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**ANSWERS IN RESPONSE TO QUESTIONS FOR THE RECORD  
FOR THE HEARING ON TUESDAY, JANUARY 28, 2020,  
“PROTECTING THOSE WHO BLOW THE WHISTLE,”  
HOUSE SUBCOMMITTEE ON GOVERNMENT OPERATIONS**

**February 26, 2020**

Hon. Gerald E. Connolly  
Chairman  
Subcommittee on Government Operations  
Committee on Oversight and Reform  
2157 Rayburn House Office Building  
Washington, D.C. 20515-6143

**SUBJECT: Answers to Questions for the Record (2/12/2020)**

**Rep. Gerald E. Connolly**

(All questions are from Rep. Gerald E. Connolly)

**1. Have whistleblowers successfully appealed to Congress to conduct oversight? Can you provide an example?**

**Answer:** Yes. For example, Federal Bureau of Investigation (“FBI”) whistleblower Dr. Frederic Whitehurst successfully appealed to Congress to conduct oversight of the FBI Laboratory in the 1990’s. Dr. Whitehurst, through his attorneys, began appealing to the House Judiciary Committee to conduct oversight of problems at the FBI Lab in the mid-1990’s when the committee was chaired by Rep. John Conyers. At the time, the FBI Lab was not subjected to regular oversight by either Congress or the Department of Justice (“DOJ”) Inspector General (“IG”) and the DOJ had not even implemented the whistleblower protections for FBI employees. Following those efforts an Inspector General investigation of Dr. Whitehurst’s allegations commenced and after the IG issued a report recommending major reforms at the FBI Lab both the House and Senate Judiciary Committees held additional oversight hearings.<sup>1</sup>

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<sup>1</sup> See House Judiciary Committee, Subcommittee on Crime, Hearing, “The Activities of the Federal Bureau of Investigation” (May 13, 1997) ([http://commdocs.house.gov/committees/judiciary/hju50136.000/hju50136\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju50136.000/hju50136_of.htm)); Senate Judiciary Committee Hearing, “Oversight Hearings on the FBI Crime Lab” (Sept. 29, 1997) (<https://www.c->

In February of 1998, Senator Charles Grassley, who actively engaged in oversight through his role as a member of the Senate Judiciary Committee, cited Dr. Whitehurst's whistleblowing as a victory for government accountability and declared Dr. Whitehurst to be "a true national hero."<sup>2</sup>

As a result of congressional oversight substantial reform of the FBI Laboratory was ordered for the first time by the Attorney General. *See* S. Hrg. 112-519, p. 4 (July 18, 2012) ("The disclosures Dr. Whitehurst made resulted in the Department of Justice IG investigation that recommended 40 changes to improve procedures at the lab, including accreditation by an outside body. Thanks to the actions of Dr. Whitehurst, cases where faulty procedures, flawed analysis, and improper testimony had been given were reviewed.") (remarks of Sen. Grassley).

Additionally, in response to Dr. Whitehurst's allegations of whistleblower retaliation President Clinton ordered that statutory whistleblower protections for FBI employees be implemented by the DOJ for the first time. *See* Memorandum of President William Jefferson Clinton, "Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978," Vol. 62 *Federal Register* No. 81, p. 23123 (April 14, 1997).

As a result of Dr. Whitehurst's whistleblowing there has been continuing oversight of the FBI Lab which resulted in the DOJ and FBI formally acknowledging in 2015 that nearly every examiner in the FBI Lab's microscopic hair comparison unit gave flawed testimony in almost all criminal trials where they offered evidence against criminal defendants over more than a two-decade period between 1980-2000.<sup>3</sup> The continued oversight also required expanded reviews of thousands of criminal cases. In particular, there have been several cases where individuals were found to have been released from lengthy prison sentences after subsequent reviews have found they were wrongfully convicted due to improper handling of forensic evidence by the FBI Lab and false or improper testimony by Lab examiners. *Id.* (citing 3 cases as of 2015 where criminal defendants had been totally exonerated). Reviews of thousands of FBI Lab cases continue to this day.

There are many other examples of successful congressional oversight resulting from whistleblower disclosures by federal employees. This example, however, is particularly instructive because congressional oversight of the FBI was virtually nonexistent before the Whitehurst whistleblower disclosures. Oversight by Congress produced substantive reforms in the FBI Laboratory's handling of criminal cases, continuing reviews of misconduct in the Lab's

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[span.org/video/?92251-1/fbi-crime-lab](https://span.org/video/?92251-1/fbi-crime-lab)); Cassandra Burrell, "Justice says FBI Trying to correct lab problems," Associate Press (Sept. 29, 1997) (<https://apnews.com/565384fbbb2c05e9e928d33624c138fd>). *See also*, Senate Judiciary Committee Hearing, S. Hrg. 112-519, "Improving Forensic Science in the Criminal Justice System" (July 18, 2012) (<https://www.govinfo.gov/content/pkg/CHRG-112shrg75711/pdf/CHRG-112shrg75711.pdf>).

<sup>2</sup> <https://www.grassley.senate.gov/news/news-releases/regarding-fbi-and-dr-frederic-whitehurst>.

<sup>3</sup> *See* Spencer Hsu, "FBI admits flaws in hair analysis over decades," Washington Post (April 18, 2015) (citing continuing oversight by Senators Grassley and Leahy on the Senate Judiciary Committee) ([https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html)); Spencer Hsu, "Convicted defendants left uninformed of forensic flaws found by Justice Dept.," Washington Post (April 16, 2012) ([https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT\\_story.html](https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html)).

handling of criminal cases where defendants have been released or exonerated due to wrongful convictions and the implementation of FBI whistleblower procedures where none had previously existed. While much work still needs to be done to take effective corrective action to address all of these issues, none of them would have come to public attention but for the congressional oversight in response to a whistleblower's disclosures.

**2. How would you further clarify or bolster protections for whistleblowers? Can you provide specific statutory citations where these changes could be made?**

**Answer:** The following recommendations are being made to further clarify or bolster existing protections for federal employee whistleblowers. These are by no means the only reforms that are needed but they are the most important based on the recognized failures that confront the current administrative and legal scheme that whistleblowers use to make confidential disclosures or to enforce protections in the event there is retaliation.

We recommend clarifying the law in three areas:

- (A) Enact clarifying amendments to the following whistleblower provisions of the Civil Service Reform Act and the statute protecting confidentiality of whistleblowers who work in the intelligence community. The specific provisions that need clarifying amendments are 5 U.S.C. § 2302(a)(2)(A) and 50 U.S.C. § 3234(a)(3). The specific text of the proposed clarifying amendments is attached hereto as Attachment "A".
- (B) Enact clarifying amendments to the Privacy Act of 1974, 5 U.S.C. § 552a, to increase penalties and enhance remedies for the wrongful disclosure of information relating to confidential whistleblowers and any person whose information is contained in a Privacy Act system of records. The specific text of the proposed clarifying amendments is attached hereto as Attachment "B".
- (C) Enact court access and jury trial provisions to the following whistleblower provisions of the Civil Service Reform Act by amending 5 U.S.C. § 7703. The specific text of this proposed amendment is attached hereto as Attachment "C".

**3. How have confidential whistleblowers contributed to improving this nation?**

**Answer:** In recent years, the confidential whistleblower disclosure provision of 5 U.S.C. § 1213(h) has enabled federal employees throughout the government to report to the Office of Special Counsel ("OSC") serious misconduct or fraud that otherwise would not have been known. Under the federal whistleblower statute, 5 U.S.C. § 1213(h), it is up to the federal employee to choose whether to remain anonymous and the federal government is not permitted to disclose the whistleblower's identity without the consent of the whistleblower.

In FY 2018 alone, confidential whistleblower disclosures resulted in saving millions of dollars in taxpayer dollars and fixed major problems within the federal government. Examples of federal employees making confidential whistleblower disclosures to OSC include federal air traffic controllers reporting dangerous flight protocols, Pentagon procurement officers reporting

significant irregularities in government contracts, and U.S. Department of Veterans Affairs (“VA”) professionals reporting unsafe practices in hospitals and clinics.

Remarkably, of the confidential whistleblower disclosures that were referred by OSC for investigation and that were closed in FY 2018, agencies substantiated allegations in 88 percent of the cases. The OSC has described the contributions by these dedicated public servants who made confidential whistleblower disclosures as follows<sup>4</sup>:

- They are invaluable to highlighting quality of care issues at VA health facilities and ensuring our government fulfill its solemn commitment to our veterans.
- Confidential whistleblowers have helped improve public safety, prevent fraud and abuse, and recoup significant funds to the U.S. Treasury.
- In one of the more recent examples, a Navy whistleblower reported to OSC that \$32 million in equipment was unaccounted for due to lax accountability measures at the facility, a claim substantiated by the agency. As a result, new policies were put in place to improve accountability and prevent further equipment loss, thus saving valuable taxpayer resources.
- In another recent case, OSC referred a whistleblower’s disclosure that an Environmental Protection Agency (EPA) regional office had failed to conduct proper lead-based paint inspections as required by law. The EPA’s Office of Inspector General investigated and largely substantiated the whistleblower’s disclosures. The EPA agreed to multiple systemic improvements to increase oversight and accountability.
- Additionally, in December of 2019 OSC announced that it had substantiated a disclosure from a confidential whistleblower at the VA, and OSC confirmed there was “more than \$223 million in wasteful spending and delayed payments for veterans’ medical bills.”<sup>5</sup>

Unquestionably, the confidential and anonymous whistleblower disclosure provisions of the federal whistleblower statute work. They enable federal employees to remain anonymous in order to encourage the reporting and correction of serious problems. The successful track record of confidential whistleblower disclosures is undeniable. Confidential whistleblowing results in saving lives, saving taxpayer money and rooting out fraud, abuse and violations of law that likely would have gone undetected.

Other laws that have enacted strong confidential whistleblower disclosure provisions, such as the Internal Revenue Service (“IRS”) tax fraud whistleblower law, the Securities and Exchange

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<sup>4</sup> <https://osc.gov/News/Pages/19-04-Notable-2018-Accomplishments.aspx>

<sup>5</sup> <https://osc.gov/News/Pages/20-07-VA-Wasted-223-Million.aspx>

Commission (“SEC”) and Commodity Futures Trading Commission (“CFTC”) whistleblower law, and the Auto Safety whistleblower law, have also been highly successful. Under the IRS, SEC, CFTC and Auto Safety whistleblower laws whistleblowers submit confidential reports that result in enforcement actions that have recovered billions of dollars for investors and taxpayers over the last decade. For example:

- Since the IRS whistleblower program was established in 2007, the government has collected approximately \$5.7 billion in unpaid taxes, penalties and fines as a result of whistleblowers reporting major tax frauds.<sup>6</sup>
- Since the SEC whistleblower program’s inception in 2011, “the SEC has ordered wrongdoers in enforcement matters brought with information from meritorious whistleblowers to pay *over \$2 billion in total monetary sanctions*, including more than \$1 billion in disgorgement of ill-gotten gains and interest, *of which almost \$500 million has been, or is scheduled to be, returned to harmed investors.*”<sup>7</sup>
- The CFTC whistleblower program has reported enforcement actions that imposed sanctions orders totaling *more than \$800 million* that resulted from information reported by meritorious whistleblowers.<sup>8</sup>

Under all of these laws, confidential whistleblowers have helped the government recover many billions of dollars on behalf of U.S. taxpayers and investors, and the enforcement actions have helped to deter fraud by wealthy tax cheats, banks and publicly traded companies. Unquestionably, confidential whistleblowers have been essential to protecting taxpayers, investors and the general public from massive fraud.

**4. In your experience representing whistleblowers, have they felt that their identity was sufficiently protected by the law?**

**Answer:** No. Although there are several provisions of law purporting to protect the identity of whistleblowers who make disclosures, in my experience representing whistleblowers for more than 30 years many feel particularly vulnerable in the event their identity is exposed either in retaliation or as a result of their identity becoming known through investigations or improper means. Consequently, attorneys representing whistleblowers who work in the federal government must advise their clients that in the event of a breach of their confidentiality the current remedies are particularly weak or in many cases non-existent. This is a major disincentive to blowing the whistle in the federal government.

By contrast, in private industry there are better protections for enforcing whistleblower confidentiality and for bringing a civil action to remedy a breach of whistleblower confidentiality

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<sup>6</sup> [https://www.irs.gov/pub/whistleblower/fy19\\_wo\\_annual\\_report\\_final.pdf](https://www.irs.gov/pub/whistleblower/fy19_wo_annual_report_final.pdf)

<sup>7</sup> <https://www.sec.gov/files/sec-2019-annual%20report-whistleblower%20program.pdf> (emphasis added).

<sup>8</sup> <https://whistleblower.gov/sites/whistleblower/files/2019-10/FY19%20Annual%20Whistleblower%20Report%20to%20Congress%20Final.pdf> (emphasis added).

or other forms of harassment. For example, in 2011 Congress passed strong whistleblower provisions in the Dodd-Frank Act, which encourages and protects confidential whistleblowing on securities fraud, commodities fraud, and bribery under the Foreign Corrupt Practices Act. By law, the SEC and CFTC must maintain the confidentiality of whistleblowers who request such protection. Also, these laws permit whistleblowers to make anonymous filings with the SEC and CFTC.

Notably, the SEC has issued sanctions against companies for taking steps to identify a confidential whistleblower. *See In the Matter of Homestreet, Inc., et al.*, Order, p. 9 SEC Release No. 79844 (Jan. 19, 2017) (“by taking actions to determine the identity of an individual whom HomeStreet suspected had brought the hedge accounting errors to the Commission staff, including suggesting that the terms of an indemnification agreement could allow them to deny payment to an individual who HomeStreet believed to be a whistleblower, HomeStreet acted to impede individuals from communicating directly with the Commission staff about a possible securities law violation.”).

Also, federal courts have found that breaching an employee’s right to confidentiality can constitute an adverse action in violation of whistleblower protection statutes. The U.S. Court of Appeals for the Fifth Circuit said it best, when it upheld an award of damages to a whistleblower simply based on the employer’s disclosure of his identity which was deemed to be a violation of the Sarbanes Oxley Act whistleblower provisions. The Court held that “it is *inevitable that such a disclosure [of the whistleblower’s identity] would result in ostracism*, and, unsurprisingly, that is exactly what happened to [the whistleblower] following the disclosure.” The Court went on to note: “*no one volunteers for the role of social pariah.*” *See, Halliburton v. Administrative Review Board*, 771 F.3d 254, 262 (5th Cir. 2014)(emphasis added) (citations omitted).

Congress should clarify protections for whistleblower confidentiality for federal employees modeled on the stronger protections that exist for whistleblowers in the private sector. That would go a long way to instilling confidence for whistleblowers that their identity will be protected and that there are effective remedies to combat retaliation in the event their identities become known.

**5. Do you believe we should legislate penalties against individuals responsible for either the “outing” or the unfair treatment of whistleblowers?**

**Answer:** Yes. President Trump made a direct call for the public outing of the confidential Trump-Ukraine whistleblower’s identity which was acted upon by his supporters.<sup>9</sup> This was very alarming not only because the President is required by law to protect intelligence community whistleblowers pursuant to 50 U.S.C. § 3234. Unquestionably, the risk of harm to

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<sup>9</sup> *See, e.g.*, FOX News, “Debate continues over protections for Ukraine whistleblower” (Nov. 5, 2019) (<https://video.foxnews.com/v/6100840036001#sp=show-clips>); Madlin Mekelburg, “Texas Rep. Louie Gohmert repeats false claim about Trump whistleblower,” Houston Chronicle (Nov. 4, 2019) ([https://www.houstonchronicle.com/news/politics/texas/article/Texas-Rep-Louie-Gohmert-repeats-false-claim-14789059.php?utm\\_campaign=CMS%20Sharing%20Tools%20\(Premium\)&utm\\_source=t.co&utm\\_medium=referral](https://www.houstonchronicle.com/news/politics/texas/article/Texas-Rep-Louie-Gohmert-repeats-false-claim-14789059.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral))).

confidential whistleblowers is great when they are publicly attacked and their identity is revealed, or threatened to be revealed. The recent criminal indictment of someone who acted upon the attacks made against the Trump-Ukraine whistleblower and their attorney, by sending death threats to the whistleblower's attorney, demonstrates that the risk of personal harm to whistleblowers is real. *See* Attachment D, Copy of Indictment in *U.S. v. Atkinson*, No. 1:20-cr-20085 (E.D. Mich. Feb. 21, 2020). According to that indictment, the defendant allegedly sent a death threat on November 7, 2019 to the whistleblower's attorney the day after President Trump held a televised campaign rally on November 6, 2019 at which the President made angry personal attacks against the whistleblower and their attorney.<sup>10</sup> Earlier that day, the President's son, Donald Trump, Jr. published a tweet to his 4 million followers on Twitter speculating on the alleged name of the confidential Trump-Ukraine whistleblower.<sup>11</sup>

Each of the legislative proposals set forth in response to these QFR's would help to address this issue. First, Congress should clarify that federal whistleblowers who are attacked by government officials and whose identities are threatened to be revealed or revealed should be able to file a claim of retaliation under the whistleblower provisions of the Civil Service Reform Act. *See* Response to QFR No. 2 and Attachment A. Second, federal whistleblowers need to be able to enforce those rights to fight retaliation, but the current administrative system has failed and whistleblowers need court access and jury trials to effectively seek justice when faced with retaliation. *See* Response to QFR Nos. 2, 6-7, and Attachments A-C.

In addition to bolstering and clarifying the remedies available to address retaliation in violation of the whistleblower protection provisions of the civil service laws, Congress needs to strengthen the Privacy Act of 1974, 5 U.S.C. § 552a, which was intended to be an enforcement tool to protect all citizens from harms resulting from the wrongful disclosure of confidential information stored in government files. Congress should enact a clarifying amendment to restore the purpose of the Privacy Act to permit civil damages for violations of the Privacy Act's disclosure without consent rule and expressly provide for Privacy Act damages for breaches of whistleblower confidentiality. *See* Attachment C.

This change would assist all federal whistleblowers, whether or not they are confidential, by preventing the disclosure or leaking of other information from government files that is protected by the Privacy Act, such as information contained in federal personnel files, medical files and security clearance files.

Leaking personal information from government files has unfortunately been all too common a tactic to smear a federal whistleblower.

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<sup>10</sup> *See* Reis Thebault, "'We will hunt you down': Man threatened attorney of Trump whistleblower prosecutors say," *Washington Post* (Feb. 20, 2020) (<https://www.washingtonpost.com/nation/2020/02/20/whistleblower-attorney-threatened/>).

<sup>11</sup> Ramsey Touchberry, "Law Firm Representing Whistleblower Calls Trump, Jr.'s Speculation on Client Identity 'Disgusting and Reckless,'" *Newsweek* (Nov. 6, 2019) ([https://www.newsweek.com/law-firm-representing-whistleblower-calls-trump-jrs-speculation-clients-identity-disgusting-1470163?utm\\_campaign=NewsweekTwitter&utm\\_source=Twitter&utm\\_medium=Social](https://www.newsweek.com/law-firm-representing-whistleblower-calls-trump-jrs-speculation-clients-identity-disgusting-1470163?utm_campaign=NewsweekTwitter&utm_source=Twitter&utm_medium=Social)).

For example, when Dr. Fredric Whitehurst blew the whistle on the FBI crime lab he alleged that the FBI was selectively leaking derogatory information about him to the news media in order to discredit him despite that he had received only the highest performance ratings and the government had called him to testify as an expert in numerous criminal cases. As a result of a lawsuit filed in federal court alleging Privacy Act violations the FBI ultimately settled with Dr. Whitehurst in advance of trial.

Similarly, when Linda Tripp reported to Independent Counsel Kenneth Starr misconduct by President Bill Clinton, in what came to be known as the Lewinsky scandal, she was subject to illegal leaks to the media from confidential personnel and security clearance files. A Department of Defense Inspector General investigation subsequently found that two Pentagon officials in fact leaked confidential information about Ms. Tripp in violation of the Privacy Act. The Defense Department later settled Ms. Tripp's Privacy Act lawsuit over these violations.

However, the Supreme Court has issued two decisions interpreting the civil damages provisions of the Privacy Act that limits recoveries to "actual damages" that did not include compensatory damages for non-pecuniary harm, such as damage to reputation or emotional harm.<sup>12</sup> The Privacy Act civil remedies also do not provide for injunctive relief. Given these limitations it is difficult for someone who is victimized by a leak of Privacy Act protected information to recover damages and pursue a Privacy Act case.

Furthermore, disclosing the identity of a whistleblower or confidential informant could also constitute an obstruction of justice, see, e.g., 18 U.S.C. § 1513(e) ("Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing information to a law enforcement authority any truthful information relating to the commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.").<sup>13</sup> Recently, a federal appeals court upheld a defendant's conviction for witness retaliation under this statute. *U.S. v. Edwards*, 783 Fed.Appx. 540 (6<sup>th</sup> Cir. 2019).<sup>14</sup> The defendant knowingly shared pictures of a witness who testified against her brothers in a drug trial on a social media site and that as a result the victim suffered harm, and when asked in response to her posts the defendant replied that the witness (who was also a confidential informant) was a "snitch" on her brothers and she thought he lied about them. *Id.* While this potential criminal penalty is available to protect confidential whistleblowers who are informants to law enforcement, the more typical problem that exists is

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<sup>12</sup> See *Federal Aviation Administration v. Cooper*, 566 U.S. 284 (2012) (holding that "actual damages" under the Privacy Act is not clear enough to allow damages for mental or emotional distress); *Doe v. Chao*, 540 U.S. 614 (2004) (holding that the Privacy Act's statutory minimum damages of \$2,000 per Privacy Act violation could not be recovered unless the plaintiff could prove "actual damages.").

<sup>13</sup> In 2002, during the debate on the passage of the Sarbanes Oxley Act, at the urging of Rep. F. James Sensenbrenner, one of the criminal obstruction statutes was strengthened to expressly address harm inflicted on whistleblowers. See, Cong. Rec., p. H5462 (July 25, 2002) (remarks of Mr. Sensenbrenner) (making it "a crime for someone to knowingly retaliate against a whistle blower and provid[ing] a criminal penalty of up to 10 years for such offense."). That criminal obstruction statute is not limited to knowing retaliation against corporate whistleblowers and it has been applied to prosecute anyone who knowingly retaliates against any individual who provides information to federal law enforcement.

<sup>14</sup> Also see, *U.S. v. Edwards*, 291 F. Supp.3d 821 (S.D. Ohio 2017) (denying motion to dismiss indictment).



where there are threats and subsequent breaches of a whistleblower's confidentiality and other forms of harassment. Potential criminal penalties alone are not adequate.

The best way for Congress to protect the confidentiality of federal employee whistleblowers is to enact clarifying amendments that would strengthen whistleblower protections in the civil service laws, similar to what currently exists for private sector whistleblowers, *see Halliburton v. Administrative Review Board*, 771 F.3d at 262 (5th Cir. 2014), and to bolster protections set forth in the Privacy Act, so that strong action can be taken to impose penalties on those who carry out such harassment and retaliation against the whistleblower. *See Attachments A-C.*

**6. Your testimony stresses the importance of access to a jury trial should a whistleblower exhaust all administrative options. Why is a jury trial so important?**

**Answer:** The failure to provide federal employee whistleblowers with direct access to U.S. District Court and the right to seek a jury trial in whistleblower retaliation cases remains the single biggest problem facing any federal employee who desires to blow the whistle.

Notably, the importance of the need for court access and jury trials for federal whistleblowers was recognized by the House of Representatives three times when it enacted court access and jury trial provisions for federal employee whistleblowers on an overwhelmingly bipartisan basis in 1994, 2007 and 2009, respectively. Despite that these bills died in the Senate, the House should not be dissuaded from passing a strong court access and jury trial provision given that the overwhelming importance and need for it still exists today.

On October 3, 1994, the House passed H.R. 2970, the "Special Counsel Reauthorization," which contained a court access and jury trial provision for federal employee whistleblowers, on a voice vote after suspension of the rules. *See* 103<sup>rd</sup> Cong., Cong. Rec., pp. H10614-18 (Oct. 3, 1994). The bill was supported on a bipartisan basis. *Id.*

In support of H.R. 2970, the Committee observed the importance of the jury trial provision as follows:

*The necessity for significant change to structurally reform current whistleblower protection law is beyond credible debate. The Act's legislative mandate is unsurpassed. Congress seldom passes any significant statute unanimously once, let alone twice in five months. Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them.*

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*The cause of the failure is no mystery. The WPA's rights have not met their promise on paper, because the agencies responsible for the Act's implementation have been hostile, or at least unwilling, to enforce its mandate. In response, H.R. 2970 overhauls the responsibilities and structure for whistleblower protection in four*

areas—agency leadership and management accountability; closing coverage gaps in the scope of statutory protection; *freeing whistleblowers from vulnerability* to abuses of discretion by the Office of Special Counsel; and creating a choice of a system that *offers civil service whistleblowers access to the same due process procedures generally available to American citizens to enforce constitutional rights*.

H.R. Rep. 103-769, 103<sup>rd</sup> Cong., 2<sup>nd</sup>. Sess. 1994, 1994 WL 534747 (Sept. 30, 1994) (emphasis added).

On March 14, 2007, the House passed H.R. 985, the “Whistleblower Protection Enhancement Act of 2007,” by a strong bipartisan vote of 331-94. H.R. 985 contained a strong court access and jury trial provision for federal employee whistleblowers. In support of H.R. 985 this Committee noted the need for court access and jury trials to address the lengthy delays that whistleblowers have always suffered in the administrative system:

*Too often, a whistleblower brings his or her case to the OSC or the MSPB and the case lingers in limbo or a determination occurs so long after the alleged prohibited practice occurred that the fired employee has been without a paycheck for years. This bill allows whistleblowers access to federal district courts for a trial by jury if the MSPB (or the IG for cases involving national security officials or contractor whistleblowers) does not take action on their claims within 180 days.*

H.R. 985, H. Rept. 110-42 (Part 1), “Whistleblower Protection Enhancement Act of 2007,” p. 4 (<https://www.congress.gov/110/crpt/hrpt42/CRPT-110hrpt42-pt1.pdf>) (emphasis added).

On January 28, 2009, the House passed by voice vote<sup>15</sup> an amendment proposed by Rep. Todd Platts (R-PA), to add the text of the Whistleblower Protection Enhancement Act (H.R. 985 in the 110<sup>th</sup> Congress) to H.R. 1, the American Recovery and Reinvestment Act of 2009. This was the second time in less than two years the House passed the court access and jury trial reform which was considered to be the most important reform that was needed to increase protections for federal employee whistleblowers.

The importance of enacting a court access and jury trial right for federal whistleblowers has been presented time and again. Based on public hearings conducted by this Committee and in the U.S. Senate, there is indeed a strong record demonstrating the importance of this proposal. This includes:

- Professor Robert Vaughn, a highly respected expert on federal employment law, testified before the U.S. Senate as to why federal court access was needed. *See Senate Hearing 111-299* (<https://www.govinfo.gov/app/details/CHRG-111shrg51786/context>);

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<sup>15</sup> <https://www.congress.gov/bill/111th-congress/house-bill/1/amendments?pageSize=100&page=5>.

- On May 4, 2009 this Committee held a hearing on federal court access for federal employees, and the testimony presented at that hearing demonstrated the importance of jury trials and why this reform was needed.<sup>16</sup>
- Every major “good government” or whistleblower support group has endorsed this reform. A letter placed on the formal record of this Committee was signed by 292 public interest groups strongly endorsing federal court access as the first reform they advocated.<sup>17</sup>

Thus, there already exists a strong record before Congress justifying this needed reform and demonstrating its importance.

In addition to the public record previously filed before Congress, this Committee should also be aware of the following:

- In 1991 Congress granted all federal employees the right to file discrimination cases in U.S. District Court. This includes race, sex, age, disability, national origin, and religious discrimination. It also covers complaints alleging retaliation for raising concerns regarding unlawful discrimination.<sup>18</sup> Although the MSPB or EEOC would have jurisdiction to hear these cases, employees were given the right to remove their cases into court and have them heard by a jury of their peers. Whistleblower discrimination cases have second-class status. Victims of race, sex, age, or religious discrimination in the federal workforce have the right to file cases in court, but whistleblowers in the federal government do not.
- Under federal law all state, local and municipal employees have the right to file their cases in federal court and seek a jury trial. It is fundamentally unfair for Congress to have provided this right to all non-federal government employees but deny this right to federal workers.
- Since 2017 the MSPB has been without a quorum. As a result, there is a backlog of over 2,500 cases.<sup>19</sup> Appointing new Board members, which happens whenever a new President is elected, will not solve this problem, as the fair and just adjudication of the backlog alone will necessarily take years to resolve. It is unfair that whistleblowers must subject their cases to a politically appointed board that has no mandatory judicial qualifications and is subject to the whims of the nominating and appointment process. Federal judges are

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<sup>16</sup> The House hearing is linked here:

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015089031192&view=1up&seq=1>.

<sup>17</sup> The public interest group letter is linked at:

<https://www.kkc.com/wp-content/uploads/2019/07/publicinterestletter5.14.09.pdf>.

<sup>18</sup> The EEOC website explains these processes in detail. *See*

[https://www.eeoc.gov/federal/fed\\_employees/lawsuit.cfm](https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm).

<sup>19</sup> On February 11, 2020 the MSPB responded to a Freedom of Information Act request which stated that as of January 31, 2020 there was a total pending backlog of 2,586 cases of which 662 cases involved whistleblower appeals that are still pending before the MSPB.

appointed for life and must meet judicial qualification standards set by the Senate Judiciary Committee.

- In 1978 federal employees were not the only class of whistleblowers who were required to use administrative agencies to vindicate their rights. In 1978 Congress also passed whistleblower protections under the Atomic Energy Act (“AEA”), which also required all employees to use an administrative process (under the AEA employees had to file with the Department of Labor). Congress responded to the inherent procedural problems created by denying whistleblowers access to U.S. District Court procedures, and Congress amended the AEA to explicitly permit all nuclear safety whistleblowers the right to file in federal court once they exhausted their remedies under the older law (i.e. after 1-year employees could file directly in federal court and seek a *de novo* jury trial). See 42 U.S.C. § 5851.
- The amendment to the AEA permitting employees to file cases in federal court has since become the “best practice” for all modern whistleblower laws. For example, the following laws permit whistleblowers to file in federal court after exhausting their administrative remedies: Sarbanes-Oxley Act, Surface Transportation Act, Consumer Product Safety, Consumer Financial Protection, Food Safety, Tax Evasion, Seaman Safety, Railroad Safety Act, National Transit Systems Security Act, and the Atomic Energy Act.
- Likewise, Congress now also permits employees to directly file whistleblower cases in federal court without having to exhaust any administrative remedies. See anti-retaliation provisions in the False Claims Act, Defense Contractor protections, Monetary Transactions (i.e. banking Frauds, Securities Exchange Act and Commodity Exchange Act).
- Congress amended other earlier whistleblower laws to create a “kick-out” provision permitting employees to remove their whistleblower cases from an administrative agency to federal court. This process has become the recognized “best practice” in all modern whistleblower retaliation laws.

If anything, the overwhelming record on the importance of court access and jury trials for federal employee whistleblowers is stronger today. There has never been a more urgent need to provide federal employee whistleblowers with the tools that they need to combat retaliation. The “vulnerabilities” that whistleblowers in the federal government face today are not simply the hostility and retaliation they have faced in the past. Today, the entire administrative system created by Congress to adjudicate administrative complaints of whistleblower retaliation is totally broken and there is, at a minimum, a three-year backlog of cases which is rising every day and will take years to address through the MSPB process. That delay alone is intolerable and demonstrates the importance of jury trials to help address the problem. Not only would creating the option of taking a whistleblower case to federal court and seek a jury trial encourage employees to report fraud, waste and abuse, it would create an effective remedy when whistleblowers face retaliation and breaches of confidentiality.

**7. Do you know of any instances in which a retaliatory investigation has been launched in response to a whistleblower coming forward? How could such actions be prevented?**

**Answer:** Yes. Jane Turner was one of the first women to be hired as a Special Agent by the FBI. She led efforts to force the FBI to provide protection for child sex crime victims on North Dakota Indian Reservations. In retaliation for Ms. Turner blowing the whistle on FBI failures within its child sex crime program, Ms. Turner was subjected to a retaliatory investigation by the FBI Inspection Division which reviewed her cases even though her investigative work had not been questioned. The FBI relied on the retaliatory investigation to justify its removal Ms. Turner from her position.

In response to the FBI's retaliatory investigation and removal Ms. Turner filed a FBI whistleblower claim and a claim of discrimination and retaliation under Title VII of the Civil Rights Act. Although the DOJ office that adjudicates FBI whistleblower cases found there was retaliation, Ms. Turner only got vindication from the federal jury in her Title VII discrimination case. After a five-year legal battle against the FBI in federal court a jury awarded Ms. Turner the maximum compensatory damages permitted under Title VII.<sup>20</sup>

Notably, at Ms. Turner's Title VII jury trial the Assistant U.S. Attorneys ("AUSA") assigned to supervise her cases testified that the FBI's retaliatory investigation of Ms. Turner materially harmed the ability of the U.S. Attorney's Office to prosecute child sex crimes in North Dakota. The ability to sue in federal court conferred the right to compel the testimony of these AUSA's to corroborate Ms. Turner's retaliation claims. The right to compel testimony and take depositions, or even the right to an evidentiary hearing as of right, was not available to Ms. Turner through the administrative whistleblower procedure available to FBI employees under 5 U.S.C. § 2303.

All federal employees should have the right to challenge retaliatory investigations as an adverse personnel action under the various whistleblower statutes. If Congress were to enact the clarifying amendments proposed with this letter it would create a statutory right for all federal employees to seek corrective action and other appropriate remedies if they prove they were subjected to a retaliatory investigation.

This is not a novel issue. The right to challenge retaliatory investigations exists under other laws, including the Civil Rights Act which is applicable to all federal employees and other whistleblower statutes (such as the Sarbanes Oxley Act) that apply to employees in the private sector. Additionally, the Military Whistleblower Protection Act contains an express statutory provision to allow challenges to alleged retaliatory investigations if they are taken in reprisal for a military member making a protected whistleblower disclosure to Congress, an Inspector General, any person in the chain of command, and other designated places. *See* 10 U.S.C. § 1034(b)(2)(A)(v). If Congress has determined it would not disrupt the military to protect

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<sup>20</sup> Senator Charles Grassley Press Statement, "FBI Whistleblower Jane Turner" (Aug. 14, 2007) (<https://www.grassley.senate.gov/news/news-releases/fbi-whistleblower-jane-turner>).

military members who are subject to retaliatory investigations for whistleblowing there is no reason why all federal employees cannot have the same rights.

See Attachments A-D, submitted herewith.

**ATTACHMENT "A"**

**ATTACHMENT “A”**

**TO ANSWERS BY DAVID COLAPINTO  
CO-FOUNDER AND GENERAL COUNSEL,  
NATIONAL WHISTLEBLOWER CENTER**

**IN RESPONSE TO QUESTIONS FOR THE RECORD  
FOR THE HEARING ON TUESDAY, JANUARY 28, 2020,  
“PROTECTING THOSE WHO BLOW THE WHISTLE,”  
HOUSE SUBCOMMITTEE ON GOVERNMENT OPERATIONS**

**Attachment “A” In Response to Question 2 from Chairman Gerald E. Connolly:**

In 5 U.S.C. § 2302(a)(2)(A), add the following language as a clarifying amendment to define what is a “personnel action” that is actionable in a whistleblower claim:

(xiii) the conducting of a retaliatory investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing an employee or applicant for making a protected communication;

(xiv) any discrimination against an employee or applicant in the terms and conditions of employment because of protected whistleblowing activities; or

(xv) to disclose the identity of a whistleblower who has made a confidential disclosure pursuant to 5 U.S.C. § 1213(h), or Sections 7 and 8(H) of the Inspector General Act.

In 5 U.S.C. § 3234(a)(3), add the following language as a clarifying amendment to define what is a “personnel action” that is actionable in a whistleblower claim:

(K) the conducting of a retaliatory investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing an employee or contracting employee for making a protected communication;

(L) any discrimination against an employee or contracting employee in the terms and conditions of employment because of protected whistleblowing activities; or

(M) to disclose the identity of a whistleblower who has made a confidential disclosure pursuant to 5 U.S.C. § 1213(h), or Sections 7 and 8(H) of the Inspector General Act.



**ATTACHMENT "B"**

**ATTACHMENT “B”**

**TO ANSWERS BY DAVID COLAPINTO  
CO-FOUNDER AND GENERAL COUNSEL,  
NATIONAL WHISTLEBLOWER CENTER**

**IN RESPONSE TO QUESTIONS FOR THE RECORD  
FOR THE HEARING ON TUESDAY, JANUARY 28, 2020,  
“PROTECTING THOSE WHO BLOW THE WHISTLE,”  
HOUSE SUBCOMMITTEE ON GOVERNMENT OPERATIONS**

**Attachment “B” In Response to Question 2 from Chairman Gerald E. Connolly:**

In 5 U.S.C. § 552a, the Privacy Act of 1974, enact a clarifying amendment as follows:

(a)...(14) The term “whistleblower record” means any information that pertains to any person who has filed a confidential or anonymous whistleblower disclosure pursuant to any federal law and shall be considered a “record” for the purpose of this Act without regard to whether the “whistleblower record” is contained in a “system of records.”

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(g)(1)...(E) fails to maintain any whistleblower record in a manner to preserve the confidentiality or anonymity of a whistleblower pursuant to any federal law.

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Add a new subsection (g)(4) as follows:

(4) In any suit brought under the provisions of subsection (g)(1)(C), (D) or (E) of this section in which the court or jury determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) any actual or compensatory damages (including but not limited to non-pecuniary damages for harm to reputation or emotional distress) sustained by the individual as a result of the refusal or failure in an amount to be determined by the Court or by a jury if requested by the plaintiff;

(B) the sum of \$5,000 for each violation of this Act; and

(C) should the District Court find any violation was committed the Court shall grant all corrective action, preliminary or permanent injunctive relief, and all costs of the action and reasonable attorneys fees incurred by the individual bringing the action;

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Add new criminal penalties in subsection (i) of 5 U.S.C. § 552a as follows:

(4) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, whistleblower records which contain individually identifiable information the disclosure of which is prohibited by any federal law, or this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific information is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a Class E felony, imprisoned not less than 1 year and not more than 5 years, and fined not more than \$250,000.

(2) Any person who knowingly and willfully requests or obtains any whistleblower record concerning an individual from an agency under false pretenses shall be guilty of a Class E felony, imprisoned not less than 1 year and not more than 5 years, and fined not more than \$250,000.

**ATTACHMENT "C"**

**ATTACHMENT “C”**

**TO ANSWERS BY DAVID COLAPINTO  
CO-FOUNDER AND GENERAL COUNSEL,  
NATIONAL WHISTLEBLOWER CENTER**

**IN RESPONSE TO QUESTIONS FOR THE RECORD  
FOR THE HEARING ON TUESDAY, JANUARY 28, 2020,  
“PROTECTING THOSE WHO BLOW THE WHISTLE,”  
HOUSE SUBCOMMITTEE ON GOVERNMENT OPERATIONS**

**Attachment “C” In Response to Question 2 from Chairman Gerald E. Connolly:**

In 5 U.S.C. § 7703, insert the following after subsection (d):

(e) Judicial review based on delay. (1) At any time after 120 calendar days of an employee seeking corrective action pursuant to Title 5, subsection (a) of section 1221 or filing an allegation of a prohibited personnel practice under subsection (a) of 5 USC 1214, an employee may remove his her or case from the Merit System Protection Board or the Office of Special Counsel and initiate proceedings in the appropriate U.S. District Court, or within the U.S. District Court for which the employee resides. Removal shall include all claims filed with either the Merit Systems Protection Board or the Office of Special Counsel.

(2) Removal shall be accomplished by filing a notice of removal to the Merit Systems Protection Board or the Office of Special Counsel, served on all parties to the proceeding, and filing a complaint in the appropriate U.S. District Court within 30 days of the filing of the notice;

(3) The U.S. District Court shall:

- (i) have jurisdiction over all claims raised by the employee under the Civil Service Reform Act, 5 U.S.C. § 2302;
- (ii) apply the same burdens of proof as set forth in sections 1214 and 1221 for claims alleging a prohibited personnel practice described in section 2302(b)(8) or (b)(9);
- (iii) should the District Court find that an agency committed a prohibited personnel action, grant all corrective action, damages, and attorney fees authorized in sections 5 U.S.C. §§ 1214 and 1221 or otherwise permitted under law;
- (iv) may grant preliminary relief, pending a final adjudication;
- (v) at the request of an employee, waive his or her right to a de novo trial and have the district court review an order, or part of an order, issued by an Administrative Judge, and issue a final order subject to appeal in the appropriate U.S. Court of Appeals or the U.S. Court of Appeals for the Federal Circuit pursuant to paragraphs (a), (b) and (c) of this section;
- (vi) at the request of the employee, the Office of Special Counsel may participate as an amicus curie or as a representative of the employee;
- (vii) at the request of the employee, conduct a trial de novo before a jury.

(4) The right of an employee to initiate a proceeding in U.S. District Court shall terminate if the Merit Systems Protection Board issues a final enforceable order prior to the filing of the removal action.

**ATTACHMENT "D"**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

UNITED STATES

v.

BRITTAN J. ATKINSON,

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Case: 1:20-cr-20085  
Judge: Ludington, Thomas L.  
MJ: Morris, Patricia T.  
Filed: 02-12-2020 At 10:37 AM  
SEALED MATTER (sk)

INDICTMENT

THE GRAND JURY CHARGES:

Count 1  
18 U.S.C. §875(c)

On or about November 7, 2019, in the Eastern District of Michigan, Northern Division, and elsewhere, Brittan J. Atkinson, knowingly sent an email communication in interstate commerce via computer, intending the communication to be a threat to injure the person of another, and knowing that the email message would be viewed as a threat to cause personal injury to the recipient, in that Brittan J. Atkinson sent a threatening email to an attorney whose identity is known to the grand jury and who represents a whistleblower, in which Atkinson stated, in part, "All traitors must die miserable deaths. Those that represent traitors shall meet the same fate[.] We will hunt you down and bleed you out like the pigs you are. We have nothing but time, and you are running out of it. Keep looking over your



your shoulder[.] We know who you are, where you live, and who you associate with[.] We are all strangers in a crowd to you[.]”

All in violation of 18 U.S.C. §875(c).

THIS IS A TRUE BILL.

Dated: February 12, 2020

Matthew Schneider  
United States Attorney

/s/ Janet L. Parker  
Janet L. Parker (P-34931)  
Assistant U. S. Attorney  
101 First Street, Suite 200  
Bay City, MI 48708

/s/ Grand Jury Foreperson  
Grand Jury Foreperson

/s/ Anthony P. Vance  
Anthony P. Vance (P-61148)  
Assistant U. S. Attorney  
Chief, Branch Offices