

**Testimony of Elizabeth Hempowicz, Policy Counsel
Project On Government Oversight
before the
House Oversight and Government Reform
Subcommittee on Government Operations
on
“Five Years Later: A Review of the Whistleblower Protection Enhancement Act”**

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Chairman Chaffetz, Ranking Member Cummings, Subcommittee Chairman Meadows, Ranking Member Connolly, and members of the Subcommittee on Government Operations, thank you for inviting me to testify today and for your oversight efforts to ensure proper implementation of whistleblower protections. I am Liz Hempowicz, the Policy Counsel at the Project On Government Oversight. Thirty-five years ago, POGO was founded by Pentagon whistleblowers who were concerned about the Department’s procurement of ineffective and overpriced weapons. A few years later, POGO expanded its mission to cover the entire federal government, and POGO’s resulting investigations into corruption, misconduct, and conflicts of interest have helped achieve a more effective, accountable, open, and ethical federal government. Whistleblowers have played an essential role in that work.

Important Reforms in the Whistleblower Protection Enhancement Act

Five years ago, Congress passed the Whistleblower Protection Enhancement Act (WPEA), closing many loopholes and upgrading protections for federal workers who blow the whistle on waste, fraud, abuse, and illegality. In short, the WPEA made it easier to blow the whistle. I want to take a few minutes to discuss four major improvements included in the WPEA and how they changed the landscape for federal whistleblowers.

First, it codified an “anti-gag” statute championed by Senator Chuck Grassley (R-IA). The anti-gag provision requires agencies to issue a statement notifying employees that statutory rights to communicate with Congress, whistleblower rights, and other statutory rights and obligations supersede agency restrictions on disclosures or communications.¹ Before this codification, Senator Grassley included an appropriations rider to accomplish the same goal every year for 24 years in order to protect whistleblowers from official actions to stifle their speech.²

In addition, the WPEA clarified that “any” disclosure of gross waste or mismanagement, fraud, abuse, or illegal activity may be protected, including when a whistleblower makes a reasonable disclosure to his or

¹ U.S. Congress, Whistleblower Protection Enhancement Act (S. 743), Introduced April 6, 2011, by Senator Daniel Akaka. <https://www.congress.gov/bill/112th-congress/senate-bill/743/text> (Downloaded January 23, 2017) (Hereinafter WPEA)

² See *generally* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 932 (2011); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 685 (2009).

her supervisor, even if the supervisor ends up being involved in the wrongdoing. Similarly, the WPEA clarified that a whistleblower's intent in making a disclosure should not be factored in when determining whether he or she made a protected disclosure.³ These changes made it easier for whistleblowers to have clear and protected channels to report through, and in turn made it easier to present a case proving whistleblower retaliation.

The WPEA also allows whistleblowers who prevail under Whistleblower Protection Act administrative hearings to receive compensatory damages.⁴ The financial toll that blowing the whistle takes on many whistleblowers cannot be overstated. Allowing for compensatory damages not only attempts to make the whistleblower financially whole, but also sends a message that the government values their service and that retaliation is not supported at the highest levels.

Finally, the WPEA created a right for federal employees who appeal a judgment of the Merit Systems Protection Board (MSPB) to file their appeal in any U.S. Court of Appeals with jurisdiction, instead of limiting them to the U.S. Court of Appeals for the Federal Circuit.⁵ This Committee led the charge in extending that pilot program two years ago, and should now work to make that right permanent.

There are a host of other changes that improved whistleblower protections under this law, and I'm sure other members of the panel will mention some of them. But while the positive impact of this law is significant, its enforcement has not been without issue.

Problems with Implementation of the Whistleblower Protection Enhancement Act

As mentioned previously, the codification of the anti-gag provision was a major victory for federal whistleblowers. However, a report released by Senator Grassley two years after the passage of the WPEA revealed that many agencies were still utilizing nondisclosure agreements that undermined that provision.⁶ Senator Grassley found that only one agency out of 15 studied, the Department of the Treasury, was fully compliant with the anti-gag provision of the law.

The application of this provision has been called into question as recently as last week, with major news outlets reporting that various agencies have been issuing nondisclosure memos to their staffs. The Environmental Protection Agency (EPA) has been directed to cease all external communications, including press releases and social media posts.⁷ The U.S. Department of Agriculture has reportedly ordered staff to route all media inquiries and press releases through the office of the Secretary.⁸ A memo to the Department of Health and Human Services (HHS)—which includes the Centers for Disease

³ WPEA

⁴ WPEA

⁵ WPEA

⁶ Press Release, Senator Chuck Grassley, "Grassley: Federal Agencies Failing to Implement Anti-gag Provision of Whistleblower Law," April 2, 2014. <http://www.grassley.senate.gov/news/news-releases/grassley-federal-agencies-failing-implement-anti-gag-provision-whistleblower-law> (Downloaded January 25, 2017)

⁷ Kate Sheppard, "EPA Freezes Grants, Tells Employees Not To Talk About It, Sources Say," *The Huffington Post*, January 23, 2017. http://www.huffingtonpost.com/entry/environmental-protection-grants-staff_us_5886825be4b0e3a7356b575f (Downloaded January 24, 2017)

⁸ Jose A. DelReal, "USDA scrambles to ease concerns after researchers were ordered to stop publishing news releases," *The Washington Post*, January 25, 2017. https://www.washingtonpost.com/news/post-politics/wp/2017/01/24/usda-science-researchers-ordered-to-stop-publishing-news-releases-other-documents/?utm_term=.107e02e4eb78 (Downloaded January 25, 2017)

Control (CDC) and the Food and Drug Administration (FDA)—forbids them from sending “any correspondence to public officials.”⁹

Unfortunately, we can’t know for sure if any of those gag orders are in force because there have been no public statements from the White House, and the agencies haven’t released the memos. We only have leaked information to go on. However, as members of this Committee have recognized, any directive such as these violates the WPEA if it is not accompanied by a disclaimer that nothing in the order supersedes whistleblower rights and protections.

Across-the-board efforts to prevent government employees from communicating with Congress and the public could represent a serious threat to public health and safety. Close Congressional oversight is necessary to make sure that this important provision continues to be implemented properly.

The WPEA also included administrative improvements to the handling of whistleblower cases. It provided the Office of Special Counsel (OSC) with authority to file *amicus* briefs to support employees appealing MSPB rulings and made it easier for the Special Counsel to discipline those responsible for illegal retaliation.¹⁰ However, these improvements are only as strong as the Office of Special Counsel itself. This can be illustrated by a comparison between two OSC’s: one led by Scott Bloch and one led by Carolyn Lerner.

Though his tenure as U.S. Special Counsel ended before the WPEA was enacted, it bears mentioning that we have seen what the OSC looks like when under the wrong leadership. Special Counsel Scott Bloch repeatedly demonstrated a fundamental lack of understanding about whistleblowers, proper investigation procedures, employee free-speech laws, and his responsibilities as a government manager. For example, the number of favorable actions that the OSC took to actually help whistleblowers dropped by 60 percent during Bloch’s time at the agency.¹¹

As POGO’s late Director of Investigations Beth Daley wrote about Bloch in 2006, “Since being appointed head of the agency, he ‘cleaned house’ of career employees whose ‘loyalty’ he doubted, inappropriately steered contracts to friends and cronies, interfered with politically-sensitive investigations, closed hundreds of whistleblower files summarily without investigation, and unilaterally re-interpreted his responsibilities so that they better fit his personal views. Along the way, he publicly made disparaging remarks about ‘leakers,’ even though it is his job to protect the federal government’s whistleblowers. As a result, Bloch has been a lightning rod for the news media, Republicans and Democrats in the Congress, whistleblower attorneys, and good government groups.”¹²

Contrast this to the last five years at OSC, under current U.S. Special Counsel Carolyn Lerner. In Fiscal Year 2015 alone, OSC obtained 233 favorable actions for 175 federal employees who filed whistleblower

⁹ House Committee on Oversight and Government Reform, Memo from Acting Secretary of the Department of Health and Human Services on Immediate Action on Regulatory Review. <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/HHS%20Memo.pdf> (Downloaded January 30, 2017)

¹⁰ WPEA

¹¹ POGO Press Release, “Special Counsel Scott Bloch Submits Resignation Letter,” October 22, 2008. <http://www.pogo.org/about/press-room/releases/2008/wi-osc-20081022-1.html>

¹² Beth Daley, “Who Wrote this Document?” POGOBlog, May 10, 2006. <http://www.pogo.org/blog/2006/05/who-wrote-this-document.html>

reprisal complaints, a 264 percent increase from 2011.¹³ OSC has also filed numerous *amicus* briefs in whistleblower cases, serving as an important voice in the fight to maintain the protections codified in the WPA and WPEA.¹⁴ Office of Special Counsel representatives have testified before Congress, including at this hearing, and have worked with Congressional staff and civil society to further improve whistleblower protections.

It is imperative that OSC continue the upward trend. Special Counsel Lerner has been re-nominated to serve another term, but there has been no movement on the nomination. We urge the Senate to confirm Lerner, and hope that you share our concerns about the future of the OSC and voice them to your Senate colleagues.

Additionally, the MSPB is now being rendered almost useless due to Senate inaction. There are currently two vacant seats on the three-person Board. Until one vacancy is filled, there will not be a quorum for the Board to interpret key issues from the Whistleblower Protection Enhancement Act. Without a quorum MSPB can't issue final rulings. The resulting vacuum could cripple enforcement of the merit system principles generally, and the Whistleblower Protection Act in particular. While not under this Committee's jurisdiction, I urge you to pass these concerns on to your Senate counterparts, who haven't yet acted on the nomination of OSC's principal deputy Special Counsel Mark Cohen to the MSPB.

Areas Ripe for Further Strengthening of Whistleblower Protections

Discussing areas where further whistleblower protections are necessary isn't a simple task, because despite broad protection laws like the WPA and the WPEA, the totality of whistleblower protection laws include a patchwork of protections dependent on where a whistleblower works in the government and in what capacity. Today I would like to address further necessary protections as they relate to Intelligence Community (IC) whistleblowers, employees in positions designated as "national security sensitive" positions, and then more general suggestions.

The WPEA afforded new and necessary protections to many federal employees when it was enacted. Unfortunately, contractors in the intelligence community were not included, despite there being a track record of success with previous protections.

From 2008 through 2012, all Pentagon and stimulus-funded IC contractors enjoyed best-practice whistleblower protections through the American Recovery and Reinvestment Act of 2009.¹⁵ This included Intelligence Community agencies like NSA. Implementation of the law was without controversy and there were never any allegations that it harmed national security. The whistleblower shield was so effective in deterring taxpayer waste that the Council of the Inspectors General on Integrity and Efficiency proposed its permanent expansion, and the Senate approved it with bipartisan support.

¹³ Nick Schwellenbach, "Office of Special Counsel Obtains Record Breaking Results for Whistleblowers in FY 2015," July 12, 2016. <https://osc.gov/News/pr16-17.pdf> (Downloaded January 25, 2016)

¹⁴ See generally Nick Schwellenbach, "OSC Files Third Amicus Brief Opposing Higher Burdens in Whistleblower Retaliation Cases," August 4, 2016. <https://osc.gov/News/pr16-22.pdf>; Nick Schwellenbach, "OSC Amicus Briefs Argue Against Additional Burden in Whistleblower Cases," April 13, 2016. <https://osc.gov/News/pr16-08.pdf>; Nick Schwellenbach, "OSC Files First Supreme Court Amicus Brief to Help Protect Whistleblower Rights," September 30, 2014. <https://osc.gov/news/pr14-18.pdf> (All downloaded January 24, 2017)

¹⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 297 (2009)

Notwithstanding its widespread support, the closing conference committee stripped all whistleblower rights for IC contractors from the National Defense Authorization Act for Fiscal Year 2012.

Six months later, NSA contractor Edward Snowden disclosed the U.S. government's mass surveillance programs. He later explained the circumstances that led to his course of action: "There are no proper channels for making this information available when the system fails comprehensively." Currently, IC contractors have two alternatives to almost certain retaliation: either remain silent observers of wrongdoing or make anonymous revelations to the media.

Although IC contractor whistleblowers have some protection under Presidential Policy Directive 19 (PPD 19)—access to review if they face adverse security clearance actions as retaliation for their whistleblowing—this is too narrow to be comprehensive protection. While it is working (POGO reported on the removal of the NSA IG following a PPD 19 complaint that he retaliated against whistleblowers¹⁶) Presidential Policy Directives are subject to revocation at the President's will. Whistleblowers must have safe channels to report abuses of power that betray the public trust, and Congress has a responsibility to fill these accountability loopholes. The next round of whistleblower protection legislation must include protections for Intelligence Community contractors.

Other employees vulnerable to whistleblower retaliation are those who hold "national security sensitive" positions with the federal government. In a 2014 court decision, *Kaplan v. Conyers, Northover and MSPB*¹⁷ (Conyers), the United States Court of Appeals for the Federal Circuit held that federal agencies have unlimited discretion to remove an individual's eligibility to occupy a national security position. The agency's removal decision is not subject to any review. The court's decision wiped out civil service due process rights and whistleblower protections for anyone in a national security "sensitive" position.

Now, if an agency uses the determination of ineligibility for a national security sensitive position as a pretext to fire an employee after the employee made a legally protected whistleblower disclosure or because of that employee's race or religion, that employee cannot seek justice from the MSPB and has no other recourse.

In 1978, Congress created the MSPB to hear federal employee appeals of alleged prohibited personnel practices. But this new system of "sensitive jobs" circumvents the MSPB, allowing the agencies an unchecked ability to remove federal employees from their positions without access to an appeal. Without the stability, balanced treatment, and consistent review Congress intended the MSPB process to provide, federal workers have lost and will continue to unfairly lose their jobs.

Congress should enact legislation to restore due process rights for employees who were removed from their positions due to a change in "sensitive" status. This right existed for all federal employees from 1883-2012 and guaranteed them a day in court before an independent administrative board after termination of employment.

Congress should also consider legislation that would require mandatory punishment against supervisors who retaliate against whistleblowers. Any such legislation should carefully balance due process rights of

¹⁶ Adam Zagorin, "NSA Watchdog Removed for Whistleblower Retaliation," POGO Blog, December 15, 2016. <http://www.pogo.org/blog/2016/12/intelligence-community-landmark.html>

¹⁷ *Kaplan v. Conyers*, No. 2011-3207, (Fed. Cir. August 20, 2013).

employees accused of retaliatory actions with a proper chance to present a defense and appeal a final decision. Without mandatory punishment for those who retaliate against whistleblowers, there is no substantial deterrence to violating these laws. While a whistleblower may eventually prevail in a claim of retaliation, he or she may also see the person who retaliated against them receive a bonus, a promotion, or both.

Recently passed legislation creates a minimum 12-day, unpaid suspension when a complaint that a supervisor has retaliated against a whistleblower is substantiated in the Department of Veterans Affairs (VA).¹⁸ This combination of due process and mandatory punishment for retaliators is the right way to send and enforce the message that retaliating against whistleblowers will not be tolerated.

Another area of concern is the implementation of former President Obama's Insider Threat program. The program was created in 2011 through Executive Order 13587 in order to ensure "responsible sharing and safeguarding of classified information."¹⁹ It included a specific provision prohibiting the use of this program to identify or prevent lawful whistleblower disclosures. Despite this prohibition, last year Kenneth Lipp at the *Daily Beast* uncovered a joint webinar from the Department of Justice and the Office of the Director of National Intelligence (ODNI) that conflated whistleblowers like Thomas Drake with terrorists like Nidal Hasan (the Fort Hood killer) and Aaron Alexis (the Navy Yard killer).²⁰ Erroneously conflating true insider threats to classified information with lawful whistleblowing is a dangerous precedent. While ODNI has assured POGO that these slides have been corrected and that the General Counsel's office has fastidiously implemented whistleblower protection training for the IC, increased Congressional oversight may be helpful to make sure incidents like the one uncovered last year don't happen again.

In addition to further protections for whistleblowers, it is important to continue to monitor enforcement of the current protections. Agency Inspectors General should be required to track whistleblower complaints and case outcomes and include these numbers and accompanying summaries in semiannual reports to Congress. This type of reporting could shed light on challenges faced by agencies in implementing whistleblower protections.

Similarly, trainings for managers about whistleblower protections and prohibited personnel practices are vital to continued improvement of WPEA implementation. Federal laws already require agency heads to ensure, in consultation with OSC, that employees are informed of their rights and any remedies available to them under the WPA and the WPEA.²¹ And OSC has already worked with over 100 offices to ensure they have completed OSC's 2302(c) Certification Program, which includes training for supervisors on prohibited personnel practices and whistleblower disclosures.²² But we urge you to make compliance with this training program mandatory for all agencies and include reasonable deadlines for when agencies must become certified.

¹⁸ Consolidated Appropriations Act, 2017, Pub. L. No. 114-223, 129 Stat. 2242 (2016)

¹⁹ Exec. Order No. 13587, § 7(e).

²⁰ Kenneth Lipp, "Government Compares NSA Whistleblower to Ft. Hood Shooter, Soviet Spies," *The Daily Beast*, November 18, 2015. <http://www.thedailybeast.com/articles/2015/11/18/government-compares-nsa-whistleblower-to-ft-hood-shooter-soviet-spies.html> (Downloaded January 25, 2017)

²¹ 5 U.S.C. § 2302(c)

²² Office of Special Counsel, 2302(c) - Agency Certification Status. <https://osc.gov/Pages/2302status.aspx> (Downloaded January 28, 2017)

Until then, we encourage you to seek more information about what offices and agencies have completed the 2302(c) Certification Program, including when their certifications will expire and how many individuals from the offices attended the certification program. Additionally, the House should create a whistleblower ombudsman office to train Congressional staff on working with whistleblowers and to provide assistance and advice to staff working with whistleblowers.

Conclusion

Many of the issues I have raised in my testimony hinge on Congressional oversight. Passing stronger laws is a necessary first step, but continued Congressional oversight is essential to ensure that whistleblowers are lauded, not retaliated against, shunned, or harmed.