THE BAR ASSOCIATION *of the* District of Columbia

March 14, 2016

Hon. Richard Burr
Chairman
U.S. Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, D.C. 20150

Hon. Dianne Feinstein
Vice Chairman
U.S. Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, D.C. 20510

Re: National Security Alternative Dispute Resolution ("NSADR")

Dear Chairman Burr and Vice Chairman Feinstein:

We are the Co-Chairman of the Bar Association of the District of Columbia's Committee on National Security Law, Policy & Practice. We write in response to discussions with your staff to express our views regarding the establishment and funding of expanded mechanisms to make increased use of secure Alternative Dispute Resolution by the Intelligence Community.

The Intelligence Community must, by necessity, function within an environment where secrecy and security are paramount concerns. As a result, many of the legal procedures ordinarily available to employees and contractors in government to publicly resolve legal disputes are effectively unavailable. A unbroken string of cases, dating back to shortly after the Civil War, makes clear that the Government cannot be sued on "secret contracts," or using classified evidence, and thus the Courts are, in most cases, simply not available as a forum to resolve such disputes in a manner that is effective, and perhaps more importantly, credible and legitimate.[1]

[1] See, e.g. *Totten v. United States,* 92 U.S. 105, 23 L. Ed. 605 (1875) (prohibiting suits against the Government based on covert espionage agreements); *United States v. Reynolds*, 345 U.S. 1 (U.S. 1953)(effectively prohibiting a suit based on evidentiary privilege); *Abilt v. CIA*, 2015 U.S. Dist. LEXIS 16108 (E.D. Va. Feb. 10, 2015)(applying States Secrets doctrine in support of dismissal of CIA employee's discrimination claim). Although similar in nature and effect, the two doctrines are separable – the Totten line of cases governs "secret contracts"; the "States Secrets" privilege is rooted in evidentiary privilege. Both have the practical effect of limiting the use of courts to adjudicate disputes within the Intelligence Community.

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This leaves employees and contractors of the Intelligence Community in a position where they enter into agreements with the U.S. Government which purport to be binding and enforceable, but in reality, cannot be enforced in Court. This, in our view, has a number of unintended effects. First, and foremost, it is fundamentally unfair, particularly where the individuals left without a remedy in law are agreeing to provide services that often place them in significant danger. Second, the absence of a legally-credible system for resolving disputes creates a pool of aggrieved individuals, frustrated by the lack of a place to address those grievances, but still having access to, or knowledge of, classified information – the Counter Intelligence concerns are self-evident. Third, while the ability to ignore a specific grievance may give a particular government agency a tactical advantage, in the long run it increases the costs associated with providing services to the Government. After all, if one enters into a contract that cannot be enforced in court, the risk of breach by the counter-party must be mitigated – one way is to increase the price; another is to simply refuse to enter into the contract.

The inability to use traditional legal mechanisms to resolve disputes is not only based on jurisprudence. Many, perhaps most, Intelligence Community employees and contractors believe deeply in the mission, and the need for secrecy, and are viscerally and emotionally unwilling to bring disputes into a public forum where sources and methods could be put at risk. In our experience, where Intelligence Community staff and contractors "go public," or worse yet, leak secrets, it is often a decision based on deep frustration with a system that asks for loyalty and secrecy, but offers few credible internal methods to resolve disputes.

We believe that the dichotomy implied by the governing cases – that we must choose between preserving secrets and providing a forum for adjudicating legal disputes – is a false one, and can be resolved by adopting, and modifying, existing Alternate Dispute Resolution techniques to the special needs of the Intelligence Community.

The value of ADR in the federal sector is well recognized. The "Administrative Dispute Resolution Act of 1996" required all Federal agencies to "adopt a policy that addresses the use of alternative means of dispute resolution and case management," and made clear that ADR should be considered for use in a wide range of disputes, including contract disputes.[2] The statutory effort was matched in 1998 by a Presidential Memorandum, "Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking."[3] In that document, the President directed each Federal Agency must take steps to "promote greater use of mediation, arbitration,[and] early neutral evaluation…"[4]

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[2] Administrative Dispute Resolution Act of 1996**,** 5 U.S.C. § 571 *et seq*., Pub L. No. 104-320, 110 Stat. 3870, 3875 (1996).

[3] William J. Clinton: "Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking," May 1, 1998. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=55876.

[4] In 1995 the Attorney General issued an order to "promote the broader use of alternative dispute resolution (ADR) in appropriate cases to improve access to justice for all citizens and to lead to more effective resolution of disputes involving the government." Department of Justice Order 1160.1, Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques, available on-line at http://www.usdoj.gov/crt/adr/agorder.html

The Department of Justice, following these directions, now has an Office of Alternative Dispute Resolution, charged with developing "policy and to promote the effective use of alternative dispute resolution ("ADR") processes," and "represents the Attorney General in leadership of federal ADR through the Interagency ADR Working Group," an organization which was created by the President and convened by the Attorney General to promote the use of ADR throughout the federal government.

Despite this history, the Intelligence Community has made little use of ADR as a technique for resolving disputes.[5] This is particularly unfortunate, because some of the attributes of ADR that make it so valuable generally are particularly important to the long-range goals of the IC. Most notable is the ability of ADR to provide dispute resolution in a private setting that can preserve secrecy.[6]

We propose that Intelligence Communities' use of ADR can easily be encouraged and authorized with simple legislation, perhaps in the Intelligence Authorization Act which would simply make clear that the Intelligence Community is directed to more fully participate in the existing ADR framework, and providing additional direction concerning establishing a physical forum that can carry out ADR in a secure facility. We suggest that "neutral" adjudicators can easily be drawn from the ranks of retired Federal District Judges or retired or inactive former Federal Government lawyers who hold, or can be provided, security clearances. This statutory direction and authorization would require a matching appropriation to fund the relatively small costs associated with establishing what may be called "National Security Alternative Dispute Resolution" ("NSADR").[7]

In short, we offer a proposal that provides benefit to all of the affected parties – it will enhance that morale and spirit of a workforce that has already accepted the significant inconveniences, and in many cases, danger, of working in the Intelligence Community. It will remove a significant (and wholly self-inflicted) Counter Intelligence vulnerability. And it will result in faster and better adjudication of disputes.

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[5] To be clear, some use has been made of ADR– particularly mediation, which has been used, with what we understand is some success, at some IC agencies, particularly in the context of EEO disputes.

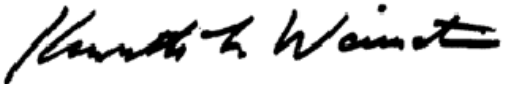
[6] Federal ADR is carried out largely through the Interagency Alternative Dispute Resolution Working Group; it appears that CIA and the Office of the DNI are not participating in this group, or at least do not have a program contact listed on the Working Group's website. See, http://www.adr.gov/fai.html
It appears the National Geospatial-Intelligence Agency, had, and perhaps still has, "an expansive approach to ADR and uses it in resolving all types of workplace dispute, as well as some procurement disputes." See Report for the President on The Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government, April 2007, available on-line at http://www.adr.gov/pdf/iadrsc_press_report_final.pdf

[7] We submit that these costs would be minimal, and would require allocation of secure space, document storage, as well as the contractual costs associated with establishing and maintaining an adequate stable of cleared "neutrals." The most recent available budget justification (FY2011) for the Office of Dispute Resolution is available on-line http://www.justice.gov/sites/default/files/jmd/legacy/2013/12/07/fy11-odr-justification.pdf - it instructively details the minimal costs associated with ADR, as well as the significant cost savings generated by it use. For instance, in 2010, ODR funded the use of neutrals in 422 cases at a cost of only circa $1.15 million; in the same report ODR estimated that for FY 2009 the use of ADR saved more than 43 thousand work hours; a chart in the report compares the amount used to fund ADR services against the savings from ADR services (2006-2009): the program cost $5.5M and saved an estimated $35M – a significant return on investment. Id. at pp. 15-16.

We would welcome the opportunity to meet with you, or your staff, to discuss this proposal in greater detail.

Steven A. Cash

Steven A. Cash
Co-Chairman



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