



**Testimony of Liz Hempowicz, Director of Public Policy
Project On Government Oversight
before the House Committee on Oversight and Reform
Subcommittee on Government Operations
on “Protecting Those Who Blow the Whistle on Government Wrongdoing”
January 28, 2020**

Chairman Connolly and Ranking Member Meadows, thank you for inviting me to testify as part of this timely hearing on the importance of whistleblowers in our system of government. I am Liz Hempowicz, director of public policy at the Project On Government Oversight (POGO). In 1981, POGO was founded by Pentagon whistleblowers who were concerned about the Defense Department’s procurement of ineffective, overpriced weapons, and had faced roadblocks, inaction, and retaliation while reporting their concerns internally. POGO later expanded its mission to cover the entire federal government. As a nonpartisan independent watchdog, POGO investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Whistleblowers have always played an essential role in that work.

Almost three years ago to the day, I testified before this subcommittee as part of a hearing reviewing the impact of the Whistleblower Protection Enhancement Act five years after its enactment.¹ That hearing underscored the bipartisan consensus that whistleblowers are vital to ensuring our federal government operates as it should, and that whistleblowers’ disclosures, *not* the whistleblowers themselves, should be pursued. The hearing also signified a bipartisan commitment to continue to strengthen the channels for whistleblowers to come forward and the protections afforded them. Unfortunately, that bipartisan support and commitment was noticeably absent in the House of Representatives when a whistleblower complaint helped kick off the impeachment inquiry into President Donald Trump last year.

Today, I will highlight whistleblowers’ role in our system of government, examine some of the challenges they face, and discuss several recommendations for your consideration that would improve the system for whistleblowers.

¹ *Five Years Later: A Review of the Whistleblower Protection Enhancement Act: Hearing before the House Committee on Oversight and Government Reform Government Operations Subcommittee*, 115th Cong, (February 1, 2017) (testimony of Liz Hempowicz, Policy Counsel, Project On Government Oversight). <https://republicans-oversight.house.gov/wp-content/uploads/2017/02/Hempowicz-POGO-Statement-Whistleblower-2-1.pdf>

Whistleblowers' Impact

Whistleblowers are vital to our system of government. They are the eyes and ears of the American taxpayer. Their disclosures of waste, fraud, and abuse help spotlight instances where the system isn't working for the benefit of the American people. The importance of preserving the relationship between Congress and whistleblowers cannot be overstated, and longstanding bipartisan support for fostering and sustaining that relationship cannot be denied.

As the branch of government entrusted with "all legislative powers," Congress has a constitutional duty to conduct oversight of trillions in spending as a key function of our system of checks and balances.² Congressional oversight benefits when individuals speak up when they see wrongdoing. Whistleblowers are fundamental to Congress' ability to exercise its oversight authority, and have been since our first steps as an independent nation.

The Continental Congress passed the first whistleblower protection law in 1778, shortly after finalizing the Declaration of Independence.³ The law stemmed from the disclosures of 10 Continental Army soldiers who informed the Continental Congress that the powerful and connected commodore of the Navy, Esek Hopkins, was personally involved in torturing British sailors, among other unlawful acts and misconduct that they believed made him "unfit for the public department" he occupied.⁴ In response to the disclosures, the Continental Congress suspended the commodore from his post; he then sued the whistleblowers for criminal libel in retaliation. He filed the suit in Rhode Island, and the two whistleblowers who were in Rhode Island at the time were imprisoned because of the charges.⁵

While confined, the soldiers petitioned the Continental Congress, asserting that they believed they did the right thing in "doing ... nothing but their duty."⁶ Understanding the value of the free flow of information between whistleblowers and the legislature, lawmakers enacted what is considered the world's first recorded whistleblower law shortly thereafter, stating:

... it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper

² U.S. Constitution art. I, § 1.

³ Stephen M. Kohn, "The Whistle-Blowers of 1777," *New York Times*, June 12, 2011. <https://www.nytimes.com/2011/06/13/opinion/13kohn.html>

⁴ Letter from revolutionary soldiers to the Marine Committee of the Continental Congress about Commodore Esek Hopkins, February 19, 1777, quoted in John G. Coyle, Edward C. McGuire, Vincent F. O'Reilly, eds., *The Journal of the American-Irish Historical Society, Volume 21* (New York: American-Irish Historical Society, 1922), 224-225. <https://books.google.com/books?id=EqTM01tq4UkC&pg=PA225&lpq=PA225&dq=#v=onepage&q&f=false>

⁵ Kohn, "The Whistle-Blowers of 1777" [see note 3].

⁶ Kohn, "The Whistle-Blowers of 1777" [see note 3].

authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.⁷

Today, Congress continues to rely on federal whistleblowers.

Whistleblowers are uniquely positioned not only to shine a light on ongoing waste, fraud, and abuse, but to prevent it in the first place. In addition to exposing mismanagement, corruption, illegality, and wasteful spending, they have prevented disasters, loss of life, and behavior and policies that would violate civil, human, and constitutional rights. Disclosures from brave public servants have sparked congressional investigations, led to important reforms, and returned money to taxpayers. Without these insiders coming forward, it is uncertain whether the wrongdoing they expose would ever come to light. They are truly invaluable to Congress.

In 2017, Senator Chuck Grassley (R-IA), then-Representative Jason Chaffetz (R-UT), and Representative Mark Meadows (R-NC), emphasized this fact in a bicameral letter to the new administration on the importance of whistleblowers in rooting out chronic problems in the executive branch.⁸ The Members advised the president that “protecting whistleblowers is crucial to [his] success and the oversight process,” and highlighted the illegality of the use of gag orders, measures that can keep problems within the executive branch in the shadows and keep them from getting fixed.⁹ They counseled the new administration that the best way to “drain the swamp” was with the help of whistleblowers.¹⁰

Perhaps most importantly, the Members also wrote that “protecting whistleblowers who courageously speak out is not a partisan issue—it is critical to the functioning of our government.”¹¹ This value is paramount. We must not allow political rhetoric to color whistleblowers, or whistleblowing generally, as partisan, regardless of what or who they are blowing the whistle on.

It would be a profound loss to Congress and taxpayers if whistleblowers stopped making disclosures, as it would make objective oversight nearly impossible.

Challenges and Necessary Reforms

⁷ Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1789, Volume XI* (Washington, DC: Library of Congress, 1908), 732. <https://bit.ly/2sRDqL6>

⁸ Letter from Senator Chuck Grassley and Representatives Chaffetz and Meadows to White House Counsel Don McGahn about the importance of whistleblowers, February 1, 2017. <https://www.grassley.senate.gov/sites/default/files/judiciary/upload/2017-02-01%20JEC%20MM%20CEG%20to%20White%20House%20Counsel%20-%20Protecting%20Whistleblowers.pdf>

⁹ Letter from Members to White House Counsel, 2 [see note 8].

¹⁰ Letter from Members to White House Counsel, 1 [see note 8].

¹¹ Letter from Members to White House Counsel, 2 [see note 8].

Whistleblowers play a crucial role in holding our government accountable. But the system is failing them.

Whistleblowers in all parts of the federal government face an uphill battle from the moment they decide to blow the whistle. While Congress has codified protections for whistleblowers, thanks in part to the leadership of Chairman Connolly and Ranking Member Meadows, systemic failures often render those protections meaningless. For example, when I testified before this subcommittee three years ago, I warned that the Merit Systems Protection Board (MSPB) lacked a quorum.¹² Now, it doesn't even have a single member.

This situation is disastrous for whistleblowers who are subject to retaliation. Currently, with the MSPB out of commission, federal whistleblowers have no way to get temporary relief from personnel actions while their cases are pending. Without the board, the Office of Special Counsel, which advocates on whistleblowers' behalf, has no way to request a stay of personnel actions while it investigates alleged retaliation, because the decision to grant or deny such a stay is left to the members of the MSPB.¹³ However, whistleblowers don't just rely on the MSPB for temporary relief: The board is also the final step in the federal bureaucracy that most whistleblowers must go through to get permanent relief from retaliation and corrective action (such as reversal of a demotion and receiving back pay, respectively). The lack of a quorum at the MSPB, now for over three years,¹⁴ means all whistleblowers fighting to enforce their whistleblower protections are in bureaucratic limbo. When the Office of Special Counsel issues a finding in a whistleblower's favor, the whistleblower's agency appeals to the MSPB to review the finding—but without the board, the case joins a 2,000-plus backlog of cases awaiting review.¹⁵ So whistleblowers are both unable to move their cases to a court and unable to enforce Office of Special Counsel decisions. This roadblock for whistleblowers could be eliminated relatively simply, if the White House and the Senate made it a priority to confirm qualified members to the board.

Better still, Congress could pass a law allowing whistleblowers to bypass the MSPB and take their retaliation complaints directly to a court to be heard by a jury of their peers. Federal whistleblowers are the only major sector of the labor force that does not have the right to have their cases tried before a jury. Even contractors, who have traditionally had weaker protections than their federal employee counterparts, have a statutory right to bring a retaliation complaint to

¹² Hempowicz testimony to Government Operations Subcommittee, 4 [see note 1].

¹³ 5 U.S.C. § 1214(b)(1)(A)(2) (2012).

¹⁴ "Frequently Asked Questions about the Lack of Board Quorum and Lack of Board Members," Merit Systems Protection Board, 1, last modified March 1, 2019.

https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf

¹⁵ Eric Katz, "With Appeals Board Hamstrung, Congress Declines to Intervene on Behalf of Whistleblowers Facing Discipline," *Government Executive*, December 19, 2019. <https://www.govexec.com/workforce/2019/12/appeals-board-hamstrung-congress-declines-intervene-behalf-whistleblowers-facing-discipline/162039/>

a jury of their peers.¹⁶ It is long past time for federal employees to have this same right, the importance of which is underscored by the problems caused by the MSPB being inactive.

Even with a fully functioning MSPB, many whistleblower reprisal cases take years, and it is often not practical for whistleblowers to fight to enforce their legal protections. Access to jury trials, while necessary and overdue, may present a similar problem. Accordingly, Congress should ensure that whistleblowers facing reprisal are entitled to interim relief while they seek to enforce their legal protections. Congress should make this interim relief available to whistleblowers who, in a request to the MSPB for a stay before their retaliation case is fully adjudicated, can show that the personnel action they face is likely being taken because they blew the whistle—also known as showing a *prima facie*, or sufficient on its face, case of retaliation. (Of course, this is only possible when the MSPB has a quorum.)

Whistleblowers also face additional problems while trying to enforce their protections. There are significant weaknesses across all sectors of federal whistleblower protection laws that Congress must address.

For example, whistleblowers in the intelligence community lack a mechanism to enforce their statutory protections. Rather than being able to petition a body like the MSPB or a court to enforce their protections, intelligence community whistleblowers can only turn to either their agency’s inspector general or the inspector general for the intelligence community. While inspectors general play an essential role in investigating whistleblower disclosures and retaliation, they are unable to enforce their recommendations for corrective action against the agency that retaliated against the whistleblower. Under Presidential Policy Directive 19, the last level of review in an intelligence community whistleblower’s case is a panel of three inspectors general from the intelligence community, referred to officially as an External Review Panel.¹⁷ However, those panels’ decisions are merely recommendations that the head of the whistleblower’s agency can disregard without consequence.¹⁸ Leaving the enforcement of whistleblower protection laws to the agencies responsible for retaliation renders those protections all but meaningless.

In 2011, the House passed a bill that would allow intelligence community whistleblowers to enforce their legal protections using the same mechanisms available to whistleblowers in other sectors of the government. Despite the support of the House and civil society, that bill did not

¹⁶ 41 U.S.C. § 4712(c)(2) (2016).

¹⁷ “Presidential Policy Directive 19: Protecting Whistleblowers with Access to Classified Information,” October 10, 2012. <https://www.dni.gov/ICIG-Whistleblower/resources/PPD-19.pdf>

¹⁸ As an example, in 2018, acting Assistant Secretary of Defense Stephanie Barna reversed the External Review Panel determination that former National Security Agency Inspector General George Ellard had retaliated against a whistleblower in 2013. See U.S. News Staff, “Review Exonerates Former NSA Inspector General George Ellard of Charge He Retaliated Against Whistleblower,” *U.S. News*, February 6, 2018. <https://www.usnews.com/news/articles/2018-02-06/review-exonerates-former-nsa-inspector-general-george-ellard-of-charge-he-retaliated-against-whistleblower>

make it through the Senate, and the provision giving intelligence community whistleblowers the right to independent enforcement of their legal protections was excluded from later reforms.¹⁹

Events surrounding the whistleblower complaint that helped spark the impeachment inquiry into President Trump underscore several additional critical issues with intelligence community whistleblower laws. Last year, when, at the direction of the White House, acting Director of National Intelligence Joseph Maguire failed to transmit the credible complaint of urgent concern to the congressional intelligence committees within seven days of the Ukraine whistleblower's disclosure, he demonstrated a fundamental problem with the Intelligence Community Whistleblower Protection Act.²⁰ The law put in place procedural hoops—such as the requirement that inspectors general send complaints to the director of national intelligence, who then transmits them to Congress—in order to prevent the unauthorized release of national security information to the public or our adversaries. However, it is clear now that these procedural hoops are to the potential detriment of proper oversight. In fact, the inspector general for the intelligence community told Congress that acting Director of National Intelligence Maguire's failure to transmit the whistleblower's complaint or any information about the complaint to Congress “may reflect a gap in the law that constitutes a significant problem and deficiency.”²¹

The Ukraine whistleblower's disclosure was made available to Congress and the public thanks to proactive steps taken by the whistleblower and by Intelligence Community Inspector General Michael Atkinson to alert Congress of its existence, not because the law worked as intended.²² It is clear that lawmakers intended to create a path for intelligence community whistleblowers to make disclosures directly to Congress, through the Intelligence Community Whistleblower Protection Act of 1998.²³ Congress must clarify the law so that future complaints are not

¹⁹ S. 372 *The Whistleblower Protection Enhancement Act of 2009: Hearing before Senate Homeland Security and Governmental Affairs Committee*, 111th Cong. (June 11, 2009) (testimony of Danielle Brian, Executive Director of the Project On Government Oversight). <https://www.pogo.org/testimony/2009/06/testimony-of-pogos-danielle-brian-on-s-372-whistleblower-protection-enhancement-act-of-2009/>; “All Actions H.R.985 - Whistleblower Protection Enhancement Act of 2007.” [Congress.gov](https://www.congress.gov/bill/110th-congress/house-bill/985/all-actions), <https://www.congress.gov/bill/110th-congress/house-bill/985/all-actions> (accessed January 21, 2020).

²⁰ *Hearing before the House Permanent Select Committee on Intelligence*, 116th Congress, at 43:49 (September 26, 2019) (testimony of the acting Director of National Intelligence Joseph Maguire). <https://www.c-span.org/video/?464509-1/acting-director-national-intelligence-maguire-testifies-whistleblower-complaint>

²¹ Letter from Inspector General of the Intelligence Community Michael Atkinson to the Chairmen of the House and Senate intelligence committees regarding lack of cooperation and direction from Acting DNI, September 17, 2019. https://intelligence.house.gov/uploadedfiles/20190917_-_ic_ig_second_letter_to_hpSCI_on_whistleblower.pdf

²² Letter from Inspector General of the Intelligence Community Michael Atkinson to the Chairmen of the House and Senate intelligence committees regarding receipt of urgent concern disclosure, September 9, 2019. https://intelligence.house.gov/uploadedfiles/20190909_-_ic_ig_letter_to_hpSCI_on_whistleblower.pdf

²³ “No basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community.” Intelligence Community Whistleblower Protection Act of 1998, Pub. Law No. 105-272, 112 Stat. 2413, 2414 (1998). <https://www.govinfo.gov/content/pkg/STATUTE-112/pdf/STATUTE-112-Pg2396.pdf#page=5>

inappropriately withheld under the same standard and legal justification promulgated by the Justice Department's Office of Legal Counsel in reference to the Ukraine whistleblower's disclosure.²⁴ Congress should remove all legal barriers for whistleblowers or the inspector general for the intelligence community to communicate directly to the intelligence committees.

Whistleblowers in the military also confront extraordinary challenges. Like intelligence community whistleblowers, they lack an independent means to enforce their legal protections, and must rely on the leadership of their branch of the armed services to enforce the decisions of an inspector general. If the head of their branch decides against ordering corrective action, the only recourse available to a whistleblower is to petition the secretary of defense.²⁵

Furthermore, in order to benefit from legal protections against retaliation, whistleblowers in the military have to prove that their agency wouldn't have taken a personnel action against them, such as a demotion or suspension, if they hadn't blown the whistle.²⁶ So while retaliating against a military service member for making a protected disclosure is prohibited, the burden of proof is on the whistleblower to show that there is no other justification for the retaliatory action before a retaliation complaint will be substantiated by an inspector general. In contrast, in whistleblower reprisal cases for civilians, the burden is placed on the agency to prove there was no retaliation. Considering the significant power and resource imbalance between an individual whistleblower and the Department of Defense, it is obvious that the law is stacked against whistleblowers. While there have been legislative initiatives to give service member whistleblowers greater parity with civilian whistleblowers, none have yet been signed into law.²⁷ It is past time to put service members on equal footing with civilians when they blow the whistle on waste, fraud, or abuse in the Department of Defense.

Whistleblowers across the federal government are frequently subjected to retaliatory investigations, a personnel practice that is only officially considered whistleblower retaliation at the Department of Veterans Affairs.²⁸ Retaliatory investigations are used to harass

²⁴ Office of Legal Counsel, "Memorandum Opinion for the General Counsel Office of The Director of National Intelligence," September 3, 2019. <https://www.justice.gov/olc/opinion/file/1205711/download>

²⁵ 10 U.S.C. § 1034(h) (1989). <https://www.law.cornell.edu/uscode/text/10/1034>

²⁶ "Oversight of the Department of Defense Office of Inspector General's Military Whistleblower Reprisal Investigations," *House Oversight and Government Reform Subcommittee on National Security*, 115th Cong. 2 (September 7, 2016) (testimony of Mandy Smithberger, Director of the Straus Military Reform Project at the Center for Defense Information at the Project On Government Oversight).

²⁷ National Defense Authorization Act for Fiscal Year 2020, H.R. 2500, 116th Cong., § 541 (2019). <https://www.congress.gov/bill/116th-congress/house-bill/2500/text#toc-HA48C6F37C84444319505E6886FC0D014>; National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong., § 545 (2016). <https://www.congress.gov/bill/114th-congress/house-bill/4909/text?q=%7B%22search%22%3A%5B%22hr+4909%22%5D%7D&r=6&s=1>

²⁸ 38 U.S.C. § 731(c)(3) (2016). <https://www.law.cornell.edu/uscode/text/38/731>

whistleblowers and tie up resources unnecessarily.²⁹ Congress should expand prohibited personnel practices across all government sectors to include retaliatory investigations.³⁰ Additionally, if Congress truly wants to ensure that blowing the whistle is not a career-ending decision for intelligence community employees, it must also make retaliatory security clearance actions, such as revoking someone's clearance, a violation of the Whistleblower Protection Act so that determinations about potentially retaliatory security clearance actions may be reviewed by the adjudicative bodies that currently resolve most disputes concerning whistleblower retaliation.

There is also a host of whistleblowers whose cases are outliers and deserve congressional attention. One such case is that of Mike Helms, an intelligence specialist who deployed as part of the Army's Intelligence and Security Command's (INSCOM) 902d Military Intelligence Group. Helms was injured in Iraq in 2004, after a roadside bomb went off near the convoy of Humvees for which he was lead gunner. After the Army repeatedly denied Helms the medical treatment that he was entitled to, he blew the whistle.³¹ The Army then revoked his security clearance, and he filed a complaint alleging that this was retaliation for his blowing the whistle. Although the Department of Defense Office of Inspector General substantiated Helms's complaint in 2010, at the time there was no sufficient administrative process to enforce any remedy to reverse the decision to revoke his security clearance in retaliation.³² Presidential Policy Directive 19, issued in 2012, directed each intelligence agency to create such a process, but the inspector general for the intelligence community has rejected Helms's requests to review his case pursuant to those procedures. Helms's experience highlights the plight of whistleblowers who fall through the

²⁹ In *Caught Between Conscience and Career*, POGO, the Government Accountability Project, and Public Employees for Environmental Responsibility highlighted the case of Air Force whistleblower William Zwicharowski, who was subjected to a retaliatory investigation that included "the unusual seizure of Mr. Zwicharowski's computer and needless comprehensive forensic analysis of the computer" to "gather evidence of unrelated misconduct" after he filed a complaint. See Nick Schwellenbach, ed., *Caught Between Conscience and Career* (Washington, DC: Project On Government Oversight with Government Accountability Project and Partnership for Public Service: 2019), 129, footnote 9. <https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/>

³⁰ 5 U.S.C. § 2302(a)(2)(A); 10 U.S.C. § 1034(b); 10 U.S.C. § 2409(a); 50 U.S.C. § 3234(a)(3). Note that currently, retaliatory investigations that lead to other prohibited personnel actions are considered whistleblower retaliation. See 5 U.S.C. § 1214(h); *Russell v. Department of Justice*, 68 M.S.P.R. 337 (1995).

³¹ Information Paper on Medical Entitlements and Eligibility of Benefits, Department of Defense, January 6, 2005, 2. <https://www.documentcloud.org/documents/271289-scan6147-000-merged.html>; Dana Liebelson, "The Whistleblower Who Fell Through the Cracks," Project On Government Oversight, December 7, 2011. <https://www.pogo.org/investigation/2011/12/whistleblower-who-fell-through-cracks/>

³² Memorandum for Major General Mary Legere from Deputy Inspector General for Administrative Investigations Donald Horstman, Department of Defense Office of the Inspector General, October 26, 2010. <https://archive.org/details/270977-dodig-transmittal-letter-and-final-report>

cracks created by the often piecemeal approach to improving whistleblower protections across the government.³³

Finally, recent events have highlighted a troubling lack of clarity about whether whistleblowers and those who voice concerns have a legal right to anonymity. First, the president, some media figures, and even Members of Congress have criticized the Ukraine whistleblower's decision to remain anonymous. President Trump has gone so far as to retweet a post that contained the name of a federal employee suspected of being the whistleblower.³⁴ The *New York Times* has published identifying information about the whistleblower in an effort to establish the credibility of the whistleblower's complaint.³⁵ At the same time, the *Washington Post* is suing the Special Inspector General for Afghanistan Reconstruction (SIGAR) to force the release of the identities of individuals who spoke to the watchdog about the war in Afghanistan.³⁶

The Inspector General Act of 1978 states that inspectors general are obligated to maintain a whistleblower's or source's confidentiality unless disclosure is "unavoidable."³⁷ While the statutory language could be stronger, the default standard is clearly that those who wish to remain anonymous so they can report wrongdoing or concerns without fear of retaliation should be able to do so.³⁸

However, inspectors general are not the only people in government who are in a position to out a whistleblower. When a whistleblower raised concerns with their supervisors before formally filing a complaint with the Office of Special Counsel or an inspector general, then that supervisor is also in a position to out the whistleblower and the prohibition in the Inspector General Act does not apply. Whistleblower laws, and various other statutes, as currently written might already provide relief for whistleblowers who have had their identities exposed without their consent, but without case law or explicit codified text, whistleblowers are left wondering

³³ POGO was recently approached by a military whistleblower who has been the target of retaliation from individuals in another military branch. It is unclear whether the law as written is sufficient to address this situation.

³⁴ Andrew Restuccia, "Trump Shares Tweet Naming Alleged Whistleblower," *Wall Street Journal*, December 28, 2019. <https://www.wsj.com/articles/trump-shares-tweet-naming-alleged-whistleblower-then-deletes-it-11577576438>

³⁵ The *New York Times*, "Why The Times Published Details of the Whistle-Blower's Identity," *New York Times*, September 26, 2019. <https://www.nytimes.com/2019/09/26/reader-center/whistle-blower-identity.html>

³⁶ "We're still fighting in court to obtain more documents and to force the government to identify everyone they interviewed for the Afghanistan Papers," a *Washington Post* reporter wrote during a live chat with readers. "Chat Transcript: How the Afghanistan Papers came together," *Washington Post*, December 12, 2019. <https://live.washingtonpost.com/afghanistan-papers-live-chat.html>

³⁷ 5a U.S.C. § 7(b) (1978). <https://www.law.cornell.edu/uscode/text/5a/compiledact-95-452/section-7>

³⁸ It's important to consider whether there should be some narrow exceptions to this default rule to prevent the misuse or weaponization by wrongdoers hoping to escape accountability. For example, a wrongdoer inside an agency should not be able to keep an inspector general from naming them in a report stemming from an administrative investigation by acting as a whistleblower or source at some point during the investigation.

whether they have an enforceable right to anonymity.³⁹ This lack of clarity will no doubt dissuade some would-be whistleblowers or investigative sources from coming forward.

Maintaining anonymity is one of the best ways for whistleblowers to protect themselves from professional and personal retaliation. I know the Members of the House Committee on Oversight and Reform understand the importance of maintaining a whistleblower's anonymity; indeed, both the Majority and the Minority committee websites promise to maintain the confidentiality of whistleblowers who disclose wrongdoing to the committee.⁴⁰

As Ranking Member Meadows, a co-chair of the House Whistleblower Protection Caucus, said in his remarks at a gathering for the 2017 National Whistleblower Day, for those who blow the whistle, "retaliation is almost certain."⁴¹ This is an unfortunate reality. However, Congress can and should address the loopholes and weaknesses in the various whistleblower protection laws to give whistleblowers a fighting chance of prevailing against those who retaliate against them.

Clearing Up Misconceptions

Before I conclude, I want to take a moment to address two pieces of misinformation about whistleblowers that have recently been repeated with some frequency. After an intelligence community whistleblower's disclosure led the House to begin an impeachment inquiry into President Trump, some argued inaccurately that the whistleblower improperly colluded with the House Permanent Select Committee on Intelligence before making their disclosure, and that the whistleblower's perceived bias against the president undermined the disclosure.

Both the whistleblower's legal team and the House Intelligence Committee assert that before filing the official disclosure with the intelligence community inspector general, the whistleblower reached out to the committee of jurisdiction to ask for guidance on how to report possible wrongdoing within the intelligence community.⁴² Whistleblower laws are very complicated, none more so than those for the intelligence community. The consequences of not following the law to the letter can be dire: Not only would whistleblowers find themselves unable to enforce the protections afforded to them under the law, but they might also find

³⁹ Kel McClanahan, "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/>

⁴⁰ "Tip Line," House Committee on Oversight and Reform. <https://oversight.house.gov/contact/tip-line> (accessed January 16, 2020); "Blow the Whistle," Committee on Oversight and Reform [Minority]. <https://republicans-oversight.house.gov/whistle/> (accessed January 16, 2020)

⁴¹ Mark Meadows, Remarks at the 2017 National Whistleblower Day Luncheon (United States Senate, Washington, DC, July 27, 2017). <https://www.youtube.com/watch?v=XIkATHkANfw&feature=youtu.be>

⁴² Benjamin Siegel and James Gordon Meek, "Whistleblower's attorney says they drafted complaint 'entirely on their own,'" ABC News, October 2, 2019. <https://abcnews.go.com/Politics/whistleblower-contacted-house-intelligence-committee-filing-complaint/story?id=66013379>; Julian E. Barnes, Michael S. Schmidt, and Matthew Rosenberg, "Schiff Got Early Account of Accusations as Whistleblower's Concerns Grew," *New York Times*, October 2, 2019. <https://www.nytimes.com/2019/10/02/us/politics/adam-schiff-whistleblower.html>

themselves facing criminal prosecution for mishandling classified information or even for espionage, as happened repeatedly during the Obama administration.⁴³ It is entirely proper for a whistleblower to ask the committee of jurisdiction for guidance on how to proceed in compliance with the law. It is also important to note that even if the whistleblower had approached the committee to make a disclosure, it would have been proper, as the committee is an avenue for protected disclosures.⁴⁴

Congressional oversight is vital to ensuring that our intelligence community respects the rule of law and constitutional protections while it uses its powerful tools and authorities to protect national security. Whistleblowers are among the best resources for congressional oversight efforts, especially when the subject matter is shrouded in secrecy. As my colleague pointed out in testimony before the House appropriations committee last year, 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.⁴⁵ Frankly, Congress needs all the help it can get from insiders who can help shed light on potential wrongdoing in the intelligence community, but arguments that the whistleblower did something wrong by talking to Congress risk deterring future whistleblowers from working with Members or committees.

Related to the lack of clarity around whistleblowers' right to anonymity is the notion that the identity of a whistleblower must be known to assess their potential bias or motive for blowing the whistle.⁴⁶ In 2012, Congress weighed in on the relevance of motive when it clarified the law through the Whistleblower Protection Enhancement Act to ensure that a whistleblower's motive could not be used as a reason to deny them legal protections for making a disclosure.⁴⁷ The law rightfully recognizes that motive is not determinative of whether a whistleblower's disclosure is legitimate. POGO teaches congressional staff through our oversight training program, "if a

⁴³ Dana Liebelson, "Six Americans Obama and Holder Charged Under the Espionage Act (and One Bonus Whistleblower)," Project On Government Oversight, January 27, 2012. <https://www.pogo.org/analysis/2012/01/six-americans-obama-and-holder-charged-under-espionage-act-and-one-bonus-whistleblower/>; Shanna Devine and Tom Devine, *Whistleblower Witch Hunts: The Smokescreen Syndrome*, Government Accountability Project (November 2010), 13. <https://www.whistleblower.org/wp-content/uploads/2018/05/WWHfinal.pdf>

⁴⁴ See 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>

⁴⁵ *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/>

⁴⁶ Minority Members of the House Permanent Select Committee on Intelligence, Committee on Oversight and Reform, and Committee on Foreign Affairs, *Report of Evidence in the Democrats' Impeachment Inquiry in the House of Representatives*, 91-92 [320-321 in PDF] (December 2, 2019). <https://docs.house.gov/billsthisweek/20191216/CRPT-116hrpt346.pdf>

⁴⁷ 5 U.S.C. § 2302(f)(1)(C) (2012). <https://www.law.cornell.edu/uscode/text/5/2302>

whistleblower's information is accurate, detailed, and has sufficient backup, it shouldn't matter what the reason for revealing the problem is."⁴⁸ Exposing a whistleblower serves no public benefit and undermines the public interest in providing strong, safe channels for insiders to report wrongdoing.⁴⁹

Recommendations

POGO proposes the following recommendations:

- Allow whistleblowers to bypass the Merit Systems Protection Board to take their retaliation complaints directly to a court to be heard by a jury of their peers.
- Ensure that whistleblowers facing reprisal are entitled to interim relief so they are able to seek enforcement of their protections under the law.
- Create independent enforcement mechanisms for intelligence community and service member whistleblowers so that the application of the law is objective and fair to whistleblowers.
- Remove all legal barriers preventing the inspector general for the intelligence community from directly notifying the congressional intelligence communities of concerns raised by whistleblowers.
- Rebalance the burden of proof standard applied to whistleblowers in the armed forces so they are on equal footing with civilians blowing the whistle.
- Expand prohibited personnel practices across all government sectors to include retaliatory investigations and security clearance actions.
- Clarify that whistleblowers are entitled to anonymity and create an actionable right for whistleblowers to challenge retaliation that includes exposing their identity.

Conclusion

Regardless of the political context, Members of Congress have a vested interest in maintaining strong support for whistleblowers. I implore you all to continue to work in a bipartisan fashion to improve the protections for whistleblowers across the federal government. Whistleblowers and taxpayers alike deserve a system that makes it easy and safe for whistleblowers in any sector of government to make protected disclosures without having to put their personal or professional well-being on the line. But we have a ways to go before that is the case.

⁴⁸ Project On Government Oversight, "Working with Insiders and Whistleblowers," (2019).

https://docs.pogo.org/resource/2019/POGO_Working-with-Insiders-and-Whistleblowers.pdf?_ga=2.246257667.66187901.1576518190-970869964.1562788841

⁴⁹ While the law amended in 2012 doesn't directly apply to intelligence community whistleblowers, the accompanying committee report plainly states that this principle should apply when considering intelligence community whistleblower disclosures. *See* Senate Committee on Homeland Security and Government Affairs, *Report to Accompany S. 743*, S. Rep. 112-115, footnote 133 (April 12, 2012).

https://fas.org/irp/congress/2012_rpt/wpea.pdf