

**QUESTIONS FOR THE RECORD
CHAIRMAN GERALD E. CONNOLLY**

Committee on Oversight and Reform
Subcommittee on Government Operations

“Protecting Those Who Blow the Whistle on Government Wrongdoing”

Hearing Date: January 28, 2020

**Responses of Paul Rosenzweig
Senior Fellow, R Street Institute**

- 1. Mr. Rosenzweig, do you think the recent politicization of issues related to the anonymity of federal whistleblowers has created a chilling effect where employees are less likely to make a disclosure?**

While this is, at bottom, an empirical question for which data have yet to be produced, there can be little doubt – indeed, there can be no doubt at all – that the likely effects of the politicization of whistleblower anonymity will have a chilling effect on whistleblowers’ willingness to come forward. Everything we know about human behavior tells us that individuals respond to incentives and disincentives. Given the well-known record of retaliation against those disclosing misconduct, it hardly seems plausible that a whistleblower could do his or her job and fulfill their obligations without the protection of anonymity. Protecting the confidentiality of these disclosures will foster open communication – destroying will undoubtedly have the opposite effect.

- 2. What is the best way to help mitigate any potential retaliatory actions against whistleblowers?**

Well, most obviously, the first and best way to mitigate potential retaliatory actions against whistleblowers is for those in the position to do so to refrain from taking retaliatory actions. If we fostered a culture of welcoming whistleblower disclosures we would certainly mitigate the risk. At a second order, knowing that we cannot prevent some from retaliating, we can take steps to disincentivize retaliation – these would range from administration punishment of those who retaliate to removal from service to civil actions for damages.

- 3. Is there a value in secondhand information from whistleblowers?**

Absolutely. Anyone who says otherwise has never understood how investigations occur. Indeed, in my 30 years of experience, I would venture to say that more than half of the cases I’ve worked on were derived from whistleblowers (or in the criminal context, informants) who had no direct, firsthand knowledge of what they were sharing. The obligation of the investigator is to take that second hand knowledge and then confirm it (or disprove it, as the case may be). When someone hears a crash outside their house and calls 911, that is second hand knowledge – the police investigation confirms that it was a crash and not a couple of kids banging trash cans.

4. Do you think Congress should pass legislation to address loopholes such as the consequences for making a disclosure to the wrong individual?

Lines of reporting are often complex. A would be whistleblower might go to the wrong supervisor or not to all of the right supervisors who need to be notified. This lack of clarity may, on occasion result in whistleblowers running afoul of the very laws that were designed to protect them. One way to ameliorate this problem would be for Congress to pass a law (or for it to mandate the development of a regulation) that created a uniform avenue for reporting that was common to all agencies. Another would be for Congress to create a good faith safe harbor for whistleblowers that protected them whenever their actions were taken in an honest effort to comply with their reporting obligations even if, in retrospect, their actions proved to be technically in violation of law.

5. Do you think exorbitant attorney fees levied on an individual who is only trying to do the right thing might dissuade an employee, contractor, or grantee from coming forward to blow the whistle? If so, what actions could Congress take to remove that hurdle for whistleblowers?

Imposing costs through litigation expenses, including attorney fees, is a well-known way for actors to deter others from examining their conduct. There are, classically, three ways to address the attorney fee problem – one is to prohibit such suits altogether but that is a draconian solution. Another is to mandate arbitration or some other form of non-judicial settlement. The third is a fee shifting statute that allows an aggrieved individual to recover his attorney's fees if he prevails. None of these is perfect in addressing the problem, but I know of no other ways to consider ameliorating the problem.

6. It seems that current law does not fully protect whistleblowers in the way that Congress has envisioned. What other weaknesses in law should Congress address to ensure all whistleblowers across government are protected?

I would give serious consideration to creating a private right of action for a whistleblower whose identity is improperly disclosed to seek liquidated damages from the individual(s) who breached his or her anonymity. When the disclosing individual is a member of the Executive Branch, I would include a waiver of immunity (akin to the Federal Tort Claims Act) allowing for the suit. Sadly, Congressional violators are likely protected by the Speech and Debate clause and remain free to violate the law with impunity.