

HOUSE JUDICIARY COMMITTEE
SELECT SUBCOMMITTEE ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT
HEARING ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT
SEPTEMBER 25, 2024

TESTIMONY OF TRISTAN LEAVITT
PRESIDENT
EMPOWER OVERSIGHT

Chairman Jordan, Ranking Member Plaskett, and Members of the Subcommittee, thank you for the invitation to testify today.

Empower Oversight is a nonprofit organization that provides free legal services to whistleblowers from the federal government. We are honored to represent Marcus Allen and many other courageous federal employees.

Marcus is a Marine Corps veteran awarded the Navy and Marine Corps Commendation and Achievement Medals. He was deployed to Kuwait and Iraq and faced live enemy fire for the Nation he loves. Yet when he sat here 16 months ago, the FBI had publicly smeared him with the lie that he was a threat to our national security. Some of you helped the FBI spread that falsehood at that hearing.

But, one year later, the FBI reinstated his security clearance and agreed to restore 27 months of backpay. This amounts to an official admission by the FBI that claims about his disloyalty to the U.S. were false. His clearance should never have been revoked in the first place. And this year whistleblower after whistleblower from *inside* the FBI's security clearance office has pulled back the curtain on the dysfunction and political bias that led to its abuse of Marcus and his family.

Last week I sent a detailed 22-page letter to the Committee outlining these problems in the FBI's Security Division.¹ As that letter details, *each and every one* of the line-level employees who worked on the review believed Marcus should retain his clearance:

- (1) The initial investigator believed it.
- (2) A second investigator believed it.
- (3) The first adjudicator believed it.
- (4) And, another adjudicator handling our appeal also believed it.

So how did the clearance still get suspended and revoked, contrary to both whistleblower retaliation and clearance adjudication law? High-level officials, at least one of whom is still in the Security Division, overruled these line-level staff and intimidated employees into doing what they wanted. Division employees lived in fear of a stranger bringing the so-called "Kelly Cart" to their desk to package up their belongings while they were escorted out of the building and fired.

¹ See Press Release, Empower Oversight, New Evidence of FBI Abusing Security Clearances as Retaliation (Sept. 19, 2024), <https://empowr.us/new-evidence-of-fbi-abusing-security-clearances-as-retaliation>.

And sure enough, of the four line-level employees who worked on Marcus's case, two of them *also* suffered reprisal from the FBI for trying to treat him fairly. In fact, the *entire* leadership of the Division's Clearance Adjudication Unit was removed in September 2023, apparently in reprisal for standing up to improper direction from Division leadership. Empower Oversight is now representing *three* current or former Security Division employees retaliated against by their managers.

This summer we disclosed to the public that the Security Division forced FBI employees to rat out their coworkers if they'd ever heard them "vocalize support for President Trump" or "vocalize objection to [the] COVID-19 vaccination."² We now understand that was just one manifestation of the FBI's politicized climate. Former Security Division leaders like Jeffrey Veltri, who is now running the investigation into the second assassination attempt on former President Trump, has a documented history of encouraging security clearance decisions based on political views and personal medical decisions. He and fellow manager Dena Perkins would often ask in staff meetings whether employees whose clearances were under investigation had received the vaccine. Veltri suggested Marcus was delusional for being motivated by his religious beliefs. And witnesses often heard Veltri say that while FBI employees might have First Amendment rights, they had no right to a security clearance—suggesting his willingness to abuse the clearance process as a pretext for unconstitutionally targeting employees with whom he disagreed.

The tone for this intolerance seems to have been set at the top. In a February 2021 call with FBI managers, Deputy Director Paul Abbate made what one observer called "a chilling and personal" "direct threat" "that there would be consequences for anyone who questioned his direction."³ Given these statements, how is the American public supposed to have confidence that its government acts without regard to politics or personal biases?

Over the past two months since a former president was nearly assassinated and one man was killed, the entire country has seen how critical Secret Service whistleblowers have been to providing even the smallest measure of transparency. Yet those Secret Service whistleblowers, like all other federal law enforcement whistleblowers—including from every other Justice Department component—have stronger protections than whistleblowers from the FBI. As some of you know, fixing this was one of my top goals as a congressional staffer a decade ago. But the House Intelligence Committee has repeatedly blocked reforms in this area.

Incredibly, the other prohibited personnel practice laws that apply to the rest of the Justice Department don't apply to the FBI either. The FBI's internal handbook is the only prohibition on political coercion, nepotism, rigged hiring, and various other merit-based policies. How could you *not* end up with poor management—and managers—in an agency like that? Even

² Press Release, Empower Oversight, Documents Reveal Political Bias and Abuse of the FBI Security Clearance Process (June 11, 2024), <https://empowr.us/documents-reveal-political-bias-and-abuse-of-the-fbi-security-clearance-process>.

³ See Press Release, Empower Oversight Delivers Evidence of FBI Deputy Director Threatening January 6th FBI Whistleblowers (June 22, 2022), <https://empowr.us/empower-oversight-delivers-evidence-of-fbi-deputy-director-threatening-january-6th-fbi-whistleblowers>.

the Justice Department's National Security Division is subject to these statutory restrictions. So why shouldn't the FBI be?

The Office of Special Counsel (OSC) investigates violations of this statute in other agencies, with recourse to the Merit Systems Protection Board (MSPB). For the FBI, the Department of Justice Office of Inspector General (OIG) is tasked with investigating whistleblower retaliation or violations of any other FBI policies. But the OIG doesn't have the legal authorities OSC does to seek a stay of a personnel action from the MSPB while it investigates. And unlike the MSPB, the OIG can't force the FBI to take any particular corrective or disciplinary action even if it finds wrongdoing. The Bureau essentially has a free rein.

This 1970s relic of an exception needs to be fixed. Congress should strike the FBI's exemption from the standard prohibited personnel practices.⁴ This would empower OSC to investigate FBI whistleblower retaliation or nepotism just as it does other agencies, and apply the same appeal routes through MSPB and the courts.

As a broad bipartisan coalition of groups has argued, it's also time for Congress to overturn or narrow the 1988 Supreme Court case *Navy v. Egan*.⁵ Because that case has been so misinterpreted by the courts, neither OSC nor MSPB review whether a security clearance action was taken as a form of whistleblower reprisal. That should change, especially because it's become the FBI's *primary form* of whistleblower retaliation.

Until last year I served on the MSPB's three-person Presidentially-appointed, Senate-confirmed Board. Over the years it has considered the case of a former FBI employee named John Parkinson, whose security clearance was suspended in 2011. Since he had blown the whistle on his coworkers using an FBI plane to solicit prostitutes and bringing women to a secure FBI facility, Parkinson alleged the suspension was retaliation. For the reasons described above, the MSPB has not reviewed the clearance determination or retaliation claim over the years. However, the case was eventually remanded by the Federal Circuit to consider some associated issues. The MSPB found the FBI improperly withheld some of Parkinson's backpay for 2 ½ years when he *did* have an active security clearance. The Board ordered the FBI to restore that backpay—a category of order from which Congress created no appeal avenue.⁶ Yet the FBI brazenly defied the order. Three weeks ago the bipartisan Board—all appointed by President Biden—unanimously issued an order to show cause why it should not impose sanctions against the FBI, writing:

⁴ Striking the FBI's exclusion as an "agency" under 5 U.S.C. § 2302(a)(2)(C)(ii) would also subject it to the requirement at 5 U.S.C. § 7515 that agencies must propose at least a three-day suspension to any supervisor who retaliates against a whistleblower, and removal for a second offense of retaliation. Congress passed this requirement in 2017 to establish greater accountability for whistleblower reprisal and deter potential retaliators. Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. 115-73, Sec. 104, 131 Stat. 1235, 1236 (Oct. 26, 2017); *see also* S. Rep. No. 115-44, at 6-8, <https://www.congress.gov/115/crpt/srpt44/CRPT-115srpt44.pdf>.

⁵ 484 U.S. 518 (1988).

⁶ *Parkinson v. Department of Justice*, MSPB Docket No. SF-0752-13-0032-C-1, Order (May 20, 2024), https://www.mspb.gov/decisions/nonprecedential/Parkinson_John_C_SF-0752-13-0032-C-1_Final_Order.pdf.

[T]he [FBI] flatly refused to comply with the Board's [backpay] order on the basis that it believed the Board's findings... "will have a substantial, adverse impact on the administration of the civil service and matters of national security." The agency provided no explanation or evidence for this extraordinary statement... If the agency is attempting to pursue some non-judicial avenue to overturn our decision, we...are aware of none, and the agency has not enlightened us...It is difficult to escape the conclusion that the [FBI]...has no intention of ever complying with the Board's orders.⁷

The FBI's blatant disregard for the Board's order is sheer lawlessness. Yet it is in part a consequence of allowing the FBI to operate by its own playbook for far too long. The FBI must not be allowed to continue acting like it's above the law.

Through the statutory reforms I've outlined, Congress can begin to restore the proper functioning of the civil service system at the FBI. These are reforms both parties should support. They would strengthen good government in the FBI no matter who sits in the White House or the Director's Office. I implore the members of this Committee to take up this challenge.

There is no way to erase the suffering endured by Marcus and his family, Special Agent Garret O'Boyle and his family, and others who have been viciously smeared and forced to endure more than 20 months without pay. But the FBI can hold those who perpetrated it accountable. And Congress can turn it into something meaningful by using it as the impetus to finally change these laws that should have been changed a long time ago.

Thank you.

⁷ *Parkinson v. Department of Justice*, MSPB Docket No. SF-0752-13-0032-X-1, Show Cause Order (Sept. 5, 2024), https://www.mspb.gov/decisions/nonprecedential/Parkinson_John_C_SF-0752-13-0032-X-1_Show%20Cause%20Order.pdf.