February 25, 2020

Chairman Gerald E. Connolly
House Committee on Oversight and Reform
Subcommittee on Government Operations
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Connolly,

Thank you for the opportunity to testify at the subcommittee's hearing on January 28, 2020, entitled "Protecting Those Who Blow the Whistle on Government Wrongdoing," and for the opportunity to address additional questions for the record.

Please find my responses to those questions in the attached document. If you have additional questions or would like me to expand on my answers, please don't hesitate to reach out to me at 202-347-1122 or ehempowicz@pogo.org.

Sincerely,

Liz Hempowicz
Director of Public Policy

cc: The Honorable Mark Meadows, Ranking Member

1. **Your testimony discusses the importance of access to Congress for whistleblowers in the intelligence community and states that congressional committees of jurisdiction are "an avenue for protected disclosure." Why is it vital for whistleblowers to have access to Congress? (Chairman Connolly)**

The Constitution empowers Congress to conduct oversight of the executive branch to ensure that it operates ethically and accountably. Robust congressional oversight is necessary for responsible legislating. Whistleblowers are a crucial resource in Congress's oversight work, because they are uniquely positioned to identify and shine a light on waste, fraud, and abuse when they see it.

But they are much more likely to do so if they're able to disclose what they've heard, witnessed, or experienced to an independent audience who can do something about it. If a whistleblower sees agency leadership as complicit in the wrongdoing or simply unmotivated to address it, they are unlikely to come forward through official channels within the agency.

This is particularly true for whistleblowers in the intelligence community or armed forces, as they are limited in their choice of audience for protected disclosures. For them, Congress is a rare independent audience for their high-stakes whistleblowing disclosures, so it is essential that the relationship be expressly and clearly protected. Furthermore, Members of Congress can serve as powerful advocates for whistleblowers who experience retaliation.

Finally, both House Intelligence Committee Chairman Adam Schiff (D-CA) and Ranking Member Devin Nunes (R-CA) have stated that their resources are inadequate for them to properly oversee the increasingly complex intelligence community.[1] Congress needs all the help it can get from insiders who can identify potential wrongdoing in the intelligence community and in the military, as the operations of both are often shrouded in secrecy with chain of command structures that are not very conducive to robust oversight.

2. **Are the laws that govern whistleblower access to Members of Congress or committees of Congress unclear? (Chairman Connolly)**

Overall, yes. While a patchwork of laws creates the right for various whistleblowers to contact Congress, those laws are often vague in the formal processes and procedures of how to do so. And, in some important instances, the laws are contradictory.

For example, it is unlawful to retaliate against intelligence community whistleblowers for contacting Congress with protected whistleblowing disclosures under 50 U.S.C. § 3234(b) and (c)(1). At the same time, two entirely different sections of law lay out a complicated bureaucratic framework to communicate an "urgent concern" to Congress (50 U.S.C. § 3033, the authorizing statute of the inspector general of the intelligence community, and 5 U.S.C. App. § 8H, the Inspector General Act). That system involves going through not only an inspector general's office, but informing the whistleblower's home agency of their intent to speak with Congress. Even though the general counsel for the director of national intelligence has acknowledged that

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[1] *Public Witness Day: Hearing before the House Appropriations Committee's Legislative Branch Subcommittee*, 116th Cong. (April 2, 2019) (testimony of Mandy Smithberger, director of the Center for Defense Information at POGO). https://www.pogo.org/testimony/2019/04/congress-must-strengthen-national-security-oversight/

intelligence community whistleblowers can still be legally protected if they go directly to congressional intelligence committees to make a disclosure, these laws are contradictory on their face.[2]

Further, while some laws create the right to contact Congress with whistleblowing disclosures, they don't always offer enforceable protections for doing so. This could create a false sense of security for whistleblowers. For example, the Lloyd La-Follette Act, codified at 5 U.S.C. § 7211, makes it unlawful to restrict communications between Congress and a civil service employee who can claim whistleblower protections under Title 5. Yet the mechanisms to hold those who violate the law to account are essentially nonexistent.

3. **How might existing provisions that provide direct whistleblower access to Congress be improved, reinforced, or clarified? (Chairman Connolly)**

Title 5 civil service employees:

Congress should add more specificity and an explicit means of enforcing the Lloyd La-Follette Act (5 U.S.C. § 7211). Currently, the law states, "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

The provision needs enforcement provisions that both address the experience of the whistleblower and provide accountability for the wrongdoer. Without these provisions, the Project On Government Oversight (POGO) fears that the law offers protection on paper only and could create a false sense of security in whistleblowers who make disclosures to Congress.

Intelligence community employees:

It is unlawful to retaliate against intelligence community whistleblowers for making protected disclosures to a congressional intelligence committee or a member of one of those committees.[3] However, different portions of the law provide cumbersome processes for making disclosures of "urgent concern" to Congress, requiring a whistleblower to first go through the inspector general's office as well as their own parent agency.

In order to ensure timely and candid disclosures from intelligence community whistleblowers, Congress should reform 50 U.S.C. § 3033(k)(5) and 5 U.S.C. App. § 8H(a) to expressly protect direct whistleblowing disclosures to Congress.

4. **Are there currently penalties or consequences for a federal employee who prohibits whistleblower communication with Congress or for someone who retaliates against a**

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[2] Letter from General Counsel for the Director of National Intelligence Jason Klitenic to the intelligence community whistleblower's lawyer Andrew Bakaj in response to a request to clarify whether protections apply to disclosures to congressional intelligence committees, September 30, 2019. https://compassrosepllc.com/wp-content/uploads/2019/10/DNI-OGC-Letter-30-September-.pdf

[3] 50 U.S.C. § 3234(b) and (c).

**whistleblower for communicating with Congress? Should there be penalties, and, if so, what might those penalties be? (Chairman Connolly)**

In addition to the Lloyd La-Follette Act discussed above, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, codified at 5 U.S.C. § 7515, mandates that heads of agencies propose minimum disciplinary actions where a supervisor has taken a prohibited personnel action against a whistleblower. This includes retaliation for making protected disclosures to Congress.

This provision applies to non-intelligence community agencies included under the Whistleblower Protection Act. The law's current penalties, suspension and termination, would be sufficient if applied uniformly. However, additional oversight is necessary to determine if the heads of agencies are complying with the law's requirements.

In order to combat an underlying culture of whistleblower retaliation within an agency, it is essential that those in positions of power are held accountable when they retaliate against employees for making lawful whistleblowing disclosures. Holding individuals to account will not only help prevent future retaliation but will send a clear message to whistleblowers that their rights are paramount and their disclosures are valued.

**5. What are the penalties for public officials who attack or "out" whistleblowers? Do penalties cover the White House and should they? (Chairman Connolly)**

While there are several laws which could be read to prohibit the exposure of a whistleblower's identity by public officials, none are clear cut.[4] A clear, comprehensive law is necessary to ensure that whistleblowers who make anonymous protected disclosures cannot be outed, with penalties that would serve as a deterrent. It is imperative that such a law expressly include the White House.

The president, as the head of the executive branch, is in a position to establish best practices for their administration in supporting whistleblowers. The reverse is also true, as the president is in a position to carry out or direct retaliation against whistleblowers. Leaders at executive agencies take their marching orders from the White House, so it is essential that any sitting president understand the crucial role of whistleblowers in ensuring an effective and ethical government.

The White House should therefore be subject to penalties that Congress enacts to prevent the exposure of a whistleblower's identity, as well as other forms of retaliation.

**6. Do you believe we should legislate penalties against individuals who retaliate against whistleblowers? What should those penalties be? (Chairman Connolly)**

As discussed in the answer to question number four, Congress has legislated penalties against individuals who retaliate against whistleblowers. Unfortunately, it's not clear whether those

[4] Kel McLanahan, "Trump and GOP Call to ID Whistleblower Exposes Glaring Gaps in Protections," *Just Security*, November 20, 2019. https://www.justsecurity.org/67363/trump-and-gop-call-to-id-whistleblower-exposes-glaring-gaps-in-protections/

penalties are being applied as Congress intended. That law also explicitly excludes intelligence agencies. Additional penalties might be necessary; depending on the severity of the retaliation, these penalties could include censure, suspension, removal from office, or civil liability.

**7. Would you agree that the MSPB's administrative judges should undergo mandatory training in how to engage with whistleblowers? (Chairman Connolly)**

Yes. All administrative judges should possess adequate training to fulfill their mandate. MSPB's administrative judges must interpret a patchwork of complex and evolving federal laws and should be trained to do their jobs effectively and objectively, including when it comes to the unique complexities of whistleblower cases.

**8. Why is a fully functioning MSPB necessary to ensure whistleblowers are protected? (Chairman Connolly)**

A fully functioning Merit Systems Protection Board is paramount to ensuring that whistleblowers can have their rights enforced as Congress intended, because whistleblowers have no other viable option for relief if settlement through mediation fails.

The board has had no members for over a year, and has lacked the two-member quorum that it needs to operate since January 2017.[5] This is the first time the board has had no sitting members. Without a quorum, the board cannot hear appeals cases from the administrative judge level. Because of that, there is a growing backlog of over 2,500 cases that will be waiting for board members once they are confirmed.[6]

Until the Senate confirms at least two board members who will uphold the federal merit system principles, justice is on hold for civil service whistleblowers. Currently, even if a whistleblower wins at the lower administrative judge level, an agency can appeal that decision to the board and delay the final decision pending a quorum. These tactics allow agencies to silence whistleblowers and conceal internal failings with impunity while whistleblowers rack up significant legal bills.

Further, without a single member, the board cannot enforce stays against agency personnel actions. While the Office of Special Counsel (OSC) can seek stays on a whistleblower's behalf, agencies are not bound by OSC's request unless a member of the board orders such a stay.

POGO also believes the lack of access to enforcement mechanisms will deter additional whistleblowers from coming forward.

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[5] "U.S. Merit Systems Protection Board: Frequently Asked Questions about the Lack of Board Quorum and Lack of Board Members," Merit Systems Protection Board, March 1, 2019. https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf

[6] Nicole Ogrysko, "Lack of Quorum Hits 3-year Mark at MSPB, with No Clear End in Sight," *Federal News Network*, January 24, 2020. https://federalnewsnetwork.com/workforce/2020/01/lack-of-quorum-hits-3-year-mark-at-mspb-with-no-clear-end-in-sight/

**9. What can Congress do to provide relief to whistleblowers, given the lack of board members at the MSPB? (Chairman Connolly)**

Congress should provide access to federal jury trials for whistleblowers seeking judicial relief. Unlike most private sector whistleblowers and federal contractors, federal civil service employees filing whistleblower retaliation complaints are not entitled to have their cases heard before a jury. Such trials would provide expedited access to justice and would reaffirm Congress's commitment to ensuring timely and meaningful judicial enforcement of whistleblower retaliation protections.

Additionally, senators can reestablish a quorum by confirming at least two MSPB nominees who they believe will uphold the federal merit system principles with integrity.

While awaiting that quorum, Congress can allow the MSPB's general counsel to approve stay requests on behalf of the board.

Additionally, Congress can make retaliatory investigations a prohibited personnel practice under the law. As the laws have changed to prohibit the most commonly used forms of retaliation, so have the tactics supervisors use to get around the law. Retaliatory investigations are often used to coerce a whistleblower to drop their claim of retaliation. Making these investigations a prohibited personnel practice would allow whistleblowers to challenge the investigation immediately by filing a claim with the Office of Special Counsel. Despite the lack of quorum at the board, OSC would at the least be able to begin an investigation into the retaliation.

Finally, Congress can provide attorney's fees for whistleblowers who win on the federal court level. Currently, whistleblowers can appeal a final decision of the MSPB to a federal appeals court. However, they are not currently statutorily entitled to attorney's fees if they prevail, and these cases are often drawn out and costly.

**10. Current whistleblower laws do not protect non-career senior managers in the federal government. Is that something that should be changed? (Chairman Connolly)**

Yes. Senior executive managers serve at the highest levels of government and so are privy to waste, fraud, and abuse among their peers and the heads of federal agencies. They are uniquely positioned to help combat cultures of retaliation within federal agencies by exposing wrongdoing at the leadership level that could otherwise persist for years and influence lower-level management. However, given the nature of this type of employment and the associated benefits, the prohibited personnel practices likely should not directly mirror those of civil service employees.

**11. What steps should Congress take to lessen the financial burden on whistleblowers? (Chairman Connolly)**

Congress should allow for the award of attorneys' fees when whistleblowers prevail in challenging retaliation in federal court. Congress should also work to ensure that whistleblowers have access to stays of the personnel actions they face when they demonstrate a *prima facie* case of retaliation so that they can continue to work while their case is pending.

Congress should also consider providing a civil cause of action with damages for whistleblowers whose confidentiality has been willfully or negligently breached. The ability to recover monetary damages in a civil action from the agency or official responsible for the confidentiality breach would act both as a deterrent and compensation for injury suffered as a result of government wrongdoing.