HOUSE JUDICIARY COMMITTEE
SELECT SUBCOMMITTEE ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT
HEARING ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT
MAY 18, 2023

TESTIMONY OF TRISTAN LEAVITT
PRESIDENT
EMPOWER OVERSIGHT

Chairman Jordan, Ranking Member Plaskett, and members of the Subcommittee:

Thank you for the invitation to testify before you today. Empower Oversight is a nonprofit, nonpartisan educational organization dedicated to strengthening public integrity through research, education, and the help of patriotic whistleblowers. My partner Jason Foster started Empower in the summer of 2021, and I was privileged to become Empower's president on March 1 of this year. Empower is honored to represent Stephen Friend and Marcus Allen, two of the other witnesses invited to this hearing today.

I. History of FBI Whistleblower Protections

I'd like to begin by giving a quick overview of what a difficult road whistleblowers at the FBI have had over the years. The Civil Service Reform Act of 1978 established the modern system of protections for federal employee whistleblowers. Yet thanks to an amendment on the floor of the House, FBI employees were given second-class status compared to most other federal employees. They were then and are now treated differently from employees at every other federal law enforcement agency, such as the Drug Enforcement Administration; the U.S. Marshals Service; the U.S. Secret Service; and what was then called the Bureau of Alcohol, Tobacco, and Firearms, to name a few. Employees at most other federal agencies did not have a statutory restriction on who they could make protected disclosures to. In fact, in 1989 Congress amended the law to reinforce its strong view that *any* disclosure was protected. But FBI employees were only protected if their disclosure was to the Attorney General, or an employee designated by the Attorney General for such purpose. Employees at most other federal agencies could file retaliation complaints with the independent Office of Special Counsel (OSC), which could investigate. FBI employees could not. Employees at most other federal agencies could appeal retaliation to the Merit Systems Protection Board (MSPB). FBI employees could not.

Despite excluding the FBI from OSC and MSPB jurisdiction, the Civil Service Reform Act required that the Attorney General issue regulations to implement the protections for FBI whistleblowers. In 1980 the Department of Justice (DOJ) issued a bare-bones regulation stating the Attorney General could implement a stay of a retaliatory personnel action when "appropriate."[1] Beyond that, DOJ took no further action until over 18 years later. Fred Whitehurst's whistleblowing on the FBI crime lab got Senator Chuck Grassley heavily involved in pushing DOJ to issue regulations that provided a process for FBI whistleblowers. The final 1999 regulations expanded who a protected disclosure could be made to, designating the highest-

[1] Office of Professional Responsibility; Protection of Department of Justice Whistleblowers, 45 FR 27754, 27755 (Apr. 24, 1980).

ranking official of each office (usually a Special Agent in Charge).[2] But even that posed extraordinary hurdles for ordinary line employees, who don't have day-to-day access to such an official.

In my view, time has demonstrated that it was a mistake to exclude the FBI from the standard whistleblower protection process. When I worked on the Senate Judiciary Committee staff as Senator Chuck Grassley's whistleblower policy expert, we invested significant energy in trying to improve those protections. At our request, the Government Accountability Office conducted a study which found various weaknesses in DOJ's process for handling FBI whistleblower complaints.[3] When I moved to Chairman Jason Chaffetz's House Oversight Committee staff, I negotiated the passage of the FBI Whistleblower Protection Enhancement Act of 2016,[4] the engrossed version of which hangs in my home office. It expanded the categories of individuals to whom FBI employees could make protected disclosures, including to supervisors in an employee's chain of command and to OSC. The new law clearly underscored that FBI whistleblowing is not some private action between individuals who happen to be federal employees, but rather a public act, promoted by Congress speaking for the American people. However, FBI whistleblowers still had no recourse outside of DOJ for remedying retaliation.

That finally changed last December, when the National Defense Authorization Act (NDAA) for Fiscal Year 2023 finally gave FBI employees the right to appeal to MSPB.[5] I couldn't have asked for a better way to end my term on that Board, and I commend Congress for adopting that provision. I understand the first FBI case is currently pending before MSPB, and Congress should closely monitor to ensure this jurisdictional provision applies as intended to all FBI retaliation cases that have been wending their way for years through DOJ's labyrinthine process. Laws prohibiting the FBI from retaliating against whistleblowers have been on the books for years, so the FBI can't claim these are new rights just because they now have to justify their actions before MSPB.

While giving FBI whistleblowers access to MSPB was an important step, I believe further action is needed. There is no valid reason why the FBI should be treated any differently than other federal law enforcement agencies, and Congress should eliminate the FBI's special exemption and give its employees access to OSC to investigate retaliation complaints. The hardworking employees of the FBI, among which I count a number of friends, deserve equal protection of the law, mirroring all other federal law enforcement officers.

Unfortunately, even OSC or MSPB access can't address the latest troubling pattern coming from within the FBI. A number of recent examples have surfaced of the FBI pretextually suspending security clearances as a means of whistleblower retaliation. Mr. Friend and Mr. Allen are just two public examples of this trend. OSC and MSPB do not have statutory jurisdiction to investigate or remedy this means of retaliation. Title 50 and Presidential Policy Directive 19 (PPD-19) prohibit suspending access to classified information to retaliate against whistleblowers,

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[2] Whistleblower Protection For Federal Bureau of Investigation Employees, 64 FR 58782 (Nov. 1, 1991).
[3] GAO-15-112, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints, January 2015.
[4] Pub. L. 114-302 (2016).
[5] Pub. L. 117-263, Title LIII, Sec. 5304(a) (2022).

in some circumstances.[6] Yet these prohibitions are rife with legal ambiguity, and their remedial mechanisms are often too little, too late for employees whose clearances are suspended. PPD-19 has been interpreted by DOJ to only apply to a clearance adjudication, so the FBI can avoid this prohibition by leaving the whistleblower in the limbo of suspension without ever getting around to adjudicating and revoking the clearance. Title 50 is interpreted to apply to clearance suspensions, but only after a year without an adjudication. Meanwhile, when the FBI suspends a clearance it also immediately suspends the employee indefinitely without pay. To make matters worse, even though the FBI is not paying the employee, it requires them to obtain permission from the FBI to take another job—permission the FBI routinely denies. Congress should closely examine this issue to stop this sort of abuse.

II. Recent Committee Treatment of FBI Whistleblowers

In light of the FBI's historic lack of transparency, history of whistleblower retaliation, and recent pattern of using security clearances to retaliate against employees, Congress should be doing everything it can to welcome FBI whistleblowers. It takes immense courage to draw attention to problems in the federal government, especially at an agency with a history as checkered as the FBI's. It takes even *more* courage to bring those concerns to Congress. So when Mr. Friend and others came to this Committee to share their disclosures and how those disclosures resulted in retaliation within the FBI, I know it was not a decision they made lightly.

Instead of welcoming or at least protecting such disclosures, FBI employees who have come forward to Congress have been shamefully treated by the Ranking Members and Minority staff of this Committee. It's one thing to hear allegations and not find them particularly persuasive or relevant to a particular inquiry. If an office even wants to ignore allegations, as the Minority staff appeared to have done for several months up until transcribed interviews with these witnesses were scheduled with the Committee, that's their prerogative. But it's another thing altogether to actively go out and smear the individuals disclosing those allegations. That's exactly what the Ranking Members and Minority staff of this Committee did when they released a March 2 report entitled "GOP Witnesses: What Their Disclosures Indicate About the State of the Republican Investigations."[7]

In the For[e]w[o]rd by Ranking Member Nadler and Ranking Member Plaskett, they wrote: "[T]he three individuals we have met are not, in fact, whistleblowers. These individuals . . . did not present actual evidence of any wrongdoing at the Department of Justice or the [FBI]." Similarly, the body of the report alleged: "[N]one of the witnesses have provided evidence related to a violation of law, policy, or abuse of authority. None are 'whistleblowers' in any sense recognized by federal law or any federal agency." These assertions are conceptually inaccurate, both in a general and in a technical sense, as well as factually inaccurate as applied to these particular cases.

Neither the Civil Service Reform Act of 1978 nor the FBI Whistleblower Protection Enhancement Act of 2016 codified a statutory definition of the colloquial term "whistleblower," which the Merriam-Webster Dictionary defines simply as "one who reveals something covert or

[6] 50 U.S.C. § 3341(j); PPD-19 Sec. B (Oct. 10, 2012).
[7] Available at https://democrats-judiciary.house.gov/uploadedfiles/2023-03-02_gop_witnesses_report.pdf.

who informs against another." Rather, those laws protect from retaliation individuals who engage in protected activity. As noted in the FBI Prepublication Review Policy Guide the Minority staff appended to its report, simply making disclosures of any information to Congress is a protected activity.[8] In fact, it has been ever since the Lloyd-La Follette Act of 1912.[9] The relevant provision states: "The right of [federal] employees . . . to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."[10] To give this provision more teeth, in fiscal year 1998 Congress gave governmentwide application to the so-called Lloyd-La Follette appropriations rider, which prohibits appropriated money from paying the salary of any officer or employee of the federal government who "prohibits or prevents, or attempts or threatens to prohibit or prevent," any federal employee from communicating with Congress.[11] Thus, purporting to deny "whistleblower status" to individuals engaged in the precise activity the Legislative Branch has worked for over a century to protect is extremely shortsighted and harmful to the longstanding institutional interests of this body.

Even in a technical sense, the Minority report's reliance on "evidence" as the determining factor is misplaced. Protected disclosures may concern "any violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Yet the law protects disclosures of "*information* . . . which the employee . . . reasonably believes evidences" these categories—not, as the Minority report puts it, making claims that "provide evidence" of such.[12] In other words, simply communicating a reasonable belief of misconduct is protected whistleblower activity, regardless of whether the whistleblower produces evidence backing up their allegations.[13] It is against the law to retaliate against a whistleblower for communicating such a reasonable belief. Only protecting whistleblower disclosures accompanied by conclusive evidence, as the Minority staff report seems to require, would have disastrous consequences for retaliation in the federal government.

Turning from disclosures to alleged retaliation, the statutory scheme is somewhat like the experience I had working for Congress: whistleblowers brought allegations, and where the committees I worked on found those allegations serious and worth congressional action, we conducted investigations. No one expects a private citizen to investigate a crime before going to the police, and we didn't expect a whistleblower to investigate their own agency. Along those lines, if an FBI employee appeals alleged retaliation to the MSPB under the new NDAA provisions, they must simply make a non-frivolous allegation that they were subjected to a personnel action for making what they reasonably believed was a protected disclosure. They are then entitled to document discovery, witness interviews, and a hearing before an administrative

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[8] U.S. House of Representatives, Committee on the Judiciary, *GOP Witnesses: What Their Disclosures Indicate About the State of the Republican Investigations*, Mar. 2, 2023, Appendix B: Referenced Documents, p. 251 ("Prepublication Review Policy Guide," Federal Bureau of Investigation, Information Management Division, Jan. 8, 2020, at 10).
[9] Act of August 24, 1912, § 6, 37 Stat. 555.
[10] 5 U.S.C. § 7211.
[11] Consolidated Appropriations Act, 2023, Pub. L. 117–328, Div. E, Sec. 713.
[12] 5 U.S.C. § 2303(a).
[13] See, e.g., *Pridgen v. Office of Management and Budget,* 2022 MSPB 31, ¶ 52.

judge. Simply put, the burden is not on the whistleblower to produce the evidence at the outset—that's why there's an investigation.

In addition to being wrong on the law, the Minority report also makes inaccurate claims regarding some of these whistleblowers' cases. For instance, the report stated of Mr. Friend's case: "The DOJ Office of Inspector General . . . declined to open an investigation into Friend's allegations." As I indicated a few minutes ago, this is simply false. After the Minority's report was released I wrote seeking clarification from the DOJ OIG, which reiterated to us on March 11, 2023: "[W]e are interested in interviewing Mr. Friend about his allegations, which remain under assessment by our office." Their interview with Mr. Friend is in fact scheduled for tomorrow. According to the DOJ OIG, no one from the Minority staff on the Committee ever contacted their office to verify whether it was investigating Mr. Friend's allegations before inaccurately asserting otherwise in their report. Inexcusably, a number of mainstream media sources uncritically repeated the Minority report's wrong information without ever bothering to check the facts for themselves.

III. Conclusion

FBI whistleblowers have traveled a hard road to the protections they currently receive. They should be treated by Congress the same as other whistleblowers, both in statute and in practice. Issuing reports smearing those who come forward from the FBI and questioning their credibility will unquestionably deter others from taking that same path.

Preventing this sort of institutional harm is no doubt why the House Code of Official Conduct mandates:

> [A] Member, Delegate, . . . officer, or employee of the House shall not knowingly and willfully disclose publicly the identity of, or personally identifiable information about, any individual who has reported allegations of possible wrongdoing, including retaliation, under processes and protections provided by the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, the Intelligence Community Whistleblower Protection Act of 1998, or any other Federal law that establishes the right for individuals to make protected disclosures to Congress.[14]

For Congress to perform its Constitutional duty of oversight of the Executive Branch, it must have firsthand, unvarnished information about how federal agencies are operating. But why would future whistleblowers bring their disclosures to Congress if they think they might be treated the way some on this Committee have treated these whistleblowers? Attacking whistleblowers hurts this Committee and others like it, the House of Representatives as an institution, and Congress as a whole.

[14] Rule XXIII—Code of Official Conduct, Clause 20, 118th Congress.