

**Before the United States House of Representatives  
Committee on Oversight and Reform, Subcommittee on Government Operations**

**“Hearing on the Importance of Federal Whistleblowers”**

**Testimony of David K. Colapinto,  
Co-Founder and General Counsel  
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**January 28, 2020**

Chairman Connolly, Ranking Member Meadows, and Honorable Members of the Committee, thank you for inviting me to testify today on the importance of federal whistleblowers and to provide suggestions for reforms to improve current laws.

My name is David Colapinto and I am speaking today on behalf of myself and as a co-founder and General Counsel of the National Whistleblower Center, a non-profit, non-partisan organization in Washington, D.C. with a 32-year history of protecting the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation.<sup>1</sup> Since 1988, the National Whistleblower Center ([www.whistleblowers.org](http://www.whistleblowers.org)) has supported whistleblowers and advocated for the improvement of whistleblower laws for employees to promote government ethics and corporate accountability.

As examined further in this written testimony, there are two essential elements for any anti-retaliation whistleblower law to be effective: employees must be enabled to freely blow the whistle, either confidentially or openly, without fear of reprisal; and there must be strong protections against retaliation. Unfortunately, creating an effective system to encourage whistleblowing in the federal government has been a challenge and past reform has fallen short.

As discussed below, whistleblower laws must be strengthened to: (1) provide greater assurances of confidentiality, (2) clarify that damages may be recovered by federal employees who suffer from violations of the Privacy Act, and (3) to provide federal whistleblowers with access to the courts and a jury of their peers after they have exhausted their administrative remedies. I have

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<sup>1</sup> I have also been a practitioner in the field of whistleblower law. My law practice at the whistleblower law firm of [Kohn, Kohn and Colapinto](http://www.kohnkohnandcolapinto.com) has focused on the area of whistleblower protection as well as representing whistleblowers in cases arising under the False Claims Act qui tam provisions and other whistleblower award laws. For example, I have had the honor of representing many federal employees including: Dr. Frederic Whitehurst (who blew the whistle on wrongdoing at the FBI crime lab and whose whistleblowing resulted in the first significant oversight of the FBI, caused major substantive changes in the operations of the FBI Lab and reform of protections for FBI whistleblowers); Bunnatine Greenhouse (who blew the whistle on the improprieties in the Army Corps of Engineers sole source contracting with Halliburton during the Iraq War); and Linda Tripp (in her Privacy Act case that resulted in findings by the Inspector General of the Defense Department that DOD officials violated the Privacy Act by leaking information from Ms. Tripp’s confidential personnel and security clearance file).

attached a Special Report from the National Whistleblower Center on the need for access to U.S. District Court and jury trials.

Additionally, the House of Representatives should join the Senate in making National Whistleblower Appreciation Day permanent. There are tangible benefits to annually celebrating whistleblowers and reminding the federal workforce about the passage of the first whistleblower bill by the Continental Congress on July 30, 1778, and the continuing need to improve the culture in today's federal government to encourage the reporting of fraud, waste, abuse and other forms of misconduct.

## **I. THE LAWS AND POLICY BEHIND THE MERIT SYSTEM MANDATES THAT EMPLOYEES REPORT WASTE, FRAUD AND ABUSE**

In order to ensure accountability to the taxpayers, it is essential that federal employees have the freedom to report waste, fraud and abuse. This vital role is recognized as core requirements within the merit system. 5 USC § 2301. These Merit System Principles state:

Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2301(b)(9).

It was recognized by President George H.W. Bush as a requirement for all federal employees that:

*Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.*<sup>2</sup>

Time and again, Congress has recognized the importance of federal employees to uncover and disclose violations of laws rules and regulations; fraud; waste and mismanagement; abuse of authority and substantial and specific dangers to public health and safety. Not only has Congress enacted laws prohibiting retaliation against federal whistleblowers (such as 5 U.S.C. §§ 2302, 2303, 1214, and 1221 and 50 U.S.C. § 3234), Congress has long recognized that providing federal employees with a safe official channel, with assurances of confidentiality, is vital to encourage them to report fraud, abuse of authority and other forms of misconduct.

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<sup>2</sup> Executive Order 12731, "PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES" (Oct. 17, 1990) (emphasis added).

## II. THE CRITICAL ROLES WHISTLEBLOWERS HAVE PLAYED TO UNCOVER FRAUD, WASTE, ABUSE AND MISMANAGEMENT THROUGHOUT THE NATION'S HISTORY.

In 1777, during the height of the American Revolution, ten sailors and marines in the Continental Navy witnessed Commodore Esek Hopkins' engaging in misconduct, including the mistreatment of British prisoners of war, and took their concerns to the Continental Congress. See, Kohn, Stephen M., "The Whistle-Blowers of 1777," *New York Times*, Section A, Page 23 (June 13, 2011). [The Continental Congress suspended Hopkins from his post](#) as Commander of the Navy.

On July 30, 1778, the Continental Congress enacted the nation's [first whistleblower law](#), proclaiming that:

*it is the duty of all persons in service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which comes to their knowledge.*

[First U.S. whistleblower law, unanimously passed on July 30, 1778 by the Continental Congress](#) (emphasis added).

Nearly every July since 2013, whistleblowers, government officials and members of the House and Senate have commemorated the heroism and courage of the "Whistleblowers of 1777." In 2019, the Senate<sup>3</sup> passed a unanimous resolution to designate July 30 as "[National Whistleblower Appreciation Day](#)," and similar resolutions have been passed by the Senate since 2013.

In the 200 years between the first whistleblower law passed by the Continental Congress and the whistleblower provisions included in the Civil Service Reform Act ("CSRA") of 1978, federal employees who blew the whistle on misconduct, fraud and waste by government agencies relied upon filing constitutional claims in federal court or seeking weak administrative remedies through the Civil Service Commission.

In the late 1960's and early 1970's Pentagon employee A. Ernest Fitzgerald came to prominence as a federal whistleblower after he was retaliated against for providing testimony to Congress about billions in cost overruns in the C5-A cargo plane and other military projects. The hostility towards Fitzgerald for publicly disclosing the fraud and waste in military programs became so great that President Richard Nixon personally ordered that Fitzgerald be fired.<sup>4</sup>

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<sup>3</sup> <https://www.congress.gov/bill/116th-congress/senate-resolution/194/text?q=%7B%22search%22%3A%5B%22national+whistleblower+day%22%5D%7D&r=1&s=1>

<sup>4</sup> As the Washington Post reported the incident in 1979 following publication of additional Nixon tapes:

"This guy that was fired," Nixon remarked in a Jan. 31, 1973, conversation with presidential aide Charles W. Colson, "I'd marked it in the news summary. That's how that happened. I said get rid of that son of a bitch."

Ernie Fitzgerald's reward for his whistleblowing about billions of dollars in government waste was removal from his position at the Pentagon and 14 years of litigation. While he won some rounds of the litigation and won reinstatement he was never restored to his prior position with responsibility.

The Fitzgerald case inspired Senator Chuck Grassley and other members of Congress to enact in a bipartisan manner the False Claims Act amendments of 1986, which empowered whistleblowers to bring complaints in federal court on behalf of the United States against government contractors who filed false claims and to recover treble damages for the taxpayers. As a result, the False Claims Act has become the most effective and successful whistleblower law. "Since its enactment in 1986, the *False Claims Act* is responsible for more than \$62 billion in recoveries, with Grassley's whistleblower provision saving taxpayers more than \$44.7 billion."<sup>5</sup>

Other laws that have been modeled after the False Claims Act *qui tam* whistleblower provisions, such as the IRS tax fraud whistleblower law, the SEC and CFTC whistleblower law, and the Auto Safety whistleblower law, have also been successful. As previously noted, under the IRS, SEC, CFTC and Auto Safety whistleblower laws whistleblowers submit confidential reports that result in enforcement actions that recover billions of dollars for investors and taxpayers. 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>

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In another conversation the same day, Nixon told presidential aide John D. Ehrlichman, "Yeah, well, the point was not that he was complaining about the overruns, but that he was doing it in public."

"That's the point," Ehrlichman replied, "and cutting up his superiors."

"That's right," Nixon agreed. "And not, and frankly, not taking orders."

Bredemier, Kenneth M., "Nixon Tapes Show Nixon Role in Firing Ernest Fitzgerald," Washington Post (March 7, 1979), <https://www.washingtonpost.com/archive/politics/1979/03/07/tapes-show-nixon-role-in-firing-of-ernest-fitzgerald/048cd88e-60e5-498d-a8e2-e3b39461356b/>

<sup>5</sup> <https://www.grassley.senate.gov/news/news-releases/feds-recover-3-billion-fraudsters-2019-thanks-grassley-law>

<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).

- 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 these laws, whistleblowers have helped the government recover more than \$50 billion on behalf of U.S. taxpayers and investors, and the enforcement actions have helped deter fraud by wealthy tax cheats, banks and publicly traded companies.

### III. THE NEED FOR CONFIDENTIALITY.

#### A. The Law and Policy Behind Whistleblower Confidentiality.

When Congress amended the whistleblower provisions of the Civil Service Reform Act (“CSRA”) in 1989, it included a provision that guaranteed confidentiality for federal employees who make whistleblower disclosures to the U.S. Office of Special Counsel (“OSC”) or to the Inspector General of an agency. See, 5 U.S.C. § 1213. This was done in response to a documented record of retaliation against government whistleblowers. In doing so, Congress recognized that the public identification of a whistleblower without the whistleblower’s consent can lead to serious adverse consequences, including retaliation, damage to reputation, loss of livelihood and career and threats and harassment, including potential physical harm.

The reason for adding this confidentiality provision in the federal Whistleblower Protection Act of 1989 was made abundantly clear by Congress at the time. It was almost universally recognized that under the original 1978 whistleblower provisions the OSC failed to protect federal employees and the 1978 federal whistleblower provisions actually made things worse for federal employees who dared to come forward. By 1984, the original OSC had acted as a screen to ensure that whistleblower cases were not heard and the OSC had turned down more than 99 percent of the whistleblower cases without initiating disciplinary or corrective actions.<sup>9</sup> Further, a GAO study also found that the OSC had conducted investigations for only 8 percent of the employees who requested assistance.<sup>10</sup>

In fact, when the Senate debated enactment of the Whistleblower Protection Act of 1989 to clarify and correct the whistleblower law for federal employees, Senator Carl Levin noted that former OSC Special Counsel William O’Connor had been quoted in 1984 advising whistleblowers as follows:

I’d say that *unless you’re in a position to retire or are independently wealthy, don’t do it. Don’t put your head up, because it will get blown off.*<sup>11</sup>

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

<sup>9</sup> 135 Cong. Rec. S2804-01, 1989 WL 172424, Cong. Record, Senate Proceedings and Debates of the 101st Congress, First Session, Thursday, March 16, 1989.

<sup>10</sup> *Id.*

<sup>11</sup> 135 Cong. Rec. S2779-01, 1989 WL 172414, Cong. Record, Senate Proceedings and Debates of the 101st Congress, First Session, Thursday, March 16, 1989 (emphasis added).

In order to expressly encourage and protect federal employees to report misconduct, abuse of authority and fraud, Congress included in the 1989 law provisions that gave “whistleblowers increased procedural protections *and important guarantees of confidentiality*.”<sup>12</sup>

As a result of these concerns, Congress has enacted statutes to ensure confidentiality to federal employee whistleblowers. Under current law, [Whistleblower Protection Act](#) (“WPA”) and the [Inspector General Act](#) both permit employees to confidentially disclose allegations of wrongdoing to the appropriate authorities, including to Congress.

#### *What Are the Confidentiality Provisions for Federal Whistleblowers in the WPA?*

Whenever whistleblower allegations covered under the WPA’s definition of a protected disclosure are raised under the WPA’s disclosure provisions, the Special Counsel *must* maintain the confidentiality of the employee in accordance with the statute which states as follows:

(h) ***The identity of any individual who makes a disclosure*** described in subsection (a) ***may not be disclosed by the Special Counsel without such individual’s consent*** unless the Special Counsel determines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

[5 U.S.C. § 1213\(h\)](#) (emphasis added).

Under 5 U.S.C. § 1213 federal civil servants can make confidential disclosures. Other provisions of the WPA prohibit retaliation if employees make these protected disclosures. These rights include the ability of the Office of Special Counsel to [investigate allegations](#) of reprisal and represent whistleblowers in cases filed against offending departments. Additionally, the WPA permits a federal whistleblower to pursue a [private right of action](#) before the Merit Systems Protection Board.

#### *What Are the Confidentiality Provisions In the Inspector General Act?*

[Section 7 of the Inspector General Act](#) requires the OIG to maintain the confidentiality of federal whistleblowers under the same terms as required under the WPA and it has three basic components.

First, it permits federal employees to raise concerns to the Inspector General regarding violations of law, an abuse of authority or mismanagement. Subsection “a” states as follows:

- *The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.*

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<sup>12</sup> *Id.* (emphasis added).

If a federal employee makes a disclosure to the Inspector General regarding potential violations of subsection “a”, their identity must be kept strictly confidential, and only a very narrow exception would apply. The confidentiality provisions state:

- *The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.*

In addition to protecting an employee’s right to confidentiality, the Inspector General Act also strictly prohibits any reprisal against any employee who raises a protected concern with the Inspector General. The statute states as follows:

- *Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.*

Thus, under the Inspector General Act a federal employee may confidentially raise a concern about a waste, fraud, abuse and violations of law. The law also prohibits retaliation based on these disclosures.

Taking a reprisal against an employee who confidentially makes a protected disclosure is also prohibited as whistleblower retaliation. See Inspector General Act, §§ 7(c) and 8H(i)(C).

*Are There Special Protections Applicable To Intelligence Community Whistleblowers Who Discloses Allegations Of An “Abuse Of Authority” By The President Of The United States?*

Yes. The overarching provision in law protecting the confidentiality of intelligence community whistleblowers is [the Inspector General Act](#). Three provisions of law direct intelligence community whistleblowers to use the protections in the Inspector General Act when raising a concern.

First, the [anti-retaliation law](#) directly permits intelligence community whistleblowers to raise their concerns with the Inspector General, their agencies or the intelligence committees of Congress, or any member of an intelligence committee.<sup>13</sup>

Second, a [special law](#) permits intelligence community whistleblowers to “urgent concerns” with the Inspector General, and if the IG confirms that these concerns are “significant,” the IG, not the whistleblower, must alert the House and Senate Intelligence Committees about the allegations

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<sup>13</sup> See, 50 U.S.C. § 3234(b) (protecting disclosures of information “which the [employee](#) reasonably believes evidences—(1) a violation of any Federal law, rule, or [regulation](#); or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”).

and why they may have merit. 50 U.S.C. § 403q. This provides intelligence community whistleblowers with an added protection against the disclosure of their identities.

Third, the [Presidential Directive](#) (PPD-19) and an [Order of the Director of National Intelligence](#) permit intelligence community whistleblowers to use the Inspector General Act when raising concerns and they also require the whistleblower protections for intelligence community employees to be administered in accordance with the principles and policies that are applicable to regular civil servants under the WPA (e.g., 5 U.S.C. §§ 2302, 1213, 1214 and 1221).

*Does the Law Protect the Confidentiality of the Intelligence Community Whistleblower Who Filed The Complaint That Triggered The Impeachment Inquiry Concerning President Donald Trump?*

Yes. The [complaint form](#) filed by federal whistleblowers (and that is used within the intelligence community) directly states that the whistleblower's identity will remain confidential. This is consistent with the policies and procedures that have long been observed to protect whistleblower confidentiality under the WPA, which the Inspector General Act, the Presidential Directive and other applicable rules require to be followed.

The complaint form also states that the information in the form would be protected under the [Privacy Act](#), which is another law that would shield the whistleblower's name from disclosure.

The whistleblower disclosures would also be fully protected under the laws cited above, which likewise would guarantee confidentiality, even if the complaint form itself did not.

*The WPA and Inspector General Act Confidentiality Provisions Are Consistent with Other Whistleblower Laws and Whistleblower Confidentiality Is Good Public Policy.*

Making confidential disclosures by federal employees under the Whistleblower Protection Act to the Office of Special Counsel pursuant to [5 U.S.C § 1213\(h\)](#), and to the Inspector General pursuant to the Inspector General Act, is similar to the provisions of other federal laws encouraging whistleblowers to make confidential disclosures.

In 2011, Congress passed whistleblower provisions in the Dodd-Frank Act, which governs whistleblowing of securities fraud, commodity fraud, and bribery under the Foreign Corrupt Practices Act. By law, the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("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. Based on the success of the Dodd-Frank Act whistleblower laws, Congress enacted similar legislation covering auto safety. Congress included strong confidentiality and anonymity provisions in the auto safety law.



Additionally, the [SEC has issued sanctions against companies](#) for taking steps to identify a confidential whistleblower.<sup>14</sup>

The Internal Revenue Service (“IRS”) tax whistleblower law covers tax frauds, tax underpayments, most money-laundering and other laws investigated by the IRS criminal division, and the IRS must protect the confidentiality of whistleblowers to the fullest extent permitted under law. Thus, the IRS whistleblower program has developed an excellent reputation for protecting the confidentiality of whistleblowers, and the right of IRS tax fraud whistleblowers has been upheld by the courts. See, e.g., *Whistleblower 14016-10W v. Commissioner*, 137 T.C 183, 203-204 (2011). The Court’s decisions are consistent with the IRS Whistleblower Office general administrative practice of keeping whistleblowers’ identities confidential. *See id.* at 205.

Notably, 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).

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>15</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>16</sup> The defendant knowingly shared pictures of a witness who testified against her brothers in drug trial on a social media site and that as a result

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<sup>14</sup> *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.”).

<sup>15</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>16</sup> *Also see, U.S. v. Edwards*, 291 F. Supp.3d 821 (S.D. Ohio 2017) (denying motion to dismiss indictment).

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.*

Finally, some academic research has confirmed that confidential whistleblowing is necessary because of the high risk of reputational harm and ostracism when someone openly report misconduct or fraud. For example, one study even found that whistleblowers whose identities had been disclosed were shunned by their peer groups because of honest people due to the stigma associated with whistleblowing, but when the identity of the whistleblower was not disclosed such negative effects on the whistleblower were not present due to confidentiality and misconduct was more likely to be reported.<sup>17</sup>

### **B. Confidential Whistleblowing By Federal Employees Is Effective.**

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 OSC serious misconduct or fraud that otherwise would not have been known. When making a disclosure to OSC federal employees choose whether to remain anonymous and report concerns confidentially. In some cases the whistleblower decides to forego confidentiality and in other cases the whistleblower asks to remain anonymous even after the OSC and the agency or Inspector General has completed their investigation.<sup>18</sup> However, under the federal whistleblower statute, 5 U.S.C. § 1213(h), it is up to the federal employee to choose whether to remain anonymous. The federal government is not permitted to disclose the whistleblower’s identity without the consent of the whistleblower.

According to a recent statement by current OSC Special Counsel Henry Kerner, the confidential whistleblower provision of 5 U.S.C. § 1213(h) is working better than ever to permit OSC to fulfill “its role as an independent investigative and enforcement agency,” and due to confidential whistleblower reports the OSC is “bringing greater integrity and efficiency to the federal government.”<sup>19</sup>

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.<sup>20</sup>

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

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<sup>17</sup> Reuben, Ernesto and Stephenson, Matt, “Nobody likes a rat: On the willingness to report lies and the consequences thereof,” Vol. 93 *Journal of Economic Behavior & Organization*, pp. 384-391 (Sept. 2013).

<sup>18</sup> [https://osc.gov/Documents/Public%20Files/FY19/DI-17-5006/DI-17-5006%20Letter%20to%20President%20\(Redacted\).pdf](https://osc.gov/Documents/Public%20Files/FY19/DI-17-5006/DI-17-5006%20Letter%20to%20President%20(Redacted).pdf)

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

<sup>20</sup> *Id.*

the cases.<sup>21</sup> The OSC has described the contributions by these dedicated public servants who made confidential whistleblower disclosures as follows:

In recent years, whistleblowers have proven invaluable to highlighting quality of care issues at VA health facilities and ensuring our government fulfill its solemn commitment to our veterans. Through its work on these cases, OSC has helped improve public safety, prevent fraud and abuse, and recoup significant funds to the U.S. Treasury. For example, 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.<sup>22</sup>

Most recently, the OSC announced in December of 2019 that it had substantiated a disclosure from a whistleblower at the VA, and OSC confirmed there was "more than \$223 million in wasteful spending and delayed payments for veterans' medical bills."<sup>23</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 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 and violations of law that likely would have gone undetected.

#### **IV. PROTECTIONS FOR FEDERAL WHISTLEBLOWERS MUST BE STRENGTHENED.**

In order to ensure that the laws and policy of whistleblowing for federal employees, including the Merit System Principles and the Executive Order signed by President George H.W. Bush are fulfilled, three legislative reforms are needed:

1. Congress needs to clarify the meaning of prohibited personnel actions to ensure that the confidentiality provisions included in the CSRA, WPA and Inspector General Act are followed and that employees whose confidentiality is violated have due process rights and the ability to obtain remedies for these violations.
2. The Privacy Act needs to be amended in order to ensure that persons whose right to privacy is illegally violated by the federal government can obtain damages for any loss of

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> <https://osc.gov/News/Pages/20-07-VA-Wasted-223-Million.aspx>

reputation or emotional distress they suffer as a result of the release of information about themselves, which can often be embarrassing.

3. Congress needs to strengthen protections against retaliation by permitting federal employees the right to bring their whistleblower cases to federal court and request a jury trial after exhausting administrative remedies. The House of Representatives has twice affirmed this right, with strong bi-partisan support. This Committee should reaffirm the positions it has taken in the past on this issue.

Additionally, the House of Representatives and the Senate should pass legislation making National Whistleblower Appreciation Day permanent to annually commemorate the passage of the first whistleblower bill by the Continental Congress on July 30, 1778, and mandating that each federal agency and department pause on July 30th to honor whistleblowers and recognize the importance of federal whistleblowing as a fundamental government policy. While this may appear to be purely symbolic, it is important because it would build on the annual recognition of whistleblowers that are already held each year by many Inspector Generals and other federal offices such as the OSC. It would go a long way to help change the culture in the federal government towards whistleblowers and reinforce the need to encourage federal employees to report fraud, waste, abuse and other forms of disclosures protected by the whistleblower statutes without fear of reprisal, and to hold accountable agencies that engage in waste and other forms of serious misconduct.

#### **A. Strengthen the Federal Whistleblower Confidentiality Provisions By Clarifying the Federal Whistleblower Statutes.**

It is alarming when well-known political figures and commentators in the media assert that despite the whistleblower confidentiality provisions of the WPA, 5 U.S.C. § 1213(h), and Sections 7 and 8(H) of the Inspector General Act, it is acceptable to reveal the identity of a confidential federal whistleblower. It is even more alarming when it is claimed that a federal employee who reports a violation of law, abuse of authority or other matters that are considered protected disclosures by the whistleblower statutes, is not considered a “real” whistleblower and therefore is not entitled to confidentiality or anonymity afforded to federal whistleblowers under law.

As previously noted, one of the reasons that Congress passed the Whistleblower Protection Act of 1989 was to provide federal whistleblowers with a guarantee of confidentiality.

In order to clear up any misunderstanding that may exist within or outside the federal government about the right of federal whistleblowers Congress should enact clarifying amendments to the federal whistleblower statutes that make it expressly clear that it is a prohibited personnel practice to harass or intimidate a federal whistleblower or reveal or threaten to reveal the confidentiality of an anonymous whistleblower who is protected by 5 U.S.C. § 1213(h), and Sections 7 and 8(H) of the Inspector General Act.

This can be accomplished through a clarifying amendment to 5 U.S.C. §§ 2302, 2303 and 50 U.S.C. §3234, to state that it is a prohibited personnel practice to take any personnel action that

would create any other significant change in duties, responsibilities, or working conditions; or in any other manner discriminate against an employee in the terms and conditions of employment because of protected whistleblowing activities; or to disclose the identity of a whistleblower who has made a confidential disclosure pursuant to 5 U.S.C. § 1213(h), and Sections 7 and 8(H) of the Inspector General Act.

### **B. Strengthen the Civil Remedies Provision of the Privacy Act.**

Additionally, Congress can make long overdue improvements to the Privacy Act of 1974, 5 U.S.C. § 552a, by enacting 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.

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 been all too common a tactic to smear a federal whistleblower.

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, after the Whitehurst and Tripp Privacy Act cases, the Supreme Court issued two decisions interpreting the civil damages provisions of the Privacy Act that limited recoveries to "actual damages" that did not include compensatory damages for non-pecuniary harm, such as damage to reputation or emotional harm.<sup>24</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.

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<sup>24</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.").

Congress should revise the civil remedies provision of the Privacy Act in order to permit anyone whose personal information is disclosed without their consent to sue and collect compensatory damages for the harm resulting from the wrongful disclosure. This would give federal whistleblowers, and any citizen for that matter, a real remedy for violations of the Privacy Act.

### **C. Strengthen Federal Whistleblower Protection By Creating Access to District Court and Jury Trials.**

To achieve strong whistleblower protection, Congress must enact reforms with full court access for federal whistleblowers. We have prepared a Special Report on the need for access to U.S. District Court and jury trials, which is attached to this testimony.

One of the reasons the administrative schemes enacted by Congress since 1978 to protect federal whistleblowers have failed is that those laws prevent federal whistleblowers from filing and requesting a jury trial on their retaliation claims in U.S. District Court.

Laws that permit district court access, like Title VII of the Civil Rights Act, where federal employees can bring claims of discrimination to U.S. District Court and request a jury trial after exhausting administrative remedies, work better than laws like the current Civil Service System that limit remedies strictly through the administrative process, such as the Merit Systems Protection Board. Most other whistleblower laws enacted by Congress permit employees to bring their cases to federal court and seek a jury trial after exhausting administrative remedies. *See* The NWC Special Report submitted in support of this Testimony.

However, under the current federal whistleblower system, the administrative process is saddled with years of delay and the chances of ultimately prevailing after 5 to 10 years of litigation through the M.S.P.B. (which hasn't had a quorum to decide cases for years) are stacked against the whistleblower.

The delay and burden of litigation upon the federal whistleblower caused by a weak administrative process will not change any time soon, given the large backlog of federal whistleblower complaints at the OSC and the M.S.P.B. The M.S.P.B.'s own figures show the "backlog of cases" (not just whistleblower cases) at the end of August, 2019 "[reached](#) 2,325 cases" and "an average of about 57 cases are added to the total each month."<sup>25</sup> It is estimated that it will take the M.S.P.B. at least three years just to get through the backlog. This creates a disastrous effect upon the federal whistleblower protection system because the administrative processes that federal whistleblowers must utilize to seek corrective action from complaints of retaliation are clogged and there is no end in sight.

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<sup>25</sup> "‘Buckets of Back Pay’ Could Go to Feds Once Appeal Board Is Back," Bloomberg Law (Sept. 25, 2019), <https://news.bloomberglaw.com/daily-labor-report/buckets-of-back-pay-could-go-to-feds-once-appeal-board-is-back>

In the most recent M.S.P.B. study of the issue, federal employee “perceptions of reprisal for disclosing wrongdoing nearly doubled between 2010 and 2016.”<sup>26</sup> Nearly half of the respondents to the M.S.P.B. federal workforce study in 2016 (or 46%) reported that they had observed one or more prohibited personnel practices under 5 U.S.C. § 2302, and there was an “increase in cases submitted to OSC—from 2,415 in FY 2010 to 4,124 in FY 2016, which “may be further evidence that perceptions of [Prohibited Personnel Practices] increased.”<sup>27</sup>

Creating full access to District Court with the right to seek a jury trial (after exhausting administrative remedies) will go a long way towards making the federal whistleblowing system more effective.

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<sup>26</sup> MSPB Research Brief, *The Perceived Incidence of Prohibited Personnel Practices*, pp. 8-9 (June, 2019), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1623951&version=1629797&application=ACR>  
[OBAT](#)

<sup>27</sup> *Id.*, p. 4.