

STATEMENT

of

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Federal Whistleblowers

Introduction

Chairman Connolly, Ranking Member Meadows, and Members of the Subcommittee, I thank you for your invitation to appear today and to present testimony on the issue of Federal Whistleblowers. My name is Paul Rosenzweig and I am a Senior Fellow at the R Street Institute.¹ I am also the Principal and founder of a small consulting company, Red Branch Consulting, PLLC, which specializes in, among other things, cybersecurity policy and legal advice; and a Professorial Lecturer in Law at George Washington University, where I teach a course on Cybersecurity Law and Policy and recently taught another on Artificial Intelligence Law and Policy.

My testimony today is in my individual capacity and does not reflect the views of any institution with which I am affiliated or any of my various clients.

By way of background, after serving as a career prosecutor in the Department of Justice, my legal career has included stints as a defense attorney, as a senior counsel in the Whitewater investigation, and as an

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investigative counsel for the Republican staff of the House Committee on Transportation and Infrastructure. From 2005 to 2009, I served as the Deputy Assistant Secretary for Policy in the Department of Homeland Security, as an appointee of President George W. Bush. In my non-legal career, I have worked for an extended stint at The Heritage Foundation and now work, as I said, at the R Street Institute, both generally characterized as conservative think tanks.

Perhaps most saliently, in addition to being a Lecturer at George Washington, I am a former Adjunct Lecturer at the Medill School of Journalism at Northwestern University. Along with two colleagues, I co-edited a book *Whistleblowers, Leaks and the Media: The First Amendment and National Security*, that was jointly published by Medill and the American Bar Association.

Though I am generally thought of as a conservative, my testimony today is, I hope, nonpartisan in nature, since I believe that the issue of whistleblower protections is one of enduring interest to both parties and, indeed, to all Americans. In my testimony today, I want to make four basic points:

- First, whistleblowers are not an afterthought. Though they are mentioned nowhere in the Constitution, they have a history that predates our nation's founding. Much like the free press, whistleblowers are an essential safety valve of accountability and transparency that allows America to have an effective and empowered executive branch while maintaining control over it to prevent a descent into autocracy.
- Second, the existing structure of whistleblower protections is, at least to some degree, grounded in Constitutional freedoms. Beyond that, Congress' history of support for federal whistleblowers is embodied in a series of laws, the most recent of which—the Whistleblower Protection Enhancement Act of 2012—confirmed Congress' long-standing view that providing whistleblowers with adequate protection and incentive to come forward served general American interests.
- Third, for that reason it is utterly unsurprising that whistleblower protections have always had bipartisan support, both in Congress and in the courts. Figures who hold views as diverse as Senator Charles Grassley and Justice Sonia Sotomayor have spoken eloquently about the value of whistleblowers. My own view—that of a longtime conservative attorney—is that whistleblowers serve a critical, albeit limited, function in our structure of democratic accountability. In any system where the electorate is the ultimate arbiter, the value of transparency in executive action is of paramount importance.
- Fourth, finally, I offer a word about the idea of confidentiality and anonymity—a topic I know is of some controversy today. I would hope that the temper of the moment would not undermine our well-grounded belief that whistleblower anonymity, when asked for, is a fundamentally positive value. All too frequently, whistleblowers have faced retaliation for their actions. If we wish them to have a positive incentive to come forward—and I think we all agree that we do—then it is, in my view, essential in some circumstances to provide whistleblowers with the protection of anonymity when they do so.

Why We Have Whistleblowers – Constitutional Theory and the Fundamental Tension²

The case for whistleblowers is simple—we have whistleblowers because we value freedom, transparency and accountability. Though we want a government that works, we want one that is limited and does not become unaccountable.

Americans value limited government because we value freedom—and we think that government is as much a threat to freedom as an enabler of it. Indeed, distrust of government is the foundational insight of the Declaration of Independence—an assertion that the rights to life, liberty, and the pursuit of happiness are inalienable rights that inhere to the citizens by virtue of their humanity—and not, in any way, derived from or granted by governments as a matter of grace. If you see government as subordinate to natural rights then, naturally, you see a need for ways of effectively checking government abuse and overreach.

At the same time, however, we want a government that works and works well. The desire for order and government protection stretches at least as far back as the Hobbesian concern that, without government, life is “nasty, brutish and short.” That concern finds strong echoes in the preamble to the Constitution, which sets as one of the priorities for the new government that it “provide for the common defense.”

To a very real degree, the concern for ineffective government action was the animating force behind the Constitutional Convention. The Articles of Confederation had proven to be inadequate to the task of enabling the federal government. The Constitution itself was therefore a reaction against an ineffective government and the chaos of an ungoverned society. Hence, the Framers of the Constitution sought to create a stronger government—what Hamilton so famously called one possessing “energy in the Executive.”

But effective governments often resist transparency and accountability—even the most well-meaning executive doesn’t like having anyone looking over his or her shoulder—and an unchecked executive is often a threat to liberty. The classic case of the disclosure of the Pentagon Papers reminds us that oft-times governments use secrecy to conceal mistakes or misconduct. And so secrecy and transparency are often in equipoise—too much secrecy threatens liberty; too much transparency threatens effectiveness.

We’ve recognized this tension since the dawn of liberal democracy in America. Thomas Jefferson once said: “The natural progress of things is for liberty to yield and government to gain ground.”³ We must guard against this natural tendency. Though Jefferson was right that we must be cautious, John Locke was equally right when he wrote: “In all states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from the restraint and violence from others; which cannot be where there is no law; and is not, as we are told, a liberty for every man to do what he likes.”⁴ Thus,

² Portions of this section are derived from earlier work I did with my colleagues Tim McNulty and Ellen Shearer in our book, *Whistleblowers, Leaks and the Media*.

³ Letter to E. Carrington, May 27, 1788, reprinted in Matthew Spalding, ed., *The Founders' Almanac 157* (The Heritage Foundation, 2002).

⁴ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305 (Peter Laslett, ed., 1988).

the obligation of the government is a dual one: to protect civil safety and security against violence, and to preserve civil liberty. That dual obligation remains, at the core, the challenge of the effectiveness/accountability debate.

Fundamental to the resolution of that debate are the whistleblower provisions of American law. They provide an authorized, lawful way in which members of the executive branch can provide greater transparency and accountability for our government—both to other branches of the government and to the American public. In short, whistleblowers are a way of helping us achieve a balance: As citizens we want an effective government, but it has to be one that is circumscribed by law and policy. Whistleblowers have always been recognized as one outlet for that tension and a way of defusing it.

The Constitutional and Statutory Framework

These theoretical considerations find expression in a Constitutional and statutory framework that has long recognized the value of whistleblowers. Indeed, whistleblowing by federal employees has a history that pre-dates the formation of the Republic. Perhaps the very first American whistleblower was a member of the Continental Navy, Midshipman Samuel Shaw. During the Revolutionary War he and Third Lieutenant Richard Marven blew the whistle on the torturing of British POWs by Commodore Esek Hopkins, the commander-in-chief of the Continental Navy. Partially as a result, the Continental Congress enacted a whistleblower protection law on July 30, 1778, by a unanimous vote.

Modern law reflects that historic commitment. To begin with, at least since the 1968 decision in *Pickering v. Board of Education*,⁵ we have recognized that the First Amendment protects public employees who communicate a matter of public concern that does not outweigh corresponding disruption of legitimate management functions. However, since the 2006 decision in *Garcetti v. Ceballos*,⁶ we have also recognized that the First Amendment does not apply to “duty speech” that is part of job responsibilities—e.g., protection for public speech that is part of the obligations of an official’s job. Federal workers are limited to administrative hearings where indirect enforcement is available for First Amendment rights as a merit system principle.⁷

The Whistleblower Protection Act (WPA), was first passed as part of the Civil Service Reform Act of 1978 and then separated into its own law in 1989. This act applies the *Pickering* balancing test to provide absolute protection for disclosures of information that an employee reasonably believes convey evidence of illegality, gross waste, abuse of authority, gross mismanagement, or a substantial and specific danger to public health or safety.⁸

The WPA is invaluable for congressional oversight. For that reason, Congress has unanimously reaffirmed and strengthened its original mandate three times—the latest through the Whistleblower

⁵ 391 U.S. 563 (1968)

⁶ 547 U.S. 410 (2006).

⁷ 5 U.S.C. § 2302(b)(11).

⁸ 5 U.S.C. § 2302(b)(8).

Protection Enhancement Act of 2012 after a 13-year campaign.⁹ The WPEA restored the Act’s original free speech mandate by systematically canceling 13 years of hostile precedents from the Court of Appeals for the Federal Circuit, expanding coverage, strengthening protections against gag orders generally and scientific censorship in particular, and temporarily restoring normal appellate review in all circuit courts of appeal during a four-year study on full access to the courts.

All alleged violations of whistleblower rights can be enforced through investigations by the Office of Special Counsel (OSC), with subsequent opportunity for an administrative Individual Right of Action due process hearing at the U.S. Merit Systems Protection Board if the OSC has not obtained requested relief for the employee within 120 days.¹⁰ For cases that involve severe consequences to the employee, such as suspension of greater than two weeks or termination, the employee can assert the whistleblower defense through an appeal straight to the board.¹¹

However, statutory rights in the WPA do not apply to employees with national security intelligence jobs. For those employees, the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA)¹² was established to create a forum for disclosures by intelligence agency employees, but its own regulations specifically state that it does not exist to protect government intelligence employees or contractors against reprisal. Instead it serves primarily as a classified conduit for specific types of “urgent actions” to be referred to by OIGs of the various intelligence agencies or to the intelligence committees in Congress. Section 702 of the Act defines “urgent concerns” to include false statement to Congress, whistleblower retaliation, or a “flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.”

The Bipartisan Consensus for Whistleblowers

There is, of course, widespread recognition that whistleblowers have a positive value for government accountability. As a conservative, I echo the sentiment of Republican members of Congress. For example, in a letter to White House Counsel Don McGahn in 2017,¹³ Senator Grassley and Representative Meadows (along with then-Representative Chaffetz) urged the Trump administration to protect whistleblowers as a means of encouraging transparency throughout the federal government. As they said: “[P]rotecting whistleblowers who courageously speak out is not a partisan issue—it is critical to the functioning of our government.” Or as Senator Grassley put it more recently: “Bottom line

⁹ Pub. L. No. 112-199, 126 Stat. 1465, 112th Cong., 2d Sess. (Nov. 27, 2012). The WPEA systematically closed judicially created loopholes, expanded the scope of coverage, removed due process barriers, banned contradictory agency gag orders, strengthened the OSC’s authority, and began a pilot test of normal access to appeal courts.

¹⁰ 5 U.S.C. § 1221.

¹¹ *Id.* § 7701

¹² Title VII, Pub. L. No. 105-272, 105th Cong., 2d Sess. (1998).

¹³ Letter from Rep. Mark Meadows, Rep. Jason Chaffetz, and Sen. Charles Grassley to White House Counsel Don McGahn, Feb. 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>.

answer: I expect the law to be followed [. . .] Most whistleblowers that come to me don't mind their publicity, they aren't seeking anonymity. If they did, I would probably try to protect that anonymity."¹⁴

Likewise, in the last Congress every Republican joined in a unanimous vote to increase the penalties for retaliating against whistleblowers. As Representative Martha Roby put it: "The reason whistleblowers face systematic retaliation is because it works. When a brave whistleblower faces intimidation or persecution for their actions, every other employee sees it and they know what will happen to them if they tell the truth. It has a powerful chilling effect... That's just wrong and it's time to punish those who do it with harsher penalties."¹⁵ Indeed, as Justice Roberts put it for the Court in *Department of Homeland Security v. MacLean*,¹⁶ the very idea of whistleblower protection is inherent in the idea that we need an alternative forum outside the normal bounds of agency hierarchy as a safety valve for the disclosure of alleged executive misconduct: "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks."

There is, of course, good reason for this consensus. Leaving aside contemporary controversy, recent American history is replete with instances in which whistleblower disclosures have benefited the American public. We have, for example, heard from whistleblowers who disclosed weaknesses in airport security,¹⁷ and in the *MacLean* case, ones who alleged that TSA abandoned federal air marshal coverage during a confirmed, ambitious rerun of the 9/11 hijacking (as well as leadership disagreement over official dress code policy that increased risk to the anonymity of federal air marshals). Others, such as legendary Pentagon whistleblower Ernest Fitzgerald, exposed Air Force lies about a \$2.3 billion cost overrun for the C-5 cargo aircraft. All of these examples and dozens of others bear witness to the utility of whistleblower protections.

Why Confidentiality?

Finally, we might address the most salient issue of current import, namely the rules that provide a whistleblower with confidentiality. This has, of course, been of some note recently, and it would be frivolous to have a hearing where the issue was not considered.

And so, again, we ask a question of first principles: Why should we provide whistleblowers with the benefit of confidentiality? Then answer, it seems to me, is much like our answer regarding any question of privilege and confidentiality: We think that the guarantee of confidentiality gains us more in transparency than it loses.

¹⁴ U.S. Sen. Chuck Grassley calls for others to 'abide by the law' in whistleblower anonymity, Des Moines Register, Nov. 6, 2019, <https://www.desmoinesregister.com/story/news/politics/2019/11/06/chuck-grassley-whistleblower-donald-trump-impeachment-ukraine-rand-paul-senate-house-gop-identity/2508120001>.

¹⁵ Rep. Martha Roby, Brave Whistleblowers Need Stronger Protections, Oct. 11, 2017, <https://roby.house.gov/newsroom/press-releases/roby-brave-whistleblowers-need-stronger-protections>.

¹⁶ 574 U.S. 383 (2015).

¹⁷ Letter from Office of Special Counsel to President Barack Obama, May 8, 2012, <http://mspbwatch.files.wordpress.com/2012/05/osc-letter-to-president-re-faa.pdf>; FAA May Have Highest Whistleblower Count in Government, ABC News, May 8, 2012, <http://abcnews.go.com/blogs/politics/2012/05/faa-may-have-highest-whistle-blower-count-in-government/>.

Broadly speaking, the idea is that we wish to enable the candid disclosure of misconduct by officials with knowledge, because that misconduct often involves matters of national security and domestic economic prosperity and is of critical importance to the nation. 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. It is thought that protecting the confidentiality of these disclosures will foster open communication.

In many ways this rationale mirrors that of more familiar confidentiality protections like attorney-client privilege or the executive privilege. Any American who hires a lawyer can rely on the attorney-client privilege—the general idea that your lawyer is not permitted and cannot be compelled to disclose whatever you tell her in confidence as part of her representation of you. The attorney-client privilege has been around for a long while, and is generally meant to encourage clients to be truthful with their lawyers. If a defendant thought that his attorney could be compelled to turn around and repeat what he had said, the defendant would, in turn, be most unlikely to tell his lawyer the unvarnished version of what happened. As anyone who has practiced criminal-defense law will tell you, this is already often the case, but it would be even more pervasive if the privilege didn't exist.

Likewise, the executive privilege (so much in the news today) extends not just to the legal advice that the president receives but, at least in theory, to all of the many communications that take place within the executive branch that are intended to develop policy for the benefit of the president. As the Supreme Court said in *United States v. Nixon* while reviewing President Nixon's claim of privilege, there is a "valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties."¹⁸

In all of these cases, by protecting the confidentiality of the communications and, in the case of a whistleblower, the anonymity as well, we advance important—indeed vital—national goals of enhancing the transparency and accountability of government and in fostering candid discussions of issues of public concern.

Conclusion

In the end, I think the tension metaphor may present a false choice—that you can either have transparency and accountability or you can have secrecy and effectiveness. If we really were put to such a choice, it would be a difficult, almost existential question. But that choice is not real. We can and do have both transparency and secrecy, both accountability and effectiveness. Our goal for things like whistleblower laws should be to maximize both values to the extent practicable.

And that, at bottom, is the theme of this hearing. It's not about "resolving" the fundamental tensions inherent to American democracy. It's about managing them and living with them and accommodating the competing values to the maximum extent practicable. We all want to be safe, we all want an effective government that can provide national security, and we all want one that acts within the rule of

¹⁸ *United States v. Nixon*, 418 U.S. 683 (1974).

law. We all want a government that is transparent and accountable, not despotic. And we all want a legal and policy structure that fosters our desires.

Sometimes we get the balance wrong. Far more often, as we would expect in a pluralistic society, we simply disagree about precisely how to achieve the ends we seek. You will see much of that disagreement played out in public debates today. But at its core, the discussion we are having today is a good thing—it's a legal analysis of a living, breathing aspect of a functioning democracy. As long as questions like those being asked by this committee are asked, we can feel reasonably confident about the safety of the Republic.