to defer the selection of the NSA GC to himself.

GEN Nakasone told us he heard in July 2020 that Mr. Ney had already selected a candidate for the position. GEN Nakasone stated that he then met with Mr. Ney in late July 2020, who told him of Mr. Ellis's selection, citing Mr. Ellis's background and other aspects that made him an impressive candidate. GEN Nakasone explained that he had conveyed his concerns that he had not interviewed any of the candidates and Mr. Ney offered to let him conduct interviews. GEN Nakasone told us that he left the meeting with a feeling that he would interview candidates and provide Mr. Ney with his assessment.

Mr. Ney told us that GEN Nakasone "clearly was not pleased about [the selection of Mr. Ellis]" because of concerns of how congressional oversight committees might receive Mr. Ellis. Mr. Ney stated that these concerns violated the essence of the merit system by disfavoring the selection of someone due to political concerns.

GEN Nakasone told us he interviewed Mr. Ellis, Candidate 2, and Candidate 3 on August 20, 2020. As he explained it to us, he believed that Mr. Ellis lacked experience to manage a large legal office of over 100 attorneys. GEN Nakasone stated that he worked once with Mr. Ellis during a

classification review of Ambassador John Bolton's book.⁶ GEN Nakasone told us that Mr. Ellis did not follow appropriate classification review procedures, set short deadlines for NSA input, and failed to coordinate with NSA. GEN Nakasone stated that he "was not pleased with his work."

GEN Nakasone met and discussed his concerns with Mr. Ney on August 27, 2020. GEN Nakasone told us that he shared with Mr. Ney that he thought there was "a pretty big delta" between Candidate 2 and the other candidates. GEN Nakasone stated:

I said, clearly the person that I think's most experienced and ready to do this job from day one is [Candidate 2]. I said that I think that [Candidate 3] and Michael Ellis ... just aren't ready for that work.

Mr. Ney told us that GEN Nakasone stated his preference for Candidate 2 and that he was not impressed with Mr. Ellis's performance working on a classification review of Ambassador Bolton's book. GEN Nakasone told us that Mr. Ney replied, "I really think it's Michael Ellis, and I think he's really talented, and he's got great credentials, and he's a fresh mind."

In recounting his conversations with Mr. Ney, GEN Nakasone told us he asked Mr. Ney to delay announcing the selection until after the November 3, 2020 presidential election because GEN Nakasone was concerned that if the administration changed, Mr. Ellis might not want to work in a new administration. Mr. Ney told us that he later decided to accept GEN Nakasone's request to delay the announcement of Mr. Ellis's selection until after the election because he did not feel a sense of urgency in making an announcement and because he did not want to create a "news story" in a news cycle "that's so sensitive about everything."

Staffing the Hiring Action After the Election

Mr. Harvey informed Ms. Cerlenko by e-mail dated November 9, 2020, that Mr. Ney selected Mr. Ellis as the NSA GC. Mr. Ney's selection initiated the DoD staffing process that included sending the action to OPM for review because Mr. Ellis was a political appointee at the NSC.

Ms. Veronica E. Hinton, SES, Acting Deputy Assistant Secretary of Defense for Civilian Personnel Policy, forwarded Mr. Ellis's selection packet to OPM by memorandum dated January 4, 2021, requesting a review and approval of his selection to the non-political, permanent DISES position as the NSA GC. Ms. Hinton told us that in her review of the hiring action, "There did not appear to be any appearance of improprieties or undue influence in the announcement, evaluation, or selection process as presented in the record."

An OPM official responded to Ms. Hinton's request on January 8, 2021, without reviewing Mr. Ellis's selection. According to the response, OPM determined that the NSA was excluded from the definition of "Agency" in 5 U.S.C. § 2302, "Prohibited personnel practices," section (a), and therefore, "an OPM pre-appointment review is not required" for Mr. Ellis's appointment.⁷

GEN Nakasone was informed of OPM's decision and requested in a memorandum dated January 12, 2021, formal written authorization from Mr. Donovan to proceed with the hiring action. GEN Nakasone told us that he requested the written authorization because he had been informed

⁶ Ambassador Bolton served as the National Security Advisor to President Trump from 2018 to 2019.

⁷ We also confirmed that OPM similarly did not conduct a review of the selection of two former political appointees who served as the previous NSA GCs. OPM determined that the NSA is excluded from the definition of "Agency" in 5 U.S.C. § 2302(a). Therefore, OPM determined that a pre-appointment review was not required for Mr. Ellis's appointment.

throughout the selection process that OPM approval was required to hire Mr. Ellis, a former political appointee.

Mr. Donovan responded by memorandum dated January 14, 2021, that OPM cited a lack of jurisdiction and returned the request without action, and that Ms. Hinton conducted a merit staffing review and determined Mr. Ellis's selection complied with applicable civil service laws and DoD policies.

GEN Nakasone responded to Mr. Donovan by memorandum dated January 15, 2021, citing the DoD OIG's review of the hiring process "and the on-going bipartisan Congressional inquiries" into Mr. Ellis's selection. Specifically, he informed Mr. Donovan that he intended to wait for the results of the DoD OIG review and "consult with Departmental leadership before deciding whether it is appropriate to extend the final job offer."

GEN Nakasone told us that he wrote the January 15, 2021 memorandum to Mr. Donovan indicating he intended to pause the hiring process until after the DoD OIG review was completed because:

I have greater concerns now ... there's an open inspector general evaluation of the hiring process. And now I'm really starting to wonder if I'm ... doing what's right by the department and the agency by hiring someone that's going to be my general counsel that ... has this series of allegations levied against [him]. ... I'm not, you know, fully convinced after the note [from Mr. Donovan] of the 14th ... that the merit-based thing is truly good to go. I'm reading what he's saying. Said okay but, you know, I've still got concerns here. And so that's why I'd written this.

Mr. Ney told us that he monitored Mr. Ellis's NSA in-processing and believed his appointment was progressing in spite of all the media coverage alleging White House pressure and congressional concerns until he saw GEN Nakasone's January 15, 2021 memorandum to Mr. Donovan citing a DoD OIG review of the selection process as the basis for suspending his selection of Mr. Ellis. Mr. Ney stated that in his opinion the selection process was conducted in accordance with all regulatory requirements, and it was improper for GEN Nakasone to supersede his authority to appoint the NSA GC.

Mr. Ney stated that no one, including GEN Nakasone, ever called him to discuss any concerns about the selection of Mr. Ellis. He also stated that a DoD OIG review of the hiring process was not sufficient justification to delay the appointment. Mr. Ney told us that he believed GEN Nakasone was refusing to do his job and was subverting the appointment.

Mr. Ney and GEN Nakasone exchanged a series of e-mails on January 15, 2021. In those e-mails, Mr. Ney informed GEN Nakasone that Mr. Ellis's appointment was approved in accordance with applicable personnel principles and processes and asked why the hiring action was not yet completed. GEN Nakasone replied that he had read the response from Mr. Donovan, which indicated the hiring action was consistent with applicable civil service laws, and wrote, "I still have concerns regarding this hiring action."

Mr. Ney provided the following response to GEN Nakasone:

I've seen your memorandum back to USD [Under Secretary of Defense] Donovan today. I am disappointed.

Your concerns do not supersede the merit system principles or process. At least some of the concern you expressed in today's and your earlier memoranda to USD Donovan has no basis in fact, while some of your stated concern appears to be inappropriately injecting partisan politics into this merit system process.

Your memorandum today indicated that you still have unanswered questions. Yet, in the ten weeks since the selection of Mr. Ellis for the NSA General Counsel position, you have not posed any questions to me.

The selecting authority's decision has been made. You have inquired about and been told by USD(P&R) [Personnel and Readiness] that a proper merit staffing review determined that the selection of Mr. Ellis complies with applicable civil service laws and department policies.

We must adhere to the merit system selection principles and process and extend the final job offer to Mr. Ellis. Both the Department and Mr. Ellis are entitled to that.

Mr. Ney told us that he then advised Acting SecDef Miller [REDACTED] and requested that he direct GEN Nakasone to appoint Mr. Ellis as the NSA GC. Acting SecDef Miller signed a memorandum dated January 15, 2021, informing GEN Nakasone of his confidence that the selection of Mr. Ellis complied with applicable civil service laws and department policies, and wrote, "I direct that you appoint him to the position no later than 6:00 p.m. on [Saturday] January 16, 2021."

GEN Nakasone responded by memorandum to Acting SecDef Miller dated January 16, 2021, stating that he appointed Mr. Ellis that same day as the NSA GC and Mr. Ellis would report for duty on January 19, 2021.

Political Concerns

Senator Mark R. Warner, Vice Chairman, Senate Select Committee on Intelligence, and Senator Jack Reed, Ranking Member, Committee on Armed Services, citing "publicly reported facts" and "press accounts," asserted on November 16, 2020, that the former White House administration improperly influenced the NSA GC selection process. This section of the report discusses that assertion. We address specific questions from Senator Warner and Senator Reed in Appendix B.

The *Washington Post* published a story on January 16, 2021, which stated that Acting SecDef Miller ordered GEN Nakasone to install Mr. Ellis, "a former GOP political operative," as the NSA GC. The article stated that GEN Nakasone was not in favor of Mr. Ellis's selection and sought to delay the appointment. The article added that Mr. Ellis's appointment was "made under pressure from the White House," but cited no specific sources. The article also stated that the concern of GEN Nakasone and others, according to "current and former officials," was that the former White House administration was seeking to "burrow" Mr. Ellis into a career civilian position before a change in administration.

Speaker of the House Nancy Pelosi sent a letter to Acting SecDef Miller dated January 17, 2021, requesting that he immediately cease plans to “improperly install” Mr. Ellis as the NSA GC due to “irregularities” in the selection process. Speaker Pelosi wrote that “public reporting” indicated that Mr. Ellis was selected due to “interference” by the White House and that he was chosen over much more qualified candidates.

GEN Nakasone informed his supervisor, Mr. Ezra Cohen, SES, Acting Under Secretary of Defense for Intelligence and Security, by memorandum dated January 20, 2021, that he placed Mr. Ellis on administrative leave pending the results of an NSA security inquiry and a DoD OIG review of Mr. Ellis’s hiring and selection. GEN Nakasone wrote that he was informed that Mr. Ellis might have mishandled classified documents while at the NSC and that the NSA would investigate the matter.

Mr. Koffsky told us that on January 20, 2021, after Mr. Ney departed as the DoD GC with the change of administration, he received a call from Mr. Barnes informing him that GEN Nakasone placed Mr. Ellis on administrative leave. [REDACTED]

GEN Nakasone’s memorandum of January 20, 2021, to Mr. Cohen cites a DoD OIG review of the selection process as an additional reason for placing Mr. Ellis on administrative leave. However, there was no allegation of misconduct against Mr. Ellis regarding his selection as the NSA GC. Other than the NSA’s inquiry into the security incidents, we are unaware of any other allegation against Mr. Ellis that would have disqualified him from performing his duties. Accordingly, the DoD OIG review into the hiring action was not a valid reason to place Mr. Ellis on administrative leave. In Section III B, ADMINISTRATIVE LEAVE, we present additional details about the decision to place Mr. Ellis on administrative leave.

GEN Nakasone told us that he had no indication that the former White House administration improperly influenced, or was even involved in, the selection of Mr. Ellis as the NSA GC.

Mr. Ney wrote an e-mail to then-Acting SecDef David Norquist dated January 21, 2021, that the “falsehood in a November newspaper article” that Mr. Ney was pressured by the White House to appoint Mr. Ellis was being used to subvert the merit system, usurp his selection authority, and, at “best, coincidentally malign an honorable public servant.”⁸ Mr. Ney wrote that he selected Mr. Ellis in “strict accordance with the applicable merit system principles and processes.” Mr. Ney wrote, in part:

I was not in any way or manner pressured or unduly influenced by any person at or associated with the White House to appoint Michael Ellis to the NSA GC position. Unsurprisingly, two of Mr. Ellis’ lawyer colleagues at the White House mentioned to me at some time during the several months of the process (but at no time at or immediately about or after Election Day) that Mr. Ellis was a very fine lawyer and person and would be a great pick for the NSA GC position.

⁸ Acting SecDef Miller departed his office on January 20, 2021, with the change in the administration, and Mr. Norquist, then-Deputy SecDef, assumed duty as the Acting SecDef.

I was neither contacted by or on behalf of any other person at the White House, nor do I recall that I spoke with any other person at the White House about the NSA GC position. I felt no pressure to do anything in favor of or adverse to Mr. Ellis or any other candidate. I always felt at liberty to exercise my judgment to make a sound appointment. That is what I did.

We asked Mr. Ney about his communications with Mr. Ellis's two "colleagues at the White House." Mr. Ney told us that two lawyers at the White House, Mr. John Eisenberg and Mr. Pat Cipollone, then-White House counsel, mentioned to him in three separate telephone calls that Mr. Ellis was a "great lawyer, great guy." Mr. Ney told us that none of the calls were in the context of "remotely hinting at [he] need[s] to [hire Mr. Ellis] ... that this [was] the White House speaking [to hire Mr. Ellis] and [he] felt no pressure ... at anything that might be considered undue influence."

Mr. Ney told us that he frequently discussed legal issues with Mr. Eisenberg, who twice mentioned Mr. Ellis to him in "passing comments" at the end of two telephone calls, telling Mr. Ney, "Michael is a great guy, he'd be really good at this."

Mr. Ney told us that Mr. Cipollone once asked him, towards the end of a telephone call on other issues, if he had selected someone for the NSA GC position and stated, "Michael's a great guy." Mr. Ney told us "that was the sum and substance to that discussion." Mr. Ney explained:

I've argued with both those guys about a lot of things intensely. Told them no. Told them no and they didn't like it. I don't feel pressure from them and I don't, and I do not infer anything from them saying Michael Ellis is a good lawyer, he's a good guy, he'd be great. No impropriety there anymore than General Nakasone saying [a certain candidate] ... [would] be my preference. No impropriety there.

Mr. Ney told us that other than these three telephone calls, he had no other communications with any other former White House administration official regarding the selection of Mr. Ellis. We asked Mr. Ney if he was pressured by former White House administration officials to select Mr. Ellis. Mr. Ney stated, "No. Not in any way, shape, or form. No inclination or direction."

None of the witnesses involved in reviewing applicants, evaluating and interviewing candidates, or processing the hiring action indicated that they were under any pressure by the former White House administration or anyone else to select Mr. Ellis.

Our review of Mr. Ney's e-mails and our interviews with witnesses who were familiar with Mr. Ney's conversations with Mr. Eisenberg and Mr. Cipollone gave us similar information about his conversations.

Mr. Castle told us that he was in Mr. Ney's office when a person he believed to be Mr. Eisenberg called Mr. Ney and recommended Mr. Ellis. However, Mr. Castle told us that he only heard Mr. Ney's side of the conversation and was "a little fuzzy" about the call. Mr. Castle told us that receiving a call from Mr. Eisenberg recommending Mr. Ellis "was not hard to fathom" as the NSA GC position was important and had national consequences. Mr. Castle added that he had no concerns about the selection of Mr. Ellis because Mr. Ellis was well qualified for the position. Mr. Castle told us that Mr. Ney gave no indication that the call influenced his decision to select Mr. Ellis. Mr. Ney always maintained that he wanted to be fair in the process, and Mr. Castle was

not aware of any other communications from anyone in the former White House administration to Mr. Ney regarding Mr. Ellis's selection.

Mr. Koffsky told us that after Mr. Ellis was selected, Mr. Ney told him that there was some "resistance" to Mr. Ellis from GEN Nakasone and some Members of Congress regarding perceptions that "political factors" influenced the selection. Mr. Koffsky told us that Mr. Ney assured him that his selection of Mr. Ellis was strictly merit-based and he received no pressure from anyone, including anyone from the former White House administration, and believed Mr. Ellis was the best candidate. We asked Mr. Koffsky if Mr. Ney ever indicated that anyone from the former White House administration had contacted him regarding Mr. Ellis. Mr. Koffsky told us:

He said nobody had. He said the one person with whom he had anything approaching a conversation on this was with John Eisenberg, who was Mr. Ellis' boss ... was the legal advisor to the National Security Council, and Deputy Counsel to the President. And Mr. Ney said that Mr. Eisenberg called him and in the course of the conversation said, you know, Michael Ellis is really a great attorney. And then ... according to Mr. Ney, Mr. Eisenberg immediately said, I don't want to influence you in any way. You know, don't take this as anything other than my opinion.

Mr. Koffsky told us that in his experience it was not unusual for an applicant's supervisor to give a recommendation to a selecting official. Mr. Koffsky told us that he received similar calls while serving as a selecting official and he took them as nothing more than a reference from someone who knew the candidate and added, "I don't take that as pressure in any way."

Mr. Eisenberg told us that he served as Mr. Ellis's direct supervisor at the NSC for 3 years until about January 2020. Mr. Eisenberg said that he spoke frequently with Mr. Ney about DoD matters, and that he talked to Mr. Ney two or three times about Mr. Ellis's qualifications for the NSA GC position. Mr. Eisenberg stated that he made the comments on his own accord without instructions from anyone else and the assertion that the former White House administration improperly influenced the selection of Mr. Ellis was "outrageous." Mr. Eisenberg told us that he never called for the express purpose of talking about Mr. Ellis but mentioned Mr. Ellis when calling Mr. Ney about other issues.

Mr. Eisenberg said that he mentioned Mr. Ellis's qualifications for the job made him the perfect candidate, and he told Mr. Ney that he "just wanted to give [his] support to Michael" for the position. Mr. Eisenberg told us that he told Mr. Ney that Mr. Ellis was one of the smartest people he had ever met; was extremely hard working, caring, collegial, and calm under pressure; and possessed a great deal of experience in national security law and intelligence programs. Mr. Eisenberg told us that Mr. Ney then responded that "this was exactly the sort of qualifications that he ... thought it [*sic*] would be important for the job."

When we asked Mr. Eisenberg about the rationale for his comments to Mr. Ney, he told us, "I would not have been happy with myself if somebody who ... works so hard for me, that I ... couldn't be bothered to basically give a recommendation before somebody makes a decision." Mr. Eisenberg told us, "[T]here's nothing inappropriate about ... somebody from the White House in an appropriate context, providing an evaluation of their employee."

Mr. Eisenberg told us that Mr. Cipollone also had high regard for Mr. Ellis, and that Mr. Ellis occasionally worked directly for Mr. Cipollone. Mr. Eisenberg believed Mr. Cipollone similarly gave his recommendation to Mr. Ney, as they also spoke frequently.⁹

Our review of Mr. Ney's Government e-mails and other electronic files disclosed no indication of any outside influence in the selection of Mr. Ellis, or any e-mails from Mr. Eisenberg or Mr. Cipollone regarding Mr. Ellis and the NSA GC position. The e-mails confirmed that Mr. Ney had frequent communications with Mr. Ellis, Mr. Eisenberg, and, to a lesser extent, Mr. Cipollone, concerning DoD matters. Separately, we found five e-mails in which Mr. Ney reacted to media articles about the selection process and wrote there was no improper influence in his selection of Mr. Ellis. For example:

- Mr. Ney wrote an e-mail to his senior military assistant on November 9, 2020, stating, "Zero White House pressure. Though two of his [White House] colleagues offered their endorsement of him, naturally, during the process. Both virtually apologized for even doing that."
- Mr. Ney wrote an e-mail to the Assistant Secretary of Defense (Public Affairs) on November 14, 2020, stating, "I, as the selecting authority, followed the prescribed hiring process as I was advised by our employment experts in every respect. ... Nobody at the White House put the slightest pressure on me or the process in favor of or against any applicant. We had several strong and capable candidates. It was not an easy decision, but I made a good choice of which I am proud. Michael is smart, hard-working, and honorable. I believe that other candidates could be described similarly. I have total confidence that he will serve and lead with distinction."
- Mr. Ney wrote an e-mail to Mr. Harvey on January 14, 2021, informing him that if the NSA did not have Mr. Ellis cleared by the next day to come on board, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Mr. Ney wrote that the single, anonymous media source report and other raw, baseless speculation about any influence on himself by the Trump White House were "simply false. There was none of that."

⁹ Shortly after interviewing Mr. Ney on March 15, 2021, we attempted to contact Mr. Cipollone. He did not respond; however, his assistant responded on July 12, 2021, and we asked to interview Mr. Cipollone. Neither Mr. Cipollone nor his assistant provided any response to our request. Based on the witness testimony and documents we reviewed, we determined that Mr. Cipollone likely did not have any additional information different from what we obtained from other sources, and we decided, therefore, not to further delay our review waiting for a response from Mr. Cipollone or his assistant.

DoD OIG Conclusion on the Selection of Mr. Ellis

We conclude there was no improper influence or failure to comply with DoD guidance in the process and decision to select Mr. Ellis as the NSA GC.

We reached our conclusion based on the following.

- Mr. Ney served as the selecting official for the NSA GC position.
- In total, eight DoD officials evaluated Mr. Ellis's application.
- In the first level of review, Mr. Ellis made the list of qualified applicants.
- In the second level of review, all the DoD officials who evaluated Mr. Ellis's packet placed his application in the top 3 of the 29 applicants.
- In the third level of review, the selection panel interviewed Mr. Ellis and two other candidates.
- Mr. Ney had conversations with Mr. Eisenberg and Mr. Cipollone about Mr. Ellis's work performance and qualifications. We consider those conversations appropriate and consistent with a candidate's supervisors providing unsolicited references to selecting officials during the hiring process.
- None of the witnesses involved in the hiring process indicated that they were under any pressure by the former White House administration or anyone else to select Mr. Ellis.
- Mr. Ney decided to select Mr. Ellis as the NSA GC.
- As required by DoD policy, Mr. Ney consulted with GEN Nakasone about the decision.

However, we also conclude that GEN Nakasone should not have included the DoD OIG review of the hiring action in his decision-making process on whether or not to place Mr. Ellis on administrative leave.

B. ADMINISTRATIVE LEAVE

We reviewed the facts and circumstances regarding Mr. Ellis's placement on administrative leave. Table 2 lists the significant events related to this issue.

Table 2. Chronology of Significant Events Related to Administrative Leave

Date	Event
Jan. 7, 2021	The NSA representative to the Department of State reports a security incident to the NSA regarding a controlled, classified NSA document obtained from a Department of State official who was not authorized to access that information.
Jan. 8, 2021	An NSA employee advises Mr. Barnes about a security incident in which Mr. Ellis allegedly failed to return classified documents to the NSA.
Jan. 13, 2021 (Wednesday)	Regarding the January 7 security incident, the NSA receives information that Mr. Ellis provided the classified NSA document to the unauthorized Department of State official.
Jan. 14, 2021 (Thursday)	Regarding the January 8 security incident allegedly involving Mr. Ellis, White House officials return the NSA documents to the NSA.
Jan. 15, 2021 (Friday)	Acting SecDef Miller directs GEN Nakasone to appoint Mr. Ellis to the NSA GC position no later than 6:00 p.m. on January 16, 2021.
Jan 16, 2021 (Saturday)	GEN Nakasone appoints Mr. Ellis as the NSA GC.
Jan. 17, 2021 (Sunday)	Mr. Barnes informs GEN Nakasone of the two security incidents involving Mr. Ellis.
Jan. 18, 2021 (Monday)	A Federal holiday takes place.
Jan. 19, 2021 (Tuesday)	Mr. Ellis reports for duty as the NSA GC.
Jan. 20, 2021 (Wednesday)	GEN Nakasone places Mr. Ellis on administrative leave.
Apr. 16, 2021	Mr. Ellis resigns from the NSA GC position.

The NSA provided classified information regarding the two alleged security incidents involving Mr. Ellis for our review. In this section, we provide an unclassified summary of the information related to those allegations. The standards related to the use of administrative leave are contained in Appendix A.

First Security Incident

An NSA employee received a controlled, classified NSA notebook of documents on January 7, 2021, from a Department of State official who was not authorized to access that information. An initial NSA review further found that several copies of the notebook had been produced without NSA authorization. This event raised concerns that other individuals possessed copies of these sensitive materials without NSA authorization.

Mr. Barnes told us that “[they] were spending the last week or so of the administration trying to find out who had them, where they were, and trying to get them back into positive control before the administration members left.” NSA officials received information on January 13, 2021, that Mr. Ellis either created or directed the copying of these notebooks of documents with compartmented, classified information without NSA knowledge, consent, or control.

Second Security Incident

On January 8, 2021, an NSA employee tried to retrieve an NSA document from Mr. Ellis that contained information of a classified, controlled, compartmented NSA program “of some of the most sensitive information that NSA possesses.” Mr. Barnes told us that Mr. Ellis refused to return the document, retained it for the White House archives, and, based on what the NSA employee saw, placed the document in a container that did not meet the security storage requirements for such a sensitive program. Mr. Barnes told us that he contacted Mr. Eisenberg on January 9, 2021, for help obtaining the document, and the document was returned to the NSA on January 14, 2021. Mr. Barnes said, “The White House people were all leaving so every day new members were leaving and so we were prioritizing on identifying our documents that needed to be brought under positive control and accounted for.” Mr. Barnes added:

And then we started to get the pressure on the 15th is when Acting SecDef ordered us to issue a job offer to him. And so, in that intervening several days, all’s we knew his [sic] is we have a problem, we have to investigate the nature of how these documents were handled, distributed outside of our purview and control. And so that was—the flares were up but we didn’t have time to actually do anything yet and Mr. Ellis was not our employee so we didn’t have a chance to contact him yet for questioning for anything. We had to get security involved to do it right whenever we do an investigation because we didn’t know if there was a disconnect or an understanding that so these were just—the flares went up on the 7th and the 8th.

NSA Actions Sunday, January 17, 2021, Through Tuesday, January 19, 2021

Mr. Barnes told us that he informed GEN Nakasone of these two security issues on January 17, 2021. Mr. Barnes told us that GEN Nakasone was concerned about Mr. Ellis’s handling of classified information and the DoD OIG “evaluation” of his selection, and wanted to suspend the hiring action until these two matters were resolved. [REDACTED]

GEN Nakasone told us that Mr. Barnes informed him on Sunday, January 17, 2021, that the NSA received the first allegation that Mr. Ellis improperly handled classified information during Mr. Ellis’s tenure on the NSC. GEN Nakasone told us that the Martin Luther King holiday was observed on Monday, January 18, 2021, and he did not get the full details of the matter until Tuesday, January 19, 2021.

Mr. Ellis reported for duty as the NSA GC on January 19, 2021.

Placement on Administrative Leave

GEN Nakasone informed his supervisor, Mr. Cohen, SES, Acting Under Secretary of Defense for Intelligence and Security, by memorandum dated January 20, 2021, that he placed Mr. Ellis on administrative leave pending the results of an NSA OSEC security inquiry and the DoD OIG’s review of Mr. Ellis’s hiring and selection. The memo stated that Mr. Ellis might have mishandled highly classified compartmented documents while at the NSC, and the NSA would investigate this matter. GEN Nakasone wrote that Mr. Ellis would remain on administrative leave until both matters were resolved.

GEN Nakasone told us that Mr. Barnes and [REDACTED]
[REDACTED] We asked GEN Nakasone to tell us why he placed Mr. Ellis on administrative leave. GEN Nakasone told us:¹⁰

I learned ... that we had questions about the way that Mr. Ellis had handled our most sensitive intelligence that deals with a foreign actor when he was in the White House. ... and I'm not able to get the actual full details until that Tuesday [January 19]. ... I'm ... growing concerned ... I have an OGC that I've said is okay to be hired, now we have concerns about his clearance. We have concerns about merit. We have concerns about an ongoing inquiry by the DoD IG. And so, my sense was ... let's get this all resolved ... before he actually becomes the General Counsel for the National Security Agency.

Mr. Barnes told us that he supported GEN Nakasone's decision to place Mr. Ellis on administrative leave due to their concern with Mr. Ellis's handling of classified information and access to the NSA facility. Mr. Barnes told us that they routinely place employees on administrative leave when security concerns are being evaluated. Regarding this specific action, he said:

Monday was a holiday, but Tuesday and Wednesday. [sic] And so it was as all these data points started to come together and this is [sic] been forced on us without proper process from our perspective and unanswered questions on security we felt that all that needed to be attended to and so admin leave was the germane tool because it was non punitive. He would get full pay, leave accrual and all those types of things. But he would not be entered on our workforce and into our system until we had a better sense of what was happening and what happened and the nature by which these things happen.

Ms. Cerlenko told us that GEN Nakasone was concerned that the DoD OIG review of Mr. Ellis's selection might find his hiring was improper and was also concerned about his alleged mishandling of classified information. [REDACTED]
[REDACTED]

[REDACTED]. We asked Ms. Cerlenko to explain GEN Nakasone's authority to place Mr. Ellis on administrative leave given that Mr. Ellis was under the "authority, direction, and control" of the DoD GC. Ms. Cerlenko told us that Mr. Ellis was a member of the DLSA assigned to the NSA as an employee, and subject to DoD Directive (DoDD) 5100.20, "National Security Agency/Central Security Service (NSA/CSS)," January 26, 2010. This Directive states, in part, that the NSA Director is delegated authority to initiate full field investigations in the interest of national security, suspend security clearances for personnel cleared by NSA, or deny all access for personnel assigned to the NSA. The OPM states that the authority to grant administrative leave derives from the inherent authority for the heads of agencies to prescribe regulations for governing their organizations. The NSA is a DoD agency.

Mr. Koffsky told us that on January 20, 2021, after Mr. Ney departed as the DoD GC with the change of administration, he received a call from Mr. Barnes. Mr. Barnes informed him that GEN Nakasone placed Mr. Ellis on administrative leave because Mr. Ellis allegedly committed a security violation after he was cleared for the NSA position. The violation was serious enough that GEN Nakasone was concerned about Mr. Ellis's trustworthiness in handling classified information. Another reason for placing Mr. Ellis on administrative leave was that the DoD OIG was reviewing the NSA GC selection process.

¹⁰ The interview was unclassified.

Mr. Koffsky told us that he told Mr. Barnes the DoD OGC would defer to GEN Nakasone on the alleged security violation since GEN Nakasone controlled Mr. Ellis's security clearance and access to the NSA and believed this was a valid reason for placing Mr. Ellis on administrative leave.

[REDACTED]. Mr. Koffsky told us that he provided Mr. Barnes the contact information for Ms. Beth George, the newly appointed DoD Principal Deputy GC and Acting DoD GC, and he understood that they spoke but had no additional information on their conversation.

Mr. Ellis's Response and Resignation

The NSA informed Mr. Ellis on January 20, 2021, that it initiated a security inquiry. On January 21, 2021, his attorney requested information about the inquiry so he could address any concerns.

Mr. Ellis wrote a memorandum to GEN Nakasone dated March 23, 2021, stating that he was disappointed at the decision to place him on administrative leave, and that no one provided any evidence that he engaged in any inappropriate behavior or that there was any impropriety regarding his selection. Mr. Ellis wrote that he was ready to work with GEN Nakasone to resolve any concerns.

Mr. Ellis also wrote that NSA officials gave him daily access to the Agency's most sensitive classified information until his last day on the NSC—January 8, 2021. He also stated that NSA security officials re-indoctrinated him into Top Secret/Sensitive Compartmented Information (TS/SCI), including multiple SCI compartments, on January 19, 2021. Mr. Ellis wrote that the security officers did not mention any security inquiry or concerns about the handling of classified information.

GEN Nakasone testified on April 15, 2021, to the House Select Intelligence Committee Hearing on Worldwide Threats. During the hearing, GEN Nakasone responded to several questions about Mr. Ellis, including concerns that the former White House administration improperly influenced the selection of Mr. Ellis and concerns about the decision to place Mr. Ellis on administrative leave. GEN Nakasone testified as follows.

- He did not discuss Mr. Ellis's situation with anyone outside the NSA, or authorize anyone to do so.
- He was not aware of anyone at the NSA who spoke to reporters or anyone outside the agency about Mr. Ellis's situation.
- Mr. Ellis underwent the standard merit-based civil service process in his selection, but GEN Nakasone could not comment on his reason for placing Mr. Ellis on administrative leave. This was due to the DoD OIG review of Mr. Ellis's hiring and selection since the DoD OIG evaluation of the selection was ongoing.
- The NSA conducts a rigorous review when deciding whether to grant an employee a TS/SCI security clearance.

- He knew that on January 19, 2021, the NSA approved Mr. Ellis for a TS/SCI clearance, the day before he placed Mr. Ellis on administrative leave for allegedly mishandling classified information.

Mr. Ellis wrote a memorandum to GEN Nakasone dated April 16, 2021, citing his earlier correspondence. Mr. Ellis wrote that GEN Nakasone declined his request for a meeting and offered no additional information. Mr. Ellis wrote that, effective immediately, he was resigning as the NSA GC.

DoD OIG Conclusion on GEN Nakasone's Placement of Mr. Ellis on Administrative Leave

We conclude that the actions by GEN Nakasone to initiate an inquiry into the alleged improper handling of classified information and place Mr. Ellis on administrative leave were appropriate and within his authority.

We reached our conclusion based on the following.

- The NSA received information regarding a security incident that Mr. Ellis either created or directed the copying of classified information without the NSA's knowledge, consent, or control.
- Several copies of the classified notebook were created and distributed without the NSA's knowledge or authorization.
- The NSA received information about a second security incident in which Mr. Ellis refused to return an NSA document containing classified, controlled, and compartmented NSA information.
- An NSA employee saw Mr. Ellis place the NSA document in an unapproved storage container.
- GEN Nakasone had the authority to initiate a security inquiry into the alleged improper handling of classified information and to restrict Mr. Ellis from access to the NSA pending the results of the inquiry.¹¹ He also had the authority to place Mr. Ellis on administrative leave, and the DoD OGC was informed of the matter and took no action to change Mr. Ellis's status. [REDACTED]

We make no determination on the merits of the alleged security incidents and defer those matters to the appropriate authorities. Separately, GEN Nakasone also cited the DoD OIG review of the selection process as an additional reason for placing Mr. Ellis on administrative leave. However, we determined that the DoD OIG review of the selection process was not a valid reason to place Mr. Ellis on administrative leave because there was no allegation against Mr. Ellis regarding his

¹¹ Mr. Ellis was assigned to the NSA as an employee, and subject to DoDD 5100.20, which gave the NSA Director the authority to initiate appropriate full field investigations, and if necessary, in the interest of national security, to suspend security clearances for personnel cleared by the NSA, or deny all access for personnel assigned or detailed to the NSA/CSS. Placing Mr. Ellis on administrative leave was in accordance with OPM guidance that administrative leave should be limited to those situations not specifically prohibited by law and satisfying one or more of the criteria, which includes the absence being directly related to the department or agency's mission and the absence is officially sponsored or sanctioned by the head of the department or agency. See Appendix A, pages 26 and 28.

selection as the NSA GC. Mr. Donovan informed GEN Nakasone that his office reviewed and determined that Mr. Ellis's selection complied with applicable civil service laws and DoD policies. Acting SecDef Miller informed GEN Nakasone that he was confident that Mr. Ellis's selection complied with applicable laws and policies. [REDACTED]

[REDACTED]. Accordingly, while NSA's inquiry into the security incidents provided justification for placing Mr. Ellis on administrative leave, the DoD OIG review of the selection process was not a valid reason to place Mr. Ellis on administrative leave.

Based on our review, we determined that GEN Nakasone acted within his discretion to place Mr. Ellis on administrative leave on the basis of the security incidents.

With regard to the security incidents, we did not examine the conduct of the security inquiry and, therefore, referred that matter to the NSA IG for such action as he deems appropriate.

IV. OVERALL CONCLUSIONS

We conclude there was no improper influence or failure to comply with DoD guidance in the process and decision to select Mr. Ellis as the NSA GC.

GEN Nakasone's placement of Mr. Ellis on administrative leave pending the results of an inquiry into the alleged security incidents was appropriate and within his authority.

V. RECOMMENDATIONS

The Office of the Under Secretary of Defense for Intelligence and Security should review the allegation and supporting material that Mr. Ellis improperly handled classified information on two occasions to determine what, if any, further actions the NSA or another agency should take regarding this allegation.

The Office of the Under Secretary of Defense for Personnel and Readiness should request that OPM review its decision not to conduct pre-appointment reviews of hiring actions of former political appointees to the NSA, NGA, NRO, and DIA to determine if they are meeting Congress's intent for oversight of the hiring of former political appointees.

Appendix A: Standards

10 U.S.C. § 1601, Subchapter I, “Defense-Wide Intelligence Personnel Policy”

In paragraph (a) General Authority, 10 U.S.C. § 1601 states that the Secretary of Defense may establish, as positions in the excepted service, such defense intelligence positions in the DoD as the Secretary determines necessary to carry out the intelligence functions of the Department, including positions in the DISES.

DoDD 5145.04, “Defense Legal Services Agency (DLSA),” April 16, 2012, (Incorporating Change 1, Effective May 28, 2020)

This Directive includes the following.

Paragraph 3. MISSION. The DLSA will provide legal advice, services, and support to the Defense Agencies, DoD Field Activities, and, as assigned, other organizational entities within the DoD.

Paragraph 5.a. The DLSA operates under the authority, direction, and control of the GC of the DoD, who will serve as the Director, DLSA.

Paragraph 7.a.(5) The Director, DLSA, will provide authority, direction, and control, including professional supervision, for DLSA attorneys serving in Defense Agencies, DoD Field Activities, and other organizations to which such attorneys are assigned. This includes, without limitations, in consultation with the DoD Component Head concerned, evaluation of their performance or other actions that may be necessary based on professional performance, including but not limited to awards, promotions, transfers and reassignments, training and professional development, and disciplinary or adverse actions, pursuant to section 140 of Reference (b) (10 U.S.C.) and in accordance with DoDI 1442.02.

Paragraph 7.b. The OSD Principal Staff Assistant and Heads of the other DoD Components will:

- (1) Support the DLSA within their respective fields of responsibility in the execution of the DLSA mission, capabilities, and functions, in accordance with applicable DoD issuances.
- (2) Coordinate with the Director, DLSA, on all matters under their purview related to the responsibilities and functions assigned to the Director, DLSA.

DoDI 1442.02, “Personnel Actions Involving Civilian Attorneys,” September 30, 2010¹²

This Instruction includes the following.

Paragraph 3.a. It is DoD policy that the recruitment, selection, appointment, compensation, transfer, promotion, and retention of civilian attorneys throughout the DoD will be made on the basis of merit and in conformity with applicable law and regulations, including this Instruction.

¹² DoDI 1442.02 does not apply to the OGC of the DoD Inspector General or to attorneys within the DoD who perform their duties as attorneys while serving as Service members.

ENCLOSURE 4. PROCEDURES FOR DLSA CIVILIAN ATTORNEY POSITIONS ONLY

Paragraph 3. This section applies to SES, DISES, Highly Qualified Expert, and equivalent-level GC positions in the Defense Agencies and DoD Field Activities.

Paragraph 3.b.(1) The Defense Agency or DoD Field Activity servicing personnel office, under the direction of the cognizant Deputy GC, DoD, will prepare the required paperwork for General Counsel of the Department of Defense/Director, Defense Legal Services Agency approval, to include a job vacancy announcement with proposed technical qualifications.

Paragraph 3.b.(2). The General Counsel of the Department of Defense/Director, Defense Legal Services Agency, in consultation with the Director of the Defense Agency or DoD Field Activity concerned, will select the executive evaluation panel and will select the candidate who will fill the position.

10 U.S.C. § 1612, “Merit system principles and civil service protections: applicability”

This Statute includes the following.

(a) Applicability of Merit System Principles.—Section 2301 of title 5 will apply to the exercise of authority under this subchapter (other than sections 1605 and 1611).

(b) Civil Service Protections.—

(1) If, in the case of a position established under authority other than section 1601(a)(1) of this title that is reestablished as an excepted service position under that section, the provisions of law referred to in paragraph (2) applied to the person serving in that position immediately before the position is so reestablished and such provisions of law would not otherwise apply to the person while serving in the position as so reestablished, then such provisions of law shall, subject to paragraph (3), continue to apply to the person with respect to service in that position for as long as the person continues to serve in the position without a break in service.

(2) The provisions of law referred to in paragraph (1) are the following provisions of title 5:

(A) Section 2302, relating to prohibited personnel practices.

(B) Chapter 75, relating to adverse actions.

(3)

(A) Notwithstanding any provision of chapter 75 of title 5, an appeal of an adverse action by an individual employee covered by paragraph (1) shall be determined within the Department of Defense if the employee so elects.

(B) The Secretary of Defense shall prescribe the procedures for initiating and determining appeals of adverse actions pursuant to elections made under subparagraph (A).

5 U.S.C. § 2301, “Merit system principles”

This Statute includes the following.

(a) This section will apply to—

- (1) an Executive agency; and
- (2) the Government Publishing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles.

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences —

(A) a violation of any law, rule, or regulation, or

(B) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

OPM FACT SHEET: ADMINISTRATIVE LEAVE

The Fact Sheet includes the following.

Administrative leave (also referred to as “excused absence”) is an administratively authorized absence from duty without loss of pay or charge to leave.

Although administrative leave is not expressly referenced in title 5, the authority to grant an excused absence derives from the inherent authority for heads of agencies to prescribe regulations for the government of their organizations. (See, for example, 5 U.S.C. 301-302.)

The Comptroller General has issued many decisions acknowledging that heads of Executive agencies have broad authority to manage their organizations, including the authority to grant administrative leave, unless prohibited by law.

Administration

Each agency has the authority and discretion to excuse employees from duty without loss of pay or charge to leave in appropriate circumstances.

Individual Agency Policies

To promote equity and consistency across Government, OPM advises that administrative leave be limited to those situations not specifically prohibited by law and satisfying one or more of the following criteria:

- The absence is directly related to the department or agency’s mission;
- The absence is officially sponsored or sanctioned by the head of the department or agency;
- The absence will clearly enhance the professional development or skills of the employee in his or her current position; or
- The absence is as brief as possible under the circumstances and is determined to be in the interest of the agency.

As a general rule, administrative leave should not be used for an extended or indefinite period or on a recurring basis.

Administrative Leave Related to Unacceptable Performance and Misconduct

OPM does not regulate the use of administrative leave. This authority rests with each agency head. However, with regard to performance deficiencies and misconduct, Comptroller

General decisions are instructive. These decisions suggest that approval for administrative leave should generally be limited to situations involving brief absences.

Administrative Leave Before Proposing Performance-Based or Adverse Actions

- Placing an employee in a paid, non-duty status is an immediate, temporary solution to the problem of an employee who should be kept away from the worksite. For example, an agency may place an employee in a paid, non-duty status during an investigation and when the agency believes the employee poses a threat to his own safety or the safety of others, the agency mission, or Government systems or property while the investigation is pending. An agency should monitor the situation and move towards longer-term actions when it is possible, appropriate, and prudent to do so. A longer-term solution could include assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or Government property, if feasible.
- OPM advises limiting the approval of administrative leave for this purpose. Where absences are for longer than brief periods, administrative leave is generally inappropriate. Approving officials should also ensure that the granting of administrative leave is not specifically prohibited by law.

Administrative Leave After Proposing Performance-Based or Adverse Actions

In rare circumstances, administrative leave may be used for an employee while suspension or removal due to adverse action procedures have been proposed. OPM adverse action regulations set forth authorities and options available to agencies to address concerns that may arise once an agency elects to pursue an adverse action against an employee. Specifically, the employee may be placed in a paid, non-duty status for the time necessary to effect the adverse action if the organization determines that the employee's continued presence on the job during the notice period may:

- pose a threat to the employee or others;
- result in loss or damage to Government property; or
- jeopardize legitimate Government interests.

However, OPM strongly recommends agencies consider other options prior to use of administrative leave in this scenario. Other options include:

- assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or Government property;
- allowing the employee to take leave, or placing him or her in an appropriate leave status (annual, sick, leave without pay) or absence without leave (if the employee has absented himself or herself from the worksite without requesting leave); or
- curtailing the advance notice period for the proposed adverse action when the agency can invoke the "crime provisions" under title 5, United States Code, because it has reasonable cause to believe the employee has committed a crime for which a

sentence of imprisonment may be imposed and is proposing a removal or suspension.

Policies on Use of Administrative Leave Related to Performance-Based or Adverse Actions

As previously noted, OPM does not regulate the use of administrative leave. This authority rests with each agency head. With this in mind, OPM recommends that agencies review their current policies regarding the proper use of administrative leave. While administrative leave may be appropriate under various circumstances, supervisors often place employees on administrative leave rather than utilizing other options that may be more appropriate, as discussed above.

In reviewing agency policies, OPM recommends agencies take steps to ensure that agency policies on administrative leave related to performance deficiencies and misconduct address:

- consideration of paid duty status options, such as reassignment to alternative duties, before placing an employee on administrative leave;
- consideration of other non-duty status options, such as indefinite suspensions, if appropriate, before placing an employee on administrative leave for extended periods of time; and
- whether supervisors and managers should provide justification and obtain prior approval from agency officials at higher organizational levels before placing an employee on administrative leave for an extended period of time.

DoDD 5100.20, "National Security Agency/Central Security Service (NSA/CSS)," January 26, 2010

This Directive includes the following.

In Enclosure 2, b. Security, (1) (b), the NSA Director is delegated authority to initiate appropriate full field investigations, and if necessary, in the interest of national security, suspend security clearances for personnel cleared by NSA, or deny all access for personnel assigned or detailed to NSA/CSS.

DoDD 5100.20 further states that all military and civilian positions of the NSA are designated as critical sensitive positions and will be treated as such in connection with investigative, security clearance, and employment matters, pursuant to sections 831-835 of title 50 U.S.C. This provision of title 50 U.S.C. states, in part, that the Secretary of Defense will prescribe such regulations relating to continuing security procedures as he considers necessary to assure that no person will be employed in, or detailed or assigned to, the NSA, or continue to be so employed, detailed, or assigned; and that no person so employed, detailed, or assigned will have access to any classified information; unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

Appendix B: Responses to Congressional Questions

Senator Mark R. Warner, Vice Chairman, Senate Select Committee on Intelligence, and Senator Jack Reed, Ranking Member, Committee on Armed Services, in a letter dated November 16, 2020, requested that the DoD OIG investigate the process for the recent selection of Mr. Ellis for the position of NSA GC. The senators referenced “publicly reported facts” and “press accounts” as the basis for their concern of improper political influence in the selection process or possible irregularities which would be of concern. The senators requested that the DoD OIG respond to eight questions regarding the selection process. We summarize the questions and our responses below.

1. What process governed the selection of the GC and the determination of the qualifications?

Response: The NSA GC position is a Defense Civilian Intelligence Personnel System position in the excepted service under 10 U.S.C. § 1601, Subchapter I, “Defense Wide Intelligence Personnel Policy.”¹³ This statute states, in part, that the Secretary of Defense may establish as positions in the excepted service, such defense intelligence positions in the DoD as the Secretary determines necessary to carry out the intelligence functions of the Department, including positions in the DISES.

Section 2301, title 5, United States Code, “Merit system principles”—which 10 U.S.C. § 1612 establishes is applicable to DoD—states that Federal personnel management should be implemented consistent with the merit system principles, which state, in part, that selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition that assures that all receive equal opportunity. Additionally, all applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation and with proper regard for their privacy and constitutional rights.

Candidates for the NSA GC position are not required to have Executive Core Qualifications approved by an OPM Qualifications Review Board (QRB), since the OPM QRB process (title 5 Code of Federal Regulations section 317.501 [1980]) only applies to title 5 U.S.C. appointments to the SES. Appointments to DISES positions, such as the NSA GC, are made pursuant to 10 U.S.C. §§ 1601 and 1606.

DoDD 5145.04 states that the DLSA operates under the authority, direction, and control of the DoD GC, then-Mr. Ney, who serves as the DLSA Director. The NSA OGC is a component of the DLSA.

DoDI 1442.02 states that the recruitment, selection, appointment, compensation, transfer, promotion, and retention of civilian attorneys throughout the DoD will be made on the basis of merit and in conformity with applicable law and regulations. DoDI 1442.02 states in Enclosure 3 that the procedures in this enclosure apply to all DoD civilian attorneys and civilian attorney positions, including those in the DoD OGC and DLSA.

DoDI 1442.02 also states that the Defense Agency [NSA] servicing personnel office, under the direction of the cognizant DoD Deputy GC, will prepare the required paperwork for the DoD

¹³ The Defense Civilian Intelligence Personnel System is the human resources management system for the DoD intelligence components and other intelligence positions as designated by the Under Secretary of Defense for Intelligence and Security.

GC/DLSA Director's approval [Mr. Ney], including a job vacancy announcement with proposed technical qualifications.

DoDI 1442.02 further directs that "The GC/D/DLSA [Mr. Ney] in consultation with the Director of the Defense Agency [GEN Nakasone] ... shall select the candidate who will fill the position."

2. Were safeguards applied to prevent political appointees from inappropriately "burrowing" into the civil service?

Response: Former political appointees are not prohibited from applying for or being selected for civil service positions, and the Merit Systems principles are applicable to their selection, as they are to all civil service positions. In this instance, a senior official from the Office of the Under Secretary of Defense for Personnel and Readiness conducted a merit staffing review of Mr. Ellis's selection packet, endorsed the packet, and stated that "there did not appear to be any appearance of improprieties or undue influence in the announcement, evaluation, or selection process as presented in the record." The official then submitted the selection packet to OPM for review. However, an OPM official replied, "OPM has determined that NSA is excluded from the definition of Agency in U.S.C. 2302(a). Therefore, an OPM pre-appointment review is not required for you to appoint the selectee. We are returning your case without action."

Similarly, we found that OPM did not review the selections of two other former political appointees who served as the NSA GC—Mr. Raj De and Mr. Glenn Gerstell.

3. Is there evidence of White House interference or influence in the selection process?

Response: Mr. Ney had conversations with Mr. Eisenberg and Mr. Cipollone about Mr. Ellis's work performance and qualifications. We consider those conversations appropriate and consistent with a candidate's supervisors providing unsolicited references to selecting officials during the hiring process. None of the witnesses involved in the hiring process indicated that they were under any pressure by the former White House administration or anyone else to select Mr. Ellis.

4. Was there an independent review by the Office of OPM's Qualification Review Board of the selected candidate's qualifications?

Response: See our response to question 2.

5. Did the DoD GC consult with the IG, or Federal or State law enforcement agencies to determine whether any relevant allegations of misconduct existed and remained unresolved prior to making the selection?

Response: No. We found no requirement that DoD OGC consult with our office or any other agency on any such hiring action.

6. Did the selected candidate go through the normal selection process to be a member of the DISES?

Response: Yes, based on our comprehensive review of the selection process.

7. Was this appointment made under the authority granted to the Secretary of Defense to appoint a limited number of individuals to DoD SES positions using the alternative qualification review process authorized by section 1009 of the National Defense Authorization Act for Fiscal Year 2019?

Response: No, it was not.

8. What was the timeline in which the panel rendered its selection and ultimately was decided on by the DoD GC?

Response: See Section III of this report.

~~CUI~~

Whistleblower Protection

U.S. DEPARTMENT OF DEFENSE

Whistleblower Protection safeguards DoD employees against retaliation for protected disclosures that expose possible fraud, waste, and abuse in Government programs. For more information, please visit the Whistleblower webpage at <http://www.dodig.mil/Components/Administrative-Investigations/Whistleblower-Reprisal-Investigations/Whistleblower-Reprisal/> or contact the Whistleblower Protection Coordinator at Whistleblowerprotectioncoordinator@dodig.mil

For more information about DoD OIG reports or activities, please contact us:

Congressional Liaison

703.604.8324

Media Contact

public.affairs@dodig.mil; 703.604.8324

DoD OIG Mailing Lists

www.dodig.mil/Mailing-Lists/

Twitter

www.twitter.com/DoD_IG

DoD Hotline

www.dodig.mil/hotline

~~CUI~~

CUI



DEPARTMENT OF DEFENSE | OFFICE OF INSPECTOR GENERAL

4800 Mark Center Drive
Alexandria, Virginia 22350-1500
www.dodig.mil
DoD Hotline 1.800.424.9098

CUI