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PROTECTING THOSE WHO BLOW THE WHISTLE ON GOVERNMENT WRONGDOING

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT AND REFORM

HOUSE OF REPRESENTATIVES

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PROTECTING THOSE WHO BLOW THE WHISTLE ON GOVERNMENT WRONGDOING

Tuesday, January 28, 2020

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON GOVERNMENT OPERATIONS
COMMITTEE ON OVERSIGHT AND REFORM
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. Gerald E. Connolly (chairman of the subcommittee) presiding.

Present: Representatives Connolly, Maloney, Norton, Sarbanes, Speier, Khanna, Lynch, Raskin, Meadows, Jordan, Massie, Hice, Grothman, and Comer.

Also present: Representative Armstrong.

Mr. CONNOLLY. The subcommittee will come to order. Without objection, the chair is authorized to declare a recess of the committee at any time. And I'm going to recognize myself for my opening statement and the ranking member will give his as soon as he arrives. I'm beginning because I'm a little worried about votes and want to try to give everyone the opportunity to be heard.

We hold this hearing at a critical moment in our Nation's history. A whistleblower who reported a reasonable belief about a Presidential misconduct has become the target of the President's wrath. In tweets and statements to the press, the President himself has tried to identify the whistleblower and has called upon others to publicly identify the whistleblower. Threats against the whistleblower are reportedly increasing.

This is a sad and, for me, dangerous moment for whistleblower. For many administrations, Federal employees and contractors have come forward to expose waste, fraud, and abuse. Whistleblowers have recovered billions of government dollars from companies that attempted to defraud the government. Whistleblowers exposed unacceptable cost overruns on agency projects and programs within the government.

They improved quality control at our Nation's nuclear facilities, fought for our veterans to receive the healthcare services they have earned, ensured the food we eat is safe, and exposed security breaches at our government's most sensitive laboratories.

These brave whistleblowers risk their reputations, careers, even their health and their family's safety sometimes when they make such allegations. They take great professional and personal risks.

For decades, Congress has worked on a bipartisan fashion to protect these whistleblowers, and we've enacted laws that encourage workers to come forward when they see waste, fraud, and abuse. We've created laws that punish retaliation against these whistleblowers.

I hope the hearing today helps us build on that important work and addresses some of the challenges to our whistleblower protections that have been brought to light by current circumstances.

We rely on whistleblowers every day to help us with our Oversight and Reform work. Without those whistleblowers, rooting out mismanagement, abuse, and corruption would be very difficult.

In fact, the most recent Office of Personnel Management survey of Federal employee engagement found that only 64.5 percent of Federal employees believe that they can disclose suspected violations of law, rule, or regulation without fear of reprisal, 10.5 percent lower than what was reported by private sector employees.

This hearing will clarify what a whistleblower is and what protections a whistleblower is afforded. No one should be punished for doing the right thing.

Contrary to the allegations of certain pundits, whistleblowers can be anonymous or confidential, and they can provide information secondhand, and they deserve protection from retaliation.

Today, we also examine the roles of Congress, the inspectors general, the Office of Special Counsel, and the Merit Systems Protection Board in engaging whistleblowers, protecting them, and pursuing meritorious allegations.

When whistleblowers produce credible information on wrongdoing, these are the entities we expect to step into the breach, to launch investigations and help the facts come to light. If whistleblowers have no expectation that the information they provide will help hold people and institutions accountable, they have little incentive to come forward.

Finally, we'll examine whether existing laws are sufficient enough to protect whistleblowers. The President's attacks on the whistleblower have exposed some uncertainties and questions about Congress' clear intent to provide robust protections to those who expose wrongdoing in government. The administration's attacks on whistleblowers certainly have had a chilling effect on those who in other administrations would otherwise have come forward to expose wrongdoing.

This hearing seeks to ensure that those protections are clear and strong and that those who retaliate against whistleblowers are held accountable.

The hearing is also a reminder that the Merit Systems Protection Board, the independent agency that serves as the guardian of the Federal merit system, still lacks a quorum and remains unable to issue final decisions in cases where employees' rights are at stake.

The Board is vital to whistleblowers in particular. In fact, my first hearing as chairman of the subcommittee focused on the need to get MSPB operating, and we have bipartisan consensus about that goal. And yet here we are a year later and the MSPB remains largely inoperable. It's a crisis that continues, unfortunately, to be ignored.

In May, I introduced legislation with my friend, our late chairman, Elijah Cummings, that would delegate temporary authority to the MSPB general counsel to stay questionable personnel actions brought by agencies against whistleblowers. The general counsel's authority would expire once one Board member is nominated and confirmed by the Senate. The bill, which was voted out of this full committee on a bipartisan voice vote, awaits floor action, and I hope that will happen expeditiously.

Our efforts to get the MSPB running are in addition to other bipartisan legislative and oversight efforts to support whistleblowers. In the last Congress, I worked with my colleague, Representative Sean Duffy, to enact the Follow the Rules Act, which restored key whistleblower protection gutted by the Supreme Court. The law prohibited agencies from retaliating against employees who refused orders that, if performed, would violate a rule or regulation.

In this Congress, I was joined by three of my Republican colleagues, including my good friend, Ranking Member Mark Meadows, in championing the Whistleblower Expansion Act of 2019. That bill seeks to clarify that subcontractors and subgrantees are afforded whistleblower protection.

I trust this hearing continues a strong tradition of bipartisan support for whistleblowers whose protections do not change according to political context. In the words of Republican Senator Chuck Grassley of Iowa, ″Members of Congress and the public,″ he said, ″owe a debt of gratitude to our fellow citizens who are willing to stand up for what's right, despite the personal consequences they may face. Their efforts should never be overlooked or taken for granted.″

I hope to work across the aisle to clarify misconceptions about whistleblowers and to enact legislation that may be needed to clarify and bolster protections. Retaliation against brave individuals who come forward must never be acceptable and it's a disservice to our country and our government.

Finally, I want to remind everyone of the committee's Blow the Whistle tip line. We, ourselves, have a tip line for whistleblowers. Those who have information about waste, fraud, and abuse, or gross mismanagement, can provide it to this committee through our portal at [http:]oversight.house.gov. And you can do it anonymously if you choose.

Mr. Jordan, are you going to have an opening statement for the minority?

Thank you.

I recognize Mr. Jordan for his opening statement.

Mr. JORDAN. Thank you, Mr. Chairman. Thanks for this hearing. I want to thank all our witnesses for being here today.

And I do look forward to talking about the whistleblower issue—in particular, the whistleblower, the anonymous whistleblower, with no firsthand knowledge, who had a bias against the President, and who worked with Joe Biden, that became the basis for what now our country has lived through for four months. I look forward to getting into that issue and this idea of anonymity versus any type of retaliatory action and those issues.

But there's also another issue that is important. It's been over six weeks since Inspector General Horowitz released his report de-

tailing the FBI's illegal surveillance of President Donald Trump's campaign back in 2016, six weeks since the inspector general published his findings that the FBI illegally spied on then candidate Trump.

We know it was illegal spying because the Justice Department admitted it. Just last week, the FBI admitted that they didn't have evidence for at least two warrants on the Trump campaign.

Inspector General Horowitz, we are glad that you're here. But for the life of me, I can't imagine why this committee, the committee that has direct jurisdiction over the inspectors general, would not call you to testify about the serious FBI abuses that you uncovered. It has been six weeks since you published your 400-plus-page report about the FBI abusing the FISA Court to spy on the Trump campaign and our chair has still yet not invited you to speak.

Think about what the FBI did. They went to a secret court to get a search warrant to spy on a Presidential campaign in America. They did it.

This is what the FISA Judge, Rosemary Collyer, said just last month, December 17, 2019, quote,"The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable."

Put that in plain English, you guys screwed up so much, how could we trust any other representation you've made to the court? That's what the FISA Court judge said last week in response to Mr. Horowitz's 400-plus-page report.

Think about what was going on here. The FBI's basis in asking the court to spy on the Trump campaign was, quote, "unsupported or contradicted by information in their possession." The FBI had evidence that members of the Trump team were innocent and they held that back from the court. Remember, they got the initial application, the initial warrant, and then they did three renewals. Didn't tell the court important information in those renewal applications.

The report is so unbelievable, you could not even make some of this stuff up for a TV show. No American suspects things like this occur. An FBI lawyer fabricated an email to support a warrant on the Trump campaign. The FBI was doing this to a Presidential candidate. Think about what they could do to regular Americans. And that's why Judge Collyer ordered the FBI to begin reviewing other applications.

And we still have not had a FISA hearing, neither here, or maybe more importantly, in the Judiciary Committee. Chairman Nadler's yet to call a hearing. This is a whistleblower hearing. It's an important issue that I'm looking forward to discussing. But I will also take this opportunity, as I said earlier today, to ask a few questions about Inspector General Horowitz's findings in his report.

The chair told us earlier this month that the inspector general has already testified before the Senate and that his presence before our committee is unnecessary. Since when did the Oversight Committee say, "Oh, if the Senate's doing it, we don't have to have a

hearing"? I've never heard that. In my 13 years in Congress, never heard that.

And imagine if it was reversed? Imagine if Inspector General Horowitz uncovered the FBI fabricating emails to spy on candidate Clinton. Bet you the Democrats would be having hearings in this committee. We'd have already had several, both in this committee and the Judiciary Committee.

So, this is important stuff and I look forward to dealing with all these issues in this setting. And I want to thank our witnesses, in particular Inspector General Horowitz, for your work and for being here today.

And with that, Mr. Chairman, I yield back.

Mr. CONNOLLY. I thank Mr. Jordan and certainly can relate to the idea that we don't always have witnesses or hearings that we would like. I have a whole list of witnesses that, unfortunately, you, Mr. Jordan, don't support coming before this committee.

Mr. JORDAN. Well, you can call them now, you're the chairman.

Mr. CONNOLLY. Well, unfortunately, some of them would require a subpoena and they are in the business of defying a subpoena.

So, we can't have it both ways. We can have Mr. Horowitz. I would like to have Mr. McGahn. I would like to have Mr. Bolton. I'd like to have Mr. Mulvaney.

Mr. JORDAN. Mr. McGahn testified for 30 hours.

Mr. CONNOLLY. I know, but we can't quite sound so sanctimonious about the lack of a hearing when in fact our own record defies that, when our own record supports withholding information relevant——

Mr. JORDAN. Mr. Horowitz issued a 400-plus-page report last month, Mr. Chairman.

Mr. CONNOLLY. Yes. And the Democrats provided 28,000 pages of documents to the U.S. Senate that could be enhanced it if we had certain witnesses.

Mr. JORDAN. The Senate had Mr. Horowitz testify——

Mr. CONNOLLY. So, his point—your point is well taken, I'd just amplify on it.

Now I want to welcome——

Mr. JORDAN. I have unanimous consent request, if I could, Mr. Chairman, just that Mr. Armstrong be allowed to participate in today's hearing.

Mr. CONNOLLY. Without objection, so ordered.

I now want to introduce our panel.

Welcome.

We are joined by the Honorable Glenn Fine, principal deputy inspector general performing the duties of inspector general at the Department of Defense.

By the way, our office wants to thank you, and I want to thank you personally, for helping us on an amendment to the defense bill regarding the incidence of domestic violence and abuse. I think we had a very good outcome on a bipartisan basis. Thanks to your office and yourself for that support.

David Colapinto, who is the founder and general counsel of the National Whistleblower Center.

Welcome.

Elizabeth Hempowicz, director of public policy on the Project of Government Oversight.

Welcome.

Paul Rosenzweig, resident senior fellow at the National Security and Cybersecurity, R Street.

And the Honorable Michael Horowitz, the subject of some previous conversation, inspector general at the Department of Justice, a frequent flyer here at the Oversight and Reform Committee.

Welcome back.

If you would all stand to be sworn in. It is the habit, as you know, of our committee and subcommittees to swear in our witnesses. If you'd raise your right hand.

Do you swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record show—thank you—that all of our witnesses answered that in the affirmative.

The microphones are sensitive, so please speak directly into them. Pull them close to you when you are addressing us.

Your written statements, without objection, will be entered in full into the record for this hearing, and so we encourage you to summarize your written testimony as expeditiously as you can. But you have a full five minutes if you want to use.

And we will start, Mr. Fine, with you. Welcome.

STATEMENT OF GLENN A. FINE, PRINCIPAL DEPUTY INSPECTOR GENERAL PERFORMING THE DUTIES OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Mr. FINE. Thank you, Chairman Connolly, Representative Jordan, and members of the subcommittee. Thank you for inviting me to testify today on the important contributions of whistleblowers and the need to protect them from reprisal.

I have been serving as the head of the DOD Office of Inspector General for over four years. Prior to this position, in addition to working as an attorney in private practice, I was the inspector general of the Department of Justice for 11 years, from 2000 to 2011.

In my written statement I discuss the significant contributions of whistleblowers in the DOD, how the DOD OIG evaluates and investigates whistleblower disclosures and complaints of reprisal, and several best practices we have implemented at the DOD OIG to improve our timeliness and efficiency in whistleblower investigations. I will discuss a few key points from that written statement.

First, whistleblowers play a crucial role in exposing waste, fraud, abuse, misconduct, and other violations of law in government programs and operations. These whistleblowers must be protected from reprisal for their protected disclosures.

There are many examples of whistleblowers exposing misconduct, saving taxpayer money, and improving the efficiency and effectiveness of DOD operations. For example, the Glenn Defense Marine Asia case, the so-called "Fat Leonard" case, is one of the largest and most complex public corruption criminal cases in DOD history, involving criminal conduct throughout the Navy's Seventh Fleet. It started with a whistleblower. And there are many other examples

of whistleblowers exposing wrongdoing, and I have provided a few more in my written statement.

The DOD OIG takes seriously our responsibility to handle the increasing number of whistleblower disclosures and whistleblower reprisal allegations that we have received. We have therefore implemented several best practices in recent years to improve the effectiveness of our whistleblower programs.

For example, to handle incoming whistleblower allegations in a more timely and thorough manner, we have reallocated significant resources to the DOD OIG's Administrative Investigations component, which is responsible for the DOD Hotline, senior official misconduct investigations, and whistleblower reprisal investigations.

Specifically, we increased staffing in Administrative Investigations from 114 positions in Fiscal Year 2016 to 154 positions in Fiscal Year 2019.

We also established an Alternative Dispute Resolution program as an option for resolving certain whistleblower reprisal complaints. ADR is a voluntary process, facilitated by a DOD OIG attorney, in which the parties agree to use mediation to seek resolution of a complaint prior to a potentially lengthy investigative process.

Since October 2017, the DOD OIG ADR program has resulted in settlements for 114 complainants and their employers. POGO has highlighted our ADR program as a model program and recommended that other IGs consider adopting similar programs.

We believe that IGs also have a responsibility to be transparent with our findings, particularly when the matters involve issues of significant public concern and relate to high level officials' actions in their official duties. We have therefore implemented a proactive release policy. We consider each of our reports of investigation, including cases arising from whistleblower disclosures and whistleblower reprisal cases, for public release. POGO also recently noted our decision to proactively release reports, calling it a powerful means of increasing the government's accountability to the public.

The DOD OIG's training curriculum for whistleblower reprisal investigators is also a model program and covers all aspects of evaluating, investigating, and reporting on reprisal complaints. We regularly deliver our course to participants throughout the DOD and to other Federal OIGs.

In addition, the DOD Hotline hosts a worldwide outreach event each July on National Whistleblower Appreciation Day. The event recognizes the importance of whistleblowers and also provides a forum to share best practices.

Finally, when whistleblower reprisal cases are substantiated, it is critical that management take prompt remedial action to make whistleblowers whole. However, recently we have seen a disturbing trend in the DOD disagreeing with the results of our investigations or not taking disciplinary action in substantiated reprisal cases without adequate or persuasive explanations.

Failure to take action sends a message to agency managers that reprisal will be tolerated and also to potential whistleblowers that the system will not protect them.

In conclusion, whistleblowers regularly expose waste, fraud, abuse, and misconduct, and the DOD OIG seeks to investigate

their allegations fully, fairly, in a timely way. These whistleblowers must be protected from reprisal. And when their allegations of reprisal are substantiated, prompt corrective action should occur.

The DOD OIG has made significant improvements in our handling of these important matters. We recognize that more work needs to be done, and we will continue to focus attention on this critical area.

That concludes my testimony. I'll be glad to answer any questions.

Mr. CONNOLLY. Thank you, Mr. Fine. Good job of summarizing.

Mr. Colapinto.

STATEMENT OF DAVID K. COLAPINTO, FOUNDER AND GENERAL COUNSEL, NATIONAL WHISTLEBLOWER CENTER

Mr. COLAPINTO. Chairman Connolly, Representative Jordan, and members of the committee, my name is David Colapinto. I'm a cofounder of the National Whistleblower Center, a nonpartisan, nonprofit organization in Washington, DC, that is devoted to advancing the rights of whistleblowers.

I'm also a legal practitioner who has represented whistleblowers in the government and private sectors for more than 30 years.

Thank you for inviting me to testify to share my perspective.

We can't begin to appreciate the courage of the women and men in the Federal work force who report wrongdoing, either openly through their chain of command at their agencies, or confidentially to the inspector general or the Office of Special Counsel, or even to Congress. Federal whistleblowers face such enormous risks for reporting misconduct, waste, fraud, abuse, and dangers to the public health and safety it's a wonder that anyone does it at all. But they do it at the risk of being called a rat, a snitch, a traitor, a spy, or worse, not to mention facing discipline or removal for blowing the whistle.

By contrast, the legal protections for whistleblowers in private industry, publicly traded companies, Federal contractors, and even in state and local government exceed the whistleblower rights and remedies currently available to Federal employees.

For effective anti-retaliation protections to work, there must be, one, a safe channel for employees to report wrongdoing confidentially; two, strong legal remedies to address whistleblower retaliation whenever it occurs; three, a work force culture that supports whistleblowers and encourages them to report serious wrongdoing.

Fortunately, there is a strong foundation on which to build. Congress can make whistleblowing effective in the Federal Government by focusing on the following areas.

First, strengthen and clarify confidentiality. While Congress has guaranteed whistleblower confidentiality for decades, there exists some confusion about how it works. Therefore, we suggest that Congress clarify Federal whistleblower confidentiality to provide Federal employees with the same remedies available under other whistleblower laws.

For example, in 2014 the U.S. Court of Appeals for the Fifth Circuit held that an employer's breach of a whistleblower's confidentiality in itself was a violation of the corporate anti-retaliation stat-

ute and gave rise to an award of noneconomic compensatory damages for private sector employees.

In reaching this conclusion the court observed it is inevitable that the disclosure of a whistleblower's identity would result in ostracism and that no one volunteers for the role of social pariah.

Congress should make clear that Federal employees have the same remedies in the event that whistleblower confidentiality is ever breached. Additionally, the identity of whistleblowers and other personal information about them is stored in systems of records protected by the Privacy Act. Congress should strengthen the civil remedy provisions of the Privacy Act.

Second, provide district court access in retaliation cases. Federal civil servants are the only major sector of the work force that don't have the right to bring whistleblower cases to U.S. district court and seek a jury trial. Congress must grant this right as it has done for employees in the private sector.

Administrative remedies alone do not work. The backlog at MSPB is near 2,500 cases and rising. The lack of court access is a disincentive to whistleblowing and enables the wrongdoing.

Third, change the work force culture. In 2011, the history of the whistleblowers of 1777 began to be retold and it was discovered that the Continental Congress passed the first whistleblower law in 1778, during the American Revolution. For the past several years, the Senate has recognized July 30 as National Whistleblower Appreciation Day to commemorate the passage of the first whistleblower bill, and we appreciate Members of the House, including Ranking Member Meadows, IG Horowitz, and others for speaking at these events.

But Congress should make National Whistleblower Appreciation Day permanent to recognize the importance of whistleblowing as a fundamental policy. While this may appear to be symbolic, it would help change the culture in the Federal Government toward whistleblowers. It would remind us that agencies need to be held accountable for waste and other forms of serious misconduct. And it would encourage employees to report serious wrongdoing without fear of reprisal.

Thank you very much, and I look forward to your questions.

Mr. CONNOLLY. Thank you Mr. Colapinto.

Ms. HEMPOWICZ.

STATEMENT OF ELIZABETH HEMPOWICZ, DIRECTOR OF PUBLIC POLICY, PROJECT ON GOVERNMENT OVERSIGHT

Ms. HEMPOWICZ. Chairman Connolly and Ranking Member Jordan, thank you for inviting me to testify as part of this hearing on the importance of protecting whistleblowers. I'm Liz Hempowicz, director of public policy at the Project on Government Oversight.

Whistleblowers play a crucial role in holding our government accountable, but the system is failing them. As Ranking Member Meadows has said, for those who blow the whistle retaliation is almost certain.

While Congress has codified legal protections for whistleblowers, systemic failures often undermine those protections.

To address these, POGO recommends that Congress allow whistleblowers to take their retaliation complaints directly to court; en-

sure that whistleblowers facing reprisal are entitled to interim relief while their cases are pending; ensure that whistleblowers in the intelligence community and Armed Forces have access to independent enforcement of their legal protections and 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 under the Whistleblower Protection Act to include retaliatory investigations and security clearance action; and clarify that whistleblowers are entitled to anonymity and can enforce that right.

As Mr. Colapinto just told you, Federal whistleblowers are still the only major sector of the work 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 this statutory right. Congress should finally allow whistleblowers to bypass the cumbersome administrative process currently in place and take their retaliation complaints directly to court.

Furthermore, whistleblowers in the Intelligence Community lack an independent mechanism to enforce their statutory protections entirely. The last level of review in an intelligence community whistleblower's case is a panel of three inspectors general whose decisions are merely recommendations that the head of the whistleblower's agency can disregard without consequence.

Similarly, as Mr. Fine mentioned, the Secretary of Defense is the final decisionmaker when it comes to addressing retaliation against military whistleblowers. This system renders their protections all but meaningless.

But it isn't just enforcement mechanisms that are failing. As Congress codifies additional prohibited actions of reprisal, those who retaliate against whistleblowers continue to adjust their approach to skirt accountability.

Whistleblowers across the board are frequently subjected to retaliatory investigations which are used to harass whistleblowers and tie up resources unnecessarily. Congress should expand prohibited retaliation across all government sectors to include these spurious investigations.

And if Congress truly wants to ensure that blowing the whistle is not a career-ending decision for Federal employees, it must also make retaliatory security clearance action, such as revoking someone's clearance, a violation of the Whistleblower Protection Act.

Additionally, recent events have highlighted a troubling lack of clarity around whether whistleblowers have a legal right to anonymity. For example, The Washington Post is suing the Special Inspector General for Afghanistan Reconstruction to force the release of the identities of individuals who spoke to the watchdog about the war in Afghanistan.

While IGs are obligated to maintain a whistleblower's confidentiality unless disclosure is unavoidable, IGs are not the only people in government who are in a position to out a whistleblower. For example, if a whistleblower raises concerns with their supervisor before formally filing a complaint, then that supervisor is in a position to out the whistleblower and the explicit prohibition in the IG Act does not apply. It is an open question whether the law cur-

rently covers outing a whistleblower as reprisal and that should be clarify.

Maintaining anonymity is one of the best ways for whistleblowers to protect themselves from professional and personal retaliation. Indeed, both this committee's majority and minority websites promise to maintain the confidentiality of whistleblowers who disclose wrongdoing to the committee.

Before I conclude, I want to take a moment to address two pieces of misinformation about whistleblowers that have been repeated with some frequency.

Some have argued inaccurately that the recent Ukraine whistleblower improperly colluded with the House Intelligence Committee before making their disclosure and that the whistleblower's reported bias against the President undermined the disclosure.

For intelligence community whistleblowers the consequences of not following the law to the letter can be dire. Not only would it negate their ability to benefit from whistleblower protection, but they might also find themselves facing criminal prosecution, as has happened repeatedly in the past.

It is entirely appropriate for a whistleblower to ask the committee of jurisdiction for guidance on how to proceed in compliance with the law. Furthermore, even if the whistleblower had approached the committee to make a disclosure, that would not violate the law.

Congress also made clear through legislation in 2012 that a whistleblower's motive could not be used as a reason to deny them legal protections for making a disclosure. That's because motive does not determine whether a whistleblower's disclosure is legitimate. Exposing a whistleblower serves no public benefit and instead undermines the public interest in providing strong safe channels for insiders to report wrongdoing.

Whistleblowers and taxpayers alike deserve a system that makes it easy and safe for whistleblowers in any sector of government to report wrongdoing without putting their personal or professional well-being on the line, but we have a ways to go before that is the case.

I look forward to your questions.

Mr. CONNOLLY. Thank you. Great timing.

Mr. Rosenzweig.

STATEMENT OF PAUL ROSENZWEIG, RESIDENT SENIOR FELLOW, NATIONAL SECURITY AND CYBERSECURITY, R STREET

Mr. ROSENZWEIG. Chairman Connolly, Ranking Member Jordan, members of the subcommittee, I thank you for the invitation to appear before you today and present testimony.

My name is Paul Rosenzweig, and I am a senior fellow at the R Street Institute. I'm also a principal and founder of Red Branch Consulting, a small consulting company, and a professorial lecturer in law at George Washington University.

In addition to being a lecturer at George Washington, I am a former adjunct lecturer at the Medill School of Journalism at Northwestern University, where along with two colleagues I coedited a book, "Whistleblowers, Leaks and the Media: The First Amendment and National Security," that was jointly published by

Medill and the American Bar Association. That work, along with my experience in the national security field, brings me here today.

Though I'm 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.

I'd summarize my testimony with the following four basic points.

First, in American history whistleblowers are not an afterthought. Though they are not mentioned in the Constitution, this 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 and the First Amendment.

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' longstanding view, dating back to before the Nation's founding, that providing whistleblowers with adequate protection and incentives to come forward serves 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 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 that 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 to provide whistleblowers with the protection of anonymity when they wish it.

All people respond to incentives and any wise system of law will recognize that.

Thank you very much, and I look forward to answering your questions.

Mr. CONNOLLY. Thank you so much.

Mr. Horowitz.

STATEMENT OF MICHAEL E. HOROWITZ, INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. HOROWITZ. Thank you, Chairman Connolly, Ranking Member Jordan, members of the subcommittee. Thank you for inviting me to testify today.

Information provided by whistleblowers plays a critical role in the ability of inspectors general to conduct nonpartisan independent oversight of Federal programs and operations.

As DOJ inspector general and as chair of the Council of the Inspectors General on Integrity and Efficiency, or CIGIE, one of my highest priorities has been to educate Federal employees about the importance of whistleblowing and to ensure that those who blow the whistle are protected from retaliation or even the threat of retaliation.

For example, in July 2019, as part of CIGIE's enhancement of Oversight.gov, CIGIE launched a new whistleblower protection page that provides informational resources to assist potential whistleblowers in determining where to make a protected disclosure or where to file a retaliation claim.

Also in July of last year CIGIE issued a report, "Whistleblowing Works: How Inspectors General Respond to and Protect Whistleblowers," which illustrates the important contributions of whistleblowers to OIG efforts to root out waste, fraud, abuse, and misconduct, and to improve government programs. The report can be found on Oversight.gov.

Additionally, CIGIE is actively complying with the Whistleblower Protection Coordination Act, which this committee and Congress passed in 2018, by helping to develop best practices for handling protected disclosures and enforcing whistleblower protection laws.

Let me turn briefly to CIGIE's efforts to protect whistleblowers from retaliation.

Whistleblowers perform an essential public service in ensuring accountability in government, and no one should be retaliated against or threatened with retaliation for bringing forward information that they reasonably believe evidences waste, fraud, abuse, or misconduct.

This is not just a principle that IGs agree with, it's a principle enshrined in the law. On a bipartisan basis Congress has passed numerous laws to protect whistleblower confidentiality and prohibit retaliation against whistleblowers.

For example, the IG Act expressly prohibits inspectors general from disclosing the identity of a whistleblower without their consent except in very limited circumstances. And the Whistleblower Protection Act of 1989 makes it unlawful for any government actor to retaliate or threaten to retaliate against a whistleblower who has brought a reasonable concern of misconduct forward.

Since 1989, Congress has extended similar protections to Federal contractors and grantees, intelligence community employees and contractors, and military personnel.

Under each of these laws inspectors general play a central role in receiving evidence of criminal or administrative wrongdoing because we have the independence and expertise to credibly assess the information and take appropriate steps to correct identified misconduct. And under every applicable anti-retaliation law em-

ployees are specifically protected for disclosing information to an inspector general.

When a whistleblower alleges retaliation for providing allegations of wrongdoing, inspectors general have the responsibility to conduct a thorough and independent assessment of the facts. OIG whistleblower investigations not only seek justice on behalf of whistleblowers, but also seek to deter potential future reprisals and to promote accountability for those who have retaliated or engaged in other misconduct.

To effectively conduct such investigations, OIGs must have access to all relevant testimony and witnesses, including individuals who may resign or retire during the course of the OIG investigation. However, with the exception of the Department of Defense OIG, OIGs do not have the authority to compel testimony from former agency employees in whistleblower retaliation investigations or in other investigations.

Our efforts to investigate whistleblower retaliation, promote accountability, and deter future misconduct have hampered our ability to receive testimony from former employees. To remedy this, CIGIE has identified testimonial subpoena authority as one of its primary legislative priorities, and this committee has worked in the past on a bipartisan basis with us to support such legislation.

The IG community understands the potential concerns with granting such authority and therefore supports incorporating appropriate controls to ensure this authority is exercised properly.

I look forward to working with this committee as we have in prior Congresses to advance this crucial measure that would both enhance whistleblower protection and independent oversight.

Thank you, and I look forward to answering your questions.

Mr. CONNOLLY. Thank you, Mr. Horowitz.

The chair now recognizes the distinguished chairwoman of the full committee, Mrs. Maloney, for five minutes.

Mrs. MALONEY. Thank you. I thank the distinguished Chairman Connolly for holding this important hearing today on whistleblower protections.

Whistleblowers are vital to Congress' constitutional oversight responsibilities. They are often the first line of defense in fighting waste, fraud, and abuse. And without strong protections and the ability to remain anonymous, whistleblowers could face retaliation. This could, I believe it would chill their willingness to report abuses to us, and that would hurt our ability to fulfill our constitutional duties of oversight.

Interfering with an employee's communications with Congress is already illegal, and so is retaliating against employees who engage in such communications. But as we have seen this past year, some of our leaders do not seem to value whistleblowers in the same way that we do.

For these reasons, I am working with Chairman Connolly and several other colleagues on legislation to improve existing protections for whistleblowers even further.

And now I want to move to questions.

Ms. Hempowicz, as you know, it is well recognized that whistleblower disclosures are a vital asset in promoting government accountability and limiting waste, fraud, and abuse. Whistleblowers

make disclosures at great risk to their careers, in some cases to their well-being and literally to their lives. And for this reason it is absolutely essential that the confidentiality of whistleblowers is protected. And without government assurance that a whistleblower can maintain being anonymous, a chilling effect may occur.

So, can you tell us why you believe it's important that whistleblower confidentiality be protected? And do you think that they are sufficiently protected?

Ms. HEMPOWICZ. Thank you for that question, Chairwoman.

Absolutely, I think anonymity should be guaranteed to whistleblowers that want it. I don't think every whistleblower wants to remain anonymous, but that should be their decision. I think not guaranteeing that right runs the risk of deterring would-be whistleblowers from coming forward, and that means waste, fraud, and abuse is not reported.

So, I think to make sure that whistleblowers do come forward, every protection needs to be put into the law to make sure that they have an incentive to come forward.

Mrs. MALONEY. OK.

Mr. Colapinto, do you believe that we have sufficient confidentiality now for protection or is there more that we can do or should do?

Mr. COLAPINTO. There is a lot more that we could do.

Mrs. MALONEY. Such as?

Mr. COLAPINTO. Well, for example, the whistleblower provisions of the Federal civil service laws can be amended in order to make it actionable so that employees can bring a complaint in the event that they are harassed or their confidentiality is breached.

There should also be stiffer penalties and the Privacy Act can be enhanced to provide for civil remedies as well. I think that Congress should also look at stiffer penalties for managers and supervisors who may, in fact, breach the confidentiality.

I have never seen arguments like we are seeing out there today where Congress passes very clear prohibitions for OSC and the inspectors general not to reveal the identity of whistleblowers when they come forward confidentially and somehow that has turned into, well, that only applies to them, so anybody else could breach the confidentiality. I think that there is a lot more that can be done to ensure that everyone gets the message that once a whistleblower goes confidential or anonymous they are not to be unmasked.

Mrs. MALONEY. OK.

Also, Mr. Rosenzweig, would you followup? Do you believe there are currently weaknesses in it for Federal employee whistleblowers? And what more could we do to protect them?

Mr. ROSENZWEIG. Well, as Mr. Colapinto said, Federal whistleblowers don't have a private cause of action against those who might disclose their identity. They have weakened protections within the workplace itself.

But I think more to the point, the degradation in confidentiality and anonymity that we promise whistleblowers is eroding the ability of Federal employees who uncover waste, fraud, and abuse to transmit those allegations with the candor and forthrightness that we as citizens and you as Congress would wish to have. You must want, I think, to have a fulsome—a full disclosure from anybody

who has such information, and by threatening confidentiality you erode that.

Mrs. MALONEY. And my time has expired. I have a lot more questions. This is an important issue and it is one that is very relevant today.

I yield back. Thank you.

Mr. CONNOLLY. I thank the distinguished chair.

The chair recognizes Mr. Meadows, the ranking member of the subcommittee.

Mr. MEADOWS. I thank the chairman. I'm going to yield my time to the gentleman from Kentucky, Mr. Massie.

Mr. CONNOLLY. Mr. Massie is recognized for his five minutes.

Mr. MASSIE. Thank you, Mr. Chairman.

In March 2013 former Director of National Intelligence James Clapper spoke an untruth when he was asked by Senator Wyden if the government was collecting information on millions of Americans. Three months later, Edward Snowden leaked documents that showed that what James Clapper said was, indeed, not true. James Clapper later characterized his answer as the least untruthful thing that he could say.

Later, people criticized Edward Snowden for not using whistleblower protections, but then this debate came about: about whether contractors were covered, because Edward Snowden was not an employee. I've gone back and looked at President Obama's policy directive of 2012 and it is silent on the issue of contractor and doesn't necessarily define employee.

Mr. Horowitz, today, I know there have been some revisions and some changes and maybe some clarifications, today would a contractor like Edward Snowden be covered under the whistleblower protections if he wished to disclose the information that was in his possession that showed that James Clapper was not accurate in his answer?

Mr. HOROWITZ. Well, it's my understanding that under the law as it currently exists that members of the intelligence community have the means by which in a whistleblower protection law specific to the intelligence community to make a report to the inspector general and, depending upon the circumstances, have that information——

Mr. MASSIE. I hate to interrupt you, but members of the intelligence community, is that defined as contractors who work in the intelligence community? Does that include people like Edward Snowden?

Mr. HOROWITZ. My understanding is that, yes, contractors can report such conduct to the IG over which agency they're working for as a contractor.

Mr. MASSIE. Can they also come to this committee?

Mr. HOROWITZ. I believe they then would have to follow the Intelligence Community Whistleblower Protection Act and provisions there.

Mr. MASSIE. Are the rules different for them than employees?

Mr. HOROWITZ. I don't believe so, but I would——

Mr. MASSIE. Can an employee come to this committee?

Mr. HOROWITZ. I'm sorry?

Mr. MASSIE. Could an employee who wishes to be a whistleblower——

Mr. HOROWITZ. They would have to go through the steps under the law. The Intelligence Community Whistleblower Protection Act provides the means by which that would occur.

Mr. MASSIE. So, they couldn't come directly to this committee or another committee?

Mr. HOROWITZ. The way Congress has set up the statutory scheme is that in the intelligence community—and this is, I believe, in section 8H of the IG Act now—employees go through their IGs, who make a finding.

Mr. MASSIE. Employees, does that include contractors?

Mr. HOROWITZ. I believe it does.

Mr. MASSIE. You believe, but you're not sure and you are the IG

Mr. HOROWITZ. I can certainly get back to you on it.

Mr. MASSIE. OK. That's really important, because I think perspective whistleblowers are watching this hearing, and they want some clarity on this. I know we don't have—let me move on.

Ms. HEMPOWICZ. May I answer your question?

Mr. MASSIE. Sure.

Ms. HEMPOWICZ. So, contractors are afforded the same whistleblower protections under law now that intelligence community employees have. And the law says that they can go to the congressional Intelligence Committees.

Mr. MASSIE. OK. Great. I would feel more comfortable if the IGs knew that and could repeat that in a hearing here to us today.

So, the process—what is the process? Let me back up.

Does it cover former employees? Let's say somebody is fired and they want to be a whistleblower. Can they be a whistleblower after they're fired? Do they still qualify?

Ms. HEMPOWICZ. For the most part, yes, sir.

Mr. MASSIE. OK. And so, what's the process they follow? Like a former employee that wants to be a whistleblower, Mr. Horowitz, what's the process they should follow?

Mr. HOROWITZ. So, under 8H of the act they would take it to the inspector general for the agency that they were employed by. The inspector general makes a legal determination about the allegations. The allegation——

Mr. MASSIE. OK. I've got 30 seconds, let me just finish this line of questioning. I'm sorry to interrupt you.

So, what about leaking it to a newspaper reporter, would that work, without going to the IG?

Mr. HOROWITZ. Leaking it to—if it's classified information, which is what we are usually talking about in intelligence, you cannot leak classified information to——

Mr. MASSIE. Can you just leak other things? What if you leak it to an intermediary?

Mr. HOROWITZ. Actually there is a Supreme Court case on this, McLean v. United States.

Mr. MASSIE. OK. What if you leak it to an intermediary who leaks it to a reporter?

Mr. HOROWITZ. It depends on——

Mr. MASSIE. Let me ask you this. Did James Comey——

Mr. HOROWITZ. Can I finish?

Mr. MASSIE. Let me ask one last question.

Mr. HOROWITZ. Can I finish my answer?

Mr. MASSIE. Did James Comey follow the proper procedure for whistleblowers when he used an intermediary to leak to the newspaper?

Mr. CONNOLLY. In one second.

Mr. HOROWITZ. So, let me answer the question before, which is——

Mr. MASSIE. I'm most interested in the last question.

Mr. HOROWITZ. I'll get to that in a minute.

But so there is clarity here, because the FBI whistleblower laws are somewhat unique, because they have been carved out of the whistleblower laws——

Mr. MASSIE. Can they leak to the newspaper?

Mr. CONNOLLY. No, no, no, no, no. The gentleman's time has expired.

Mr. HOROWITZ. So, under the McLean case, which was a Supreme Court decision involving a then air marshal at the Department of Homeland Security, they attempted to fire or did fire that individual for disclosing information that they had not authorized an air marshal to disclose to a newspaper. The Supreme Court found that that was a violation of the law to fire him and that the employee was not prohibited from making the disclosure——

Mr. CONNOLLY. Thank you, Mr. Horowitz.

Mr. HOROWITZ. So, let me just, if I could, getting back to the FBI, that is different, and as we laid out in our report about Mr. Comey's disclosure of the information to the newspapers, that was not consistent with the procedures of the FBI.

Mr. CONNOLLY. Thank you very much.

Mr. MASSIE. Thank you, Mr. Chairman, for indulging me.

Mr. CONNOLLY. Thank you. And did you—all right.

The chair now recognizes the gentleman from Maryland, Mr. Sarbanes, for five minutes.

Mr. SARBANES. Thank, Mr. Chairman.

Thanks to the panel. Obviously a very, very important topic.

I just wanted to make the point, first of all, I thank all of you who've pointed out that a whistleblower stepping forward, particularly when they are working inside our Federal Government and within agencies that have a particular mission, they are anything but a traitor and I think in so many ways a patriot, because in that context what they are stepping up to do is make sure that the mission of their agency is carried out in a way that meets the expectations of the taxpayers out there, American citizens, certainly Members of Congress. So, everything we can do to protect them I think obviously is critical.

Mr. Colapinto, I want to ask you a question, based on actually testimony in Ms. Hempowicz's testimony, I think written, where she talks about—we all know this—that many lawmakers and the President in fact argued that the Ukraine whistleblower should not be afforded confidentiality or other whistleblower protections because the whistleblower conveyed information that was, quote, "secondhand."

So, Mr. Colapinto, can you just talk for a moment, is secondhand information common from whistleblowers? Is that something that we see? Is that an important source of information?

Mr. COLAPINTO. It's very common. And in fact earlier this month there was actually an article published in the Harvard Business Review about an academic study or a study in the field of whistleblowing which found that secondhand information in the corporate whistleblowing context is actually more important and it actually—it leads to more whistleblower disclosures by encouraging secondhand information.

And secondhand information oftentimes is better than firsthand information because it leads to the early discovery of problems that aren't known. If you wait for the firsthand reporter, it may be far down—the misconduct may be far down the line, leading to a bigger problem.

So, encouraging more whistleblowing, encouraging secondhand reporting——

Mr. SARBANES. It's sort of like an early—you're saying it's kind of like an early warning system.

Mr. COLAPINTO. That's exactly what whistleblowers are, and that's what should be encourage.

Mr. SARBANES. Yes. But the secondhand information in particular may be able to play that role.

In a December 2019 survey which the Government Business Council conducted of 691 Federal civilian employees, 34 percent answered, and I quote, "The attacks on the whistleblower by President Trump and various congressional Republicans have made it much less or somewhat less likely that I will report an act of perceived wrongdoing to the appropriate authorities."

Mr. Rosenzweig, are you concerned about the impact of the rhetoric that we hear sometimes from some of our colleagues when they are referring to the whistleblower who alleged misconduct by the President?

Mr. ROSENZWEIG. Well, sir, I went to the University of Chicago. They taught us that incentives are everything, that people are essentially rational actors who respond to external stimulus.

If whistleblowers perceive a greater risk to their personal livelihoods, to their employment, to their personal safety they will be less likely to come forward. That is as sure as night follows day and rain follows the sun.

So, yes, it is inevitable that adverse rhetoric that challenges the integrity of or the confidentiality of whistleblowers will have the second order effect of systematically decreasing the likelihood that whistleblowers will be willing to come forward. That's an iron law of human nature and of economics.

Mr. SARBANES. And it's not just the President's sort of undermined that perspective with respect to whistleblowers. I want to thank Mr. Horowitz and Mr. Fine and 65 other Federal IGs who sent a letter to the assistant attorney general, Steven Engel, writing that you had concerns that the Office of Legal Counsel's opinion would have a chilling effect on employees, contractors, and grantees.

And that's an important thing to put in the record. I'd ask that we do that, unanimous consent to place that letter into the record.

Mr. CONNOLLY. Without objection.

Mr. SARBANES. The last thing I'd just like to ask, and any of you can volunteer an answer here, is as we've been discussing it I've been thinking to myself we have these statutes, obviously they're incredibly important, but creating a culture inside of the government, inside of these agencies among supervisors, others who are going to be in a position to receive a whistleblower complaint that says this is an appropriate action for you to take and we are here to protect you. In other words, a culture that says that this is something that's important to do and ought to be respected.

What kind of training or other things happen, and could there be more, to make sure that that culture, that positive reinforcing culture exists? Anybody who wants to respond could.

Mr. FINE. If I could respond. That is a key, to make sure that we are training, educating employees and supervisors about their rights and responsibilities with regard to whistleblowers and not to treat whistleblowers as traitors or anything like that, but that they provide valuable information.

Not all of it is supported. Sometimes they don't know all the facts. But they should be encouraged to provide that information and we need to investigate it fully, fairly, and take each complaint seriously.

And what is important, too, as I point out in my testimony, is when we do substantiate cases of retaliation or reprisal that management takes appropriate action. And that sends a message that reprisal will not be tolerated and that disclosures are valued. And if they do not do that in a timely way, in a full way, in a fair way, it sends the opposite message. So, that is very important as well.

Mr. CONNOLLY. Thank you, Mr. Fine. The gentleman's time has expired.

The chair recognizes the gentleman from Georgia, Mr. Hice, for his five minutes.

Mr. HICE. Thank you, Mr. Chairman, and thank you for holding this hearing.

Thank each of our panelists for being here.

Important discussion about whistleblowers, and, tragically, I believe, we're watching the protection of whistleblowers these days become very much twisted in politics. This is something I hear constantly in my district, the concern that certain actors within our political system at this particular point in time, have especially the whistleblower statutes to attack the President. And case in point, while we're right here today right now, across the way in the Senate, they are litigating a baseless impeachment case that all started with the whistleblower.

Of course, there's been a lot of media attention added to the drama, but there's still a lot of questions that are surrounding the spark that got this whole thing started. Now here's what we do know. There's a lot we don't know, but here's what we do know: On August 12th, 2019, an anonymous individual filed a complaint with the inspector general of the intel community against the President. We know that. We also know that the individual admitted to having no actual firsthand knowledge of the events described in their complaint. Instead, they relied on rumors, secondhand information, and public news clippings. We know that. We also know

that press reports have said that this individual admitted to having a close relationship with former Vice President and current Presidential candidate Joe Biden. We know that this individual was in secret communication with House Intel Chairman Adam Schiff and/or his staff.

So, to this day, as far as I know, Chairman Schiff is the only person who knows the identity of this particular whistleblower. Those are some things we know. There's a lot of things we don't know. A lot of questions we have, like not only the identity of the whistleblower but whether anonymity is actually protected in this case. Does this individual, in fact, warrant whistleblower status? That's a legitimate question in this particular situation. The extent of the individual's political bias and to what degree this individual coordinated with Chairman Schiff and/or his staff.

Now all this stuff eventually is going to come out. In this city, of course, it always does. There will eventually be a day of reckoning, but, Mr. Horowitz, I realize that the intel community is not within your jurisdiction—I get that—but you have vast experience, and so, based on your experience overall, have you ever seen a case similar to this where there is an anonymous complaint with no firsthand information against the President by an individual as having communications with the staff of the other political party?

Mr. HOROWITZ. I'm not aware of a case other than this one personally on those facts, but just to be clear, we get anonymous complaints all the time on our——

Mr. HICE. Yes, but this one, in particular, like this, and I want to keep going because——

Mr. HOROWITZ. I don't have any particular knowledge.

Mr. HICE. OK. I didn't think you would. Again, relying on your experience, are you familiar with any Federal law that would grant anonymity to this individual given the circumstances here?

Mr. HOROWITZ. The IG Act requires us as IGs to protect the identity of individuals who come to us absent very limited circumstances. So, anybody who comes to an IG, we're going to be in a situation protecting the identity.

Mr. HICE. OK. It's my understanding that the IG, the intel IG, is to protect the—not to disclose the identity, but I'm not familiar with any statute that would guarantee that.

Mr. HOROWITZ. The IG Act doesn't have 100 percent guarantee in it.

Mr. HICE. OK.

Mr. HOROWITZ. It has a limited exception in there. For example, we face this when there's a court order and a subpoena of some sort that would require someone to testify in court. That would then be up to a judge to decide how to proceed.

Mr. HICE. Mr. Chairman, I would ask unanimous consent to put into the record an article from The Washington Post that deals with this whole issue.

Mr. CONNOLLY. Without objection.

Mr. HICE. Thank you.

Mr. CONNOLLY. I thank the gentleman.

The chair now recognizes the gentlelady from California for her five minutes, Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman.

And thank you all for being here. At the outset, I would like to submit an open letter to the American people signed by former inspectors general who are interested in making sure that all Americans can be guaranteed safety, and that's what whistleblowers provide.

Mr. CONNOLLY. Without objection, it will entered into the record.

Ms. SPEIER. Thank you.

The inspector general of the intelligence community testified before the Intelligence Committee that he had investigated the complaint, found it to be credible and urgent. That was then sent to the Director of National Intelligence who decided not to do what the law requires, which is to automatically send it to the committees of jurisdiction, the Intelligence Committees of both Houses, but to tell the White House. So, I guess my question to any one of you is, what do we have to do within that particular law to make sure that the Intelligence Committees get access to complaints that are filed that are deemed to be both urgent and credible?

Ms. HEMPOWICZ. I can take this question. I think it's important to remove some of those steps in between. So, I think it should be possible for the inspector general of the intelligence community to transmit those credible complaints of urgent concern directly to the committees of jurisdiction rather than go through the Director of National Intelligence for starters.

Ms. SPEIER. So, historically, they always have been sent to the committees, even when they weren't found to be credible or urgent. So, this was a divergence that took place that, frankly, smacks of political interests, does it not? You don't have to answer that.

Mr. Fine, you note in your written statement that there's a small but disturbing trend and called to account DOD managers that have failed to take action even after your office has substantiated claims of reprisal having taken place. I'm disheartened to hear about the results of the Leidos case in which a subcontractor employee reported about sexual harassment; your office provided an investigative report recommending compensatory damages; and the Under Secretary of Defense for Acquisition and Sustainment disagreed without real explanation.

Why do we spend taxpayer money empowering you to do investigations to substantiate complaints, you make recommendations, and then the agency can decline to move forward with the investigation and the results that you have come up with?

Mr. FINE. Well, that's the scheme that—that's the legislation that has been created that we are not the final arbiters of that. We're the investigators. We did do a full investigation. We provided the reasons why, a detailed analysis about why we thought it was substantiated. It took us a long time to get a response from the Department. When we did get a response, it was not very detailed or thorough or persuasive. We pushed back, and eventually we got the ultimate decision by the Under Secretary. We then came to Congress and notified you of that because the power that we have is the power of the spotlight. We shine a spotlight on this, and we do think it is important that the components—the agencies take action. We're not infallible. We're not always right, but we try to explain why we reached our conclusions, and we think the Department ought to do the same thing and take appropriate action.

It is a disturbing trend. I point out in my testimony that there are at least two other cases where the same thing happened. They declined to take action in a substantiated case without providing detailed or persuasive reasons why. That is a disturbing trend, and we think that a spotlight ought to be shined on that and questions ought to be asked about that.

Ms. SPEIER. Well, beyond a spotlight, what would you recommend? Maybe you should take this as a request that you can respond to the full committee.

What kind of changes would you like to see in the law so that this discretion isn't such that the facts that are verified and your recommendations are made and people are denied justice?

Mr. FINE. Well, the Senate Armed Service Committee in the NDAA, a conference report to the NDAA, required that both we and the IG for the Department of Homeland Security put in our semi-annual reports any time that that happens or that the Department has not responded in a timely way. So, I think transparency is an important thing. I don't think we ought to be the final arbiters; we're not judge and jury. But we ought to provide transparency on when this happens, and then people ought to be asked about this. I mean, hearings are good, questions are good, and I think that can have a positive impact as well.

Mr. CONNOLLY. Thank you, Mr. Fine.

The gentlelady's time has expired.

The chair now recognizes the gentleman from Kentucky for his five minutes of questioning.

Mr. MASSIE. Thank you, Mr. Chairman.

Because I used Mr. Meadows' time, I'm going to yield to my five minutes to Mr. Jordan.

Mr. CONNOLLY. Mr. Jordan is recognized for five minutes.

Mr. JORDAN. I thank the gentleman for yielding.

I thank the chairman.

Ms. Hempowicz, in your closing statement—closing part of your opening statement, you said: Some have argued inaccurately that the recent Ukraine whistleblower improperly colluded with the House Intelligence Committee.

"Some have argued inaccurately." How do you know that the argument's not accurate?

Ms. HEMPOWICZ. Well, I based that simply on what's been said by the Acting Director of National Intelligence and the intelligence community inspector general as well as the whistleblower's attorneys who say that this individual is——

Mr. JORDAN. You have no knowledge—you didn't talk to Chairman Schiff, have you talked to Chairman Schiff about it?

Ms. HEMPOWICZ. No, sir.

Mr. JORDAN. Did you talk to his staff about the interaction they had with the whistleblower?

Ms. HEMPOWICZ. No, sir.

Mr. JORDAN. Did you talk to the ICIG about the interaction he had with the whistleblower?

Ms. HEMPOWICZ. No, sir, but I will say the committee staff did also say that they have talked publicly about——

Mr. JORDAN. Well, you made a blanket statement. You said: Some have argued inaccurately.

We have no idea what took place between the whistleblower and Chairman Schiff's staff, and yet you come in front of the Oversight Committee on a hearing on whistleblowers, and you say: Some have argued inaccurately that the recent Ukraine whistleblower improperly colluded with the House Intelligence Community.

We have no idea.

Ms. HEMPOWICZ. Well, sir, I'm not quite sure what improper collusion would look like in that aspect because the intelligence community whistleblower would be able to go to the committee and make their disclosure under the law. So, I'm not quite sure——

Mr. JORDAN. But——

Ms. HEMPOWICZ [continuing]. What they could've done that would have been improper.

Mr. JORDAN. Well, we know the chairman thought that, when he was first asked about it, he thought it was better off to say something that wasn't accurate—namely, that his staff had no contact with the whistleblower—only to have to correct that a few days later and say: Whoops, we actually did.

So, for some reason, he was willing to hide it, and yet you come here and say there was nothing done improperly. And you've not talked to any of the people who participated, and, frankly, none of us have. No one in the country has.

And I've got a chance to look at a little bit of the ICIG's testimony. It's interesting that Chairman Schiff has failed to release the inspector general of the intelligence community's testimony. He did have a chance to go through and look at all this, but, you know, Chairman Schiff interviewed 18 people; he's released 17 transcripts of those 18 people that he interviewed in this impeachment inquiry but not the inspector general.

You go on to say this: Before making their disclosure and that, the quote, ″whistleblower reported bias against the President″ undermined the disclosure.

So, bias doesn't matter?

Ms. HEMPOWICZ. According to Congress, no. You guys updated the law in 2012 to say that motive couldn't be considered a factor that would undermine whistleblower protection because the facts matter more.

Mr. JORDAN. As far as whistleblower protection goes, I get that, but motive always matters. When you're evaluating the claim of anybody, you always have to look at bias and motive. And yet, again, you come in front of the Oversight Committee today on a hearing about whistleblowers, and you say bias doesn't matter, particularly bias against the President of the United States in an impeachment proceeding doesn't matter?

Ms. HEMPOWICZ. It certainly doesn't matter more than the facts, and I believe that most of the facts alleged in the underlying complaint have been corroborated.

Mr. JORDAN. Actually, there are all kinds of things that the whistleblower got wrong in the complaint because, again, as Mr. Hice pointed out, the whistleblower had no firsthand knowledge. Do you know, Ms. Hempowicz—you seem to be an expert on all this—do you know if we ever in the impeachment inquiry in the House, do you know if we talked to any of the people who did have firsthand knowledge?

Ms. HEMPOWICZ. I think you have not, and I think mostly because they have refused to come before the committee.

Mr. JORDAN. No. I'm talking about the people the whistleblower alleges in his complaint. Bullet point No. 1 of the whistleblower's complaint, he says this: Over the past four months, more than half a dozen U.S. officials have informed me about the complaint.

Do you know who those more than half a dozen U.S. officials are?

Ms. HEMPOWICZ. No, sir.

Mr. JORDAN. I don't either. No one knows because, guess what? We didn't get to talk to the whistleblower. The whistleblower, who is biased, and the whistleblower, who met with Adam Schiff's staff and then Adam Schiff said, "No, he didn't," only later to have to correct that and say, "Well, yes, he did."

And remember what else Mr. Schiff said about the whistleblower. Early on in this process back in September, guess what Adam Schiff said? "We look forward to hearing from the whistleblower." Remember that?

Ms. HEMPOWICZ. I believe that's when the whistleblower wanted to testify publicly.

Mr. JORDAN. That's when we all wanted to hear from the whistleblower, including Adam Schiff, but suddenly that changed when Adam Schiff made the other statement that they hadn't talked to—that his staff had not met with him when in fact, they had. I just find it amazing that you can say, "Some have argued inaccurately that the recent whistleblower improperly colluded with House Intelligence Committee," and you have no knowledge whether it was accurate or not, whether they colluded or not. Sure looks like they did, particularly in light of the fact that the chairman tried to hide the fact that they met in the first place.

Ms. HEMPOWICZ. Again, I'm just not quite sure what could be improper about those conversations, and so it's difficult for me to imagine what could have gone on, but I can't speak to why Chairman Schiff said what he said. Like I said earlier, I have not spoken with him.

Mr. JORDAN. I thank the chairman. I yield back.

Mr. CONNOLLY. Thank you, Mr. Jordan.

The chair now recognizes the gentleman from Maryland, Mr. Raskin, for five minutes.

Mr. RASKIN. Mr. Chairman, thank you very much, and I want to thank you and all of our colleagues for your indulgence. I'm chairing another hearing right now, and so let me proceed quickly.

Ms. Hempowicz, let me come quickly to you because you're with the Project on Government Oversight, which represents whistleblowers who are blowing the whistle on waste and fraud and abuse, governmental corruption, waste of the taxpayers' money. Is that right?

Ms. HEMPOWICZ. We advocate for whistleblowers; we don't represent them.

Mr. RASKIN. You advocate for them?

Ms. HEMPOWICZ. But we advocate for them.

Mr. RASKIN. OK. So, in other words, you would not represent them in court, but you advocate for their interests——

Ms. HEMPOWICZ. Yes, sir.

Mr. RASKIN [continuing]. And to protect them. Why do people get so mad about whistleblowers? Why are people so upset about whistleblowers?

Ms. HEMPOWICZ. I'm not quite sure, honestly. I think whistleblowers are patriots who are doing what all Federal employees take an oath to do, which is to uphold the laws of our country and whistleblowers come forward when they see that those laws, rules, and regulations are not being upheld. So, I don't know how to answer your question, but I'm probably not the right person to ask that.

Mr. RASKIN. Well, we have had to legislate to protect whistleblowers in the past because they often irritate people. People get mad at them. They're powerful interests that come down hard on them.

Mr. Colapinto, let me ask you, what's going on when people get incensed and irate about whistleblowers?

Mr. COLAPINTO. "Nobody likes a rat." That was the name of a title of another academic study that created a whistleblowing game. And what they found out was that, even amongst people who were honest in a group, once the whistleblower's identity became known that they had blown the whistle, the members of the honest group shunned that person. It is part of human nature that, if your integrity or your ethics are attacked or your political position is attacked, people will circle the wagons, and they will strike out and create intimidation. And that's what happens with whistleblowers.

Mr. RASKIN. No, that's fascinating. You're telling me, as a matter of social psychology and empirical documentation, you're saying that, even when a whistleblower comes forward to tell the truth and the revelations and the disclosures are proven to be true and, say, they saved the government millions of dollars or they blow the whistle on a criminal scheme or corruption, still people are mad at them for what they did?

Mr. COLAPINTO. Yes, because what is going on is a person is raising an issue of importance that may impinge on budgets; it may embarrass the department; and people don't want to be associated with that because whistleblowing is known to be a stigma and is career-limiting.

Mr. RASKIN. OK. So, why is it that, in the strong democracies on Earth, we've adopted whistleblower protections? What is the social function played by protections of the whistleblowers?

Mr. COLAPINTO. Because we want to save taxpayers' money. We want government to be efficient. We want to combat government waste. We want to combat fraud, and in the final analysis, nobody really wants to work for a crook or to have a government that's inefficient and wastes taxpayer money.

Mr. RASKIN. What are the major gaps that still exist in Federal statutory protections for whistleblowers now? If you could write a new statute to fill it in, what are the major areas that you would target?

Mr. COLAPINTO. Well, there are three things, as I mentioned in my opening statement, was that, you know, I would recommend and suggest increasing confidentiality to allow people to bring an action if their confidentiality or privacy is breached after they were guaranteed confidentiality under the statute.

The second thing——

Mr. RASKIN. Let me pause you right there because there's a big attack on confidentiality of whistleblowers right now, saying, "We want to out the whistleblowers. We want to hold them up to the light," and so on.

Explain why whistleblowers should have confidentiality and how that doesn't endanger anybody else's due process?

Mr. COLAPINTO. Because what it does is that it provides a safe channel. Any organization, whether it's a corporation or the government in a large department, should be encouraging whistleblowing. It makes them more effective. It makes them more efficient. And by making it confidential, you eliminate that stigma hopefully, unless the person has gone internal first and is widely known or is fingerprinted.

Mr. RASKIN. Well, why would somebody want to maintain their confidentiality if they're blowing the whistle on corporate corruption or child sexual abuse or someone stealing money?

Mr. COLAPINTO. Because the track record has shown that people lose their careers.

Mr. CONNOLLY. Thank you, Mr. Colapinto.

The gentleman's time has expired, but I thank him for coming from his hearing to this important hearing.

The other gentleman from Kentucky, Mr. Comer, is recognized for five minutes.

Mr. COMER. Thank you, Mr. Chairman.

I think we all know by now the FBI doctored an email to get a FISA warrant in order to spy on the Trump campaign and that's what I want to address.

Mr. Horowitz, last month, in an exchange with Senator Lee, you testified you couldn't rule out political bias contributing to surveilling Trump campaign associates. You testified, and I quote, ″We were not in a position with the evidence we had to make that conclusion, but I am not ruling it out,″ unquote.

I want to go over a few of those biased messages this FBI lawyer texted when candidate Trump was elected right after the election. Quote,″I'm so stressed out—I'm so stressed about what I could've done differently.

Next quote, ″I just can't imagine the systematic disassembly of the progress we made over the last eight years.″

Next quote, ″The crazies finally won.″

Next quote, ″This is the tea party on steroids.″

Next quote, ″The GOP is going to be lost. They have to deal with an incumbent in four years.″

Next quote,″We have to fight this, again.″

And the last quote from the lawyer with the FBI, quote, ″Pence is stupid.″

Now, he also texted someone else, ″Viva la resistance. Of course, that's French for 'long live the resistance'.″ He texted that a few weeks after Donald Trump was elected President. Is that correct?

Mr. HOROWITZ. That's correct.

Mr. COMER. Are you aware if this FBI lawyer interviewed another Trump campaign associate, not just Carter Page?

Mr. HOROWITZ. As I sit here, I don't recall that person interviewing.

Mr. COMER. This lawyer also interviewed George Papadopoulos. Now, are you reviewing other legislative steps this lawyer's taken?

Mr. HOROWITZ. So, the FISA court issued an order ordering the Department to do that. We're obviously following up on our report and are watching their responses, both to the court and to us.

Mr. COMER. Do you know if attorney John Durham is looking into this FBI lawyer?

Mr. HOROWITZ. I have a general understanding of what Mr. Durham's working on, but I would direct you to him.

Mr. COMER. So, did you speak with John Durham about this FBI lawyer?

Mr. HOROWITZ. We referred the matter to the attorney general per the IG Act for his handling.

Mr. COMER. So, tell me, can you tell us anything you two discussed even if it's in general terms?

Mr. HOROWITZ. I'm not going to get into discussions that I had with Mr. Durham. We had some general discussions along the way about the substance of our report, about generally his work, but I'd ask you to go to him to inquire about any referrals that he may be handling.

Mr. COMER. OK.

Inspector General, you testified last month this FBI lawyer doctored an email to support a probable cause against Trump's campaign associate Carter Page. You also testified Carter Page, the Trump campaign associate, and I quote, ″I do not think the Department of Justice fairly treated these FISAs, and he—referring to Carter Page I believe—was on the receiving end,″ end quote.

Is that correct?

Mr. HOROWITZ. That I recall generally that testimony, yes.

Mr. COMER. If you were a target of a FISA warrant after everything you uncovered, if you were a target, would you trust the team the FBI assembled in the Carter Page investigation? Would you trust that you would be given a fair shake?

Mr. HOROWITZ. I hope I wasn't the target of the FISA.

Mr. COMER. Don't we all.

Mr. HOROWITZ. Certainly this team that handled this FISA did not do what they were supposed to do. The rules were clear. They didn't follow the rules, and so I think it's appropriate what the court is looking at here to see what other matters they worked on.

Mr. COMER. Well, thank you very much, Mr. Horowitz.

And, Mr. Chairman, I yield back.

Mr. CONNOLLY. I thank the gentleman.

The chair now recognizes the gentlelady from the District of Columbia, Ms. Norton, for five minutes.

Ms. NORTON. Mr. Chairman, I want to thank you for this timely hearing on whistleblowers.

I do want to note that the ranking member of the full committee spoke of the bias of the whistleblower even though ultimately witnesses came forward and essentially proved that what the whistleblower had alleged about concerning the President was true. So, I don't understand that any bias was ever founded. The opposite seems to have been found.

I'm interested in the roles of the multiple whistleblowers. The whistleblower can apparently speak to inspector general, speak to

the Office of Special Counsel, to the Merit Systems Protection Board, and when I see a scenario where there could be some confusion as to where to go, Mr. Horowitz, is there any role for the Office of Inspector General in overseeing the whistleblower investigations reported to the IG offices?

Mr. HOROWITZ. I'm sorry. Could you just say that, again, Congresswoman?

Ms. NORTON. Given the multiple places that a whistleblower can go to, I'm asking is there any role for your office, the Office of Inspector General, in overseeing the whistleblower investigations reported to various IG offices?

Mr. HOROWITZ. So, as chair of the council of IGs, what we have tried to do is couple things. One, set up the whistleblower page I mentioned earlier on Oversight.gov that provides information on where whistleblowers can go because it can be, as you said, confusing where to report it. We also formed a working group in 2015 shortly after I became chair. So, we are getting together regularly with all of the whistleblower protection coordinators in the IG community to share best practices and so that we can talk with one another about what we're each finding, challenges from our agency, challenges within our work.

Ms. NORTON. I just wish if you found your way to anybody, that would be regarded as done so that the jurisdictional questions wouldn't matter; the point is to encourage whistleblowing.

Mr. Fine, I have here a report of the GAO. I want to quote from just a sentence, ″The General Accounting Office found that the Office of Management and Budget withheld from obligation funds appropriated to the Department of Defense for security assistance to Ukraine.″ What is the role of the Department of Defense inspector general in investigating such a withholding?

Mr. FINE. So, that relates to the whole Ukrainian matter, and we were asked by several Senators to get involved, and what we—we discussed it with our colleagues at Justice and the State Department and decided that, in light of the inquiry by the House and the impeachment inquiry and even the trial by the Senate, it would not be appropriate for the IGs to, at this point, investigate those matters because it would overlap, duplicate, and potentially interfere with that very important inquiry. We have an obligation to make sure that we do not do that.

Ms. NORTON. Overlap with what? Interfere with what?

Mr. FINE. There are similar witnesses, potentially similar witnesses, and we do not want to be interviewing witnesses that perhaps the House wanted to interview or that potentially could be part of the trial. It's the same principle we apply when there's a criminal case ongoing. We would not open an investigation and interfere with that and would defer to that.

Now, I know the impeachment is not a criminal matter, but it is not a usual congressional inquiry. So, we responded to the Senators saying we declined to open an investigation at this time, but down the road, if there's things that needed to be reviewed, we would consider it at that point.

Ms. NORTON. I should certainly hope that, at some point, when this matter is straightened out, we could learn whether the IG at

the Department of Defense had a role and what that role should be or should have been.

I'm interested in enforcement. What good is the law if there isn't any enforcement? And I understand that enforcement lies with Merit System Protection Board. Now they don't have a quorum, and it looks like they haven't had a quorum for a while.

Ms. Hempowicz, what happens when Federal employees do not have access to the MSPB or to any enforcement mechanism?

Ms. HEMPOWICZ. Unfortunately, what happens is they're in administrative bureaucratic limbo.

Ms. NORTON. How long has it been that MSPB has not had a quorum?

Ms. HEMPOWICZ. Three years. Almost three years.

Ms. NORTON. So, there's been no enforcement whatsoever?

Ms. HEMPOWICZ. No, ma'am. There's a case backlog of 2,500 cases right now.

Ms. NORTON. I don't know if there's anything we can do, Mr. Chairman.

Mr. CONNOLLY. Well, as I indicated earlier, as you know, Ms. Norton, Mr. Cummings, the late Mr. Cummings, and I have a bill that would at least allow some administrative action by the attorney until there's a board member confirmed so that we eat into that backlog and we protect whistleblowers. That bill passed this committee unanimously on a voice vote, and we're waiting for some floor action. So, any help you can provide with your influence would be great.

Ms. HEMPOWICZ. Can I make one suggestion?

Ms. NORTON. Yes, please.

Ms. HEMPOWICZ. I think, even beyond restoring the quorum to the MSPB, it's really—it's vital to give whistleblowers the right to go to a jury trial, and I think that would also help reduce that backlog.

Mr. CONNOLLY. We heard that from your testimony.

Ms. NORTON. I was going to ask you about the jury trial. Thank you very much.

Mr. CONNOLLY. Thank you.

The gentleman from Massachusetts, Mr. Lynch, is recognized.

Mr. LYNCH. Thank you, Mr. Chairman. I want to thank all——

Mr. CONNOLLY. You get five more minutes?

Mr. JORDAN. Yep.

Mr. CONNOLLY. Please forgive me, Mr. Lynch.

Mr. LYNCH. I will yield.

Mr. CONNOLLY. I thought Mr. Jordan had used his five minutes.

Mr. Kelly, as soon as we're finished, we'll come to you. Thank you, Mr. Jordan.

Mr. JORDAN. I thank the chairman.

Mr. Horowitz, was Carter Page an operational contact for another Federal agency?

Mr. HOROWITZ. He was.

Mr. JORDAN. Did the Department of Justice tell that—did the Department of Justice and the FBI tell that to the FISA court when they went to get the FISA application on Mr. Page?

Mr. HOROWITZ. They did not.

Mr. JORDAN. They did not. Did an FBI lawyer doctor an email that was part of the FISA application to get this warrant on Carter Page?

Mr. HOROWITZ. Doctored an email THAT went to the affiant who swore out the FISA application. The email itself wasn't part of the application.

Mr. JORDAN. Understand. And the way it was doctored was not just doctored, they directly changed it. It said it went from Carter Page—was a source to Carter Page was not a source. Is that right?

Mr. HOROWITZ. Correct.

Mr. JORDAN. Directly the opposite meaning and that became part of the basis to go to the court and get the warrant on Carter Page.

Mr. HOROWITZ. That was relied upon by the FBI agent who swore out the——

Mr. JORDAN. I've seen correspondence between Christopher Steele, the guy who wrote the dossier that was taken to the court, correspondence between him at the Department of Justice where he indicated to them that—to the Department of Justice—that he was desperate to stop Trump from becoming President. Did that get communicated to the FISA court when they were getting the warrant to spy on Carter Page?

Mr. HOROWITZ. It did not. He relayed that to Bruce Ohr, who relayed it to the FBI.

Mr. JORDAN. Yep. I also know that the Clinton campaign paid the law firm Perkins Coie, who hired Fusion GPS, who hired Mr. Steele, who actually put together the dossier as we just said. Did the fact that the Clinton campaign was paying for this operation, this dossier, did that get communicated to the FISA court?

Mr. HOROWITZ. That information did not.

Mr. JORDAN. Did not get communicated to the FISA court. How many false or misleading communications were made to the FISA court relative to the Carter Page warrant?

Mr. HOROWITZ. We identified 17 significant omissions or inaccuracies in the report. That's not all of them. That's the 17 we thought were the most material.

Mr. JORDAN. So, more than 17 times they misled the court?

Mr. HOROWITZ. We—we identified a bunch of instances of inaccuracies. I think I'd leave it to others to decide and the court to decide what was misleading or not.

Mr. JORDAN. January 29, 2018, two years ago, chairman of the House Intel Committee, Chairman Schiff, said, that the FBI and DOJ officials did not abuse the FISA process. Is that an accurate statement, Mr. Horowitz?

Mr. HOROWITZ. Well, the Department has submitted a letter to the court now that has been made public where the Department has determined that the last two FISAs at a minimum did not have and did not support probable cause.

Mr. JORDAN. Mr. Schiff also said, on January 29, 2018, that the DOJ and FBI, quote, ″made only narrow use of information from Christopher Steele's sources about Carter Page's specific activities in 2016.″ Is that accurate?

Mr. HOROWITZ. I don't know the specific wording of what was said there, but as we reported, we found that the dossier that the

Steele reporting was central and essential to the application for the initial FISA and to the subsequent FISA.

Mr. JORDAN. I think you said, on December 11th, in front of the Senate that FBI's FISA applications relied entirely on Steele's and his primary subsource reporting to make allegations against Mr. Page.

Mr. HOROWITZ. Just to add, it was—to be precise, for the purpose of connecting Carter Page—alleged activities Carter Page's alleged activities to Russia to the Trump campaign. There were—there was other information in there concerning Mr. Page not connected to the Trump campaign.

Mr. JORDAN. Did the FBI corroborate the allegations against Mr. Page?

Mr. HOROWITZ. The allegations in the FISA about his purported serving as an intermediary between Russia and the Trump campaign, they did not substantiate.

Mr. JORDAN. So, again, two years ago, on January 29, 2018, when Adam Schiff said the Department of Justice provided additional information obtained through multiple independent sources that corroborated Steele's reporting, that would be inaccurate as well?

Mr. HOROWITZ. As we noted in the report, they provided some information, mostly from public sourcing, that they found corroborated the reporting, what they did not find was corroboration for the allegations connecting Mr. Page to Russia to the Trump campaign.

Mr. JORDAN. Finally, let me ask this, also two years ago, Mr. Schiff said on — the Department of Justice met the rigor, transparency, and evidentiary basis needed to meet FISA's probable cause requirement.

Is that an accurate statement?

Mr. HOROWITZ. Given the nature and the number of omissions and inaccuracies in there, we certainly didn't characterize what they had done as following the rules or complying with the rigor that's required of a FISA application.

Mr. JORDAN. You not only didn't characterize it in the way Mr. Schiff portrayed it two years ago and stated in his memo. You said this, ″The IG report found 51 factual assertions in Carter Page's FISA applications that, quote, 'had no supporting documentation. Supporting document doesn't state fact, or supporting document shows factual assertion is inaccurate'.″ Is that right?

Mr. HOROWITZ. And that's my reference. Before at least 17, there were many others that we have in our appendix that are supposed be followed through the Woods procedures, which is the factual——

Mr. JORDAN. I understand——

Mr. HOROWITZ [continuing]. Were not there. Some are significant; some are not as significant. But there shouldn't be any.

Mr. JORDAN. One last question, are there any other reports coming? What are you working on right now in this area?

Mr. HOROWITZ. We are doing a followup audit because one of the questions we had coming away from this was, is this happened—did this happen only in this case, or does the failures we heard about in the Woods procedures and that we saw in the Woods pro-

cedures, in fact, other counterintelligence FISAs and, something we hadn't looked at, counterterrorism related FISAs——

Mr. JORDAN. Can you give us a little preview of what you may be finding and when that report may be——

Mr. CONNOLLY. Thank you, Mr. Horowitz.

The gentleman's time has expired.

Mr. LYNCH.

I'm worried about the clock because votes have been called.

Mr. LYNCH. Thank you, Mr. Chairman.

I appreciate that. I want to thank all the witnesses for your helping the committee with its work. Mr. Horowitz, have you ever seen a situation where the President and Members of Congress openly and aggressively attack a whistleblower, like we have with the Ukraine whistleblower?

Mr. HOROWITZ. I can't say I've personally——

Mr. LYNCH. Anybody else on the panel ever see anybody, any whistleblower attack, especially after the report of the phone call was basically corroborated, remember? Anybody ever see a situation like that where a whistleblower was attacked by Members of Congress who were supposed to be the recipients of intelligence and information from a whistleblower? Anybody ever see anything like that happen? Me either.

Ms. Hempowicz?

Ms. HEMPOWICZ. I would say not like this.

Mr. LYNCH. Not like this. Right. So, what do you think the effect on other whistleblowers will be if this whistleblower who basically got—based on the transcript—got it right, got it right. Under the Whistleblower Protection Act, if you see any evidence of misconduct, waste, fraud, or abuse, abuse of power, you're supposed to report that. And by all the evidence, it appears that this whistleblower, in fact, did just that. And then, in return for that whistleblower speaking out at great risk to themselves, they get attacked by the President who, on September 26, said that this whistleblower was akin to a traitor and a spy and should be treated as we used to treat traitors and spies. What kind of effect do you think that will have on whistleblowers, Ms. Hempowicz?

Ms. HEMPOWICZ. I would say it's certainly going to chill others from coming forward, especially in the intelligence community where it's already almost impossible to enforce their legal protections.

Mr. LYNCH. Mr. Horowitz, you've been up before this committee. You're a frequent flyer here and you do some amazing work. I give you great credit. What do you think that would—on the minds of other Federal employees who are being asked to report misconduct, this—and it appears, based on the evidence, based on the transcript, that there certainly was some evidence there of abuse of power—remember, a whistleblower doesn't have to prove the case, he just raises his hand and says: Something is not right here, and I'm reporting this, and I want this looked at.

So, when a whistleblower does that and then Members of Congress, the President likens that person to a traitor and a spy and suggests that that person should be treated as a traitor or a spy like we used to do in the old days when they were shot, what do

you think that impact has on a potential whistleblower out there who observes misconduct within the government?

Mr. HOROWITZ. Individuals who step forward and report wrongdoing or what they reasonably believe to be wrongdoing should not face even the threat of retaliation. We want people to come forward.

It's then our jobs as IGs and others who investigate this to assess whether the information is supported, but you don't want to attack and you shouldn't be attacking the person who brings that forward. They may be right; they may not be right. But that's for us to assess, not to attack the people that come forward.

Mr. LYNCH. If now we have a situation where Members of Congress who, again, are going to be the recipients of this intelligence, to protect the public trust, to protect the taxpayer, to protect our Government, if we, in turn, attack the whistleblower for reporting misconduct, should there not be—should there not be penalties on us for violating the law, public officials who go for revenge, you know? I'll ask you, Ms. Hempowicz. You're an advocate for functioning whistleblowers within government. Oftentimes these departments are so densely controlled and they're so distant from the public and from the rest of Congress, we are at a loss—we can't drill down and find out what some of these agencies, tens of thousands of employees, we can't figure out what everybody's doing so we rely on this self-reporting. I mean, should we protect those individuals from retaliation from Congress as well?

Ms. HEMPOWICZ. Absolutely. And I would also add that the White House isn't covered by the whistleblower protection statutes and so it should extend to them as well.

Mr. LYNCH. Thank you.

Mr. Chairman, my time is expired. I yield back.

Mr. CONNOLLY. Thank you, Mr. Lynch.

The chair recognizes the gentleman from Wisconsin.

Mr. GROTHMAN. Yes. Mr. Horowitz, just because over the years we've asked you tons of questions, I'm comfortable with you, and I'll ask you some more questions. You testified last month, and I'll quote, ″I do not think the Department of Justice fairly treated these FISAs, and Carter Page was on the receiving end.″

OK. Is that true?

Mr. HOROWITZ. I recall that.

Mr. GROTHMAN. You also found—you found several major issues with FBI, an FBI case agent who was investigating Carter Page's investigation. We'll call him Case Agent No. 1. I just wanted to go over a few of them. Case Agent No. 1 never shared with the Justice Department information that showed Carter Page was innocent. For instance, he never met Paul Manafort. He told you he couldn't recall why that happened, correct?

Mr. HOROWITZ. That's correct.

Mr. GROTHMAN. OK. Case Agent No. 1 wrote that Christopher Steele, the source for Carter Page's FISA, that Steele's work was previously used in criminal proceedings when that wasn't true and contradicted Steele's FBI handler, correct?

Mr. HOROWITZ. They never shared it with the FBI handler—handling agent who said that he thought it wasn't fully accurate.

Mr. GROTHMAN. OK. Case Agent No. 1 did not share with the Justice Department information that showed Papadopoulos, another campaign associate, of being innocent. Case Agent No. 1 just said, "It may have been an oversight," correct?

Mr. HOROWITZ. There were interactions by FBI confidential human source with Mr. Papadopoulos where Mr. Papadopoulos made statements that were inconsistent with the allegations in the FISA, and that information was not shared, as it should have been, with the Justice Department.

Mr. GROTHMAN. OK. How can you miss something that important on investigation as sensitive as looking into a Presidential candidate? Don't you think that's odd?

Mr. HOROWITZ. That was our concern with the explanations we received why we noted in our report that we didn't find those explanations convincing in the least.

Mr. GROTHMAN. OK. Again, with regard to Case Agent 1, who was in charge of putting together the Woods file for accuracy, you found 51 errors in his Woods file verification, right?

Mr. HOROWITZ. That's correct.

Mr. GROTHMAN. Kind of scary, isn't it?

Mr. HOROWITZ. Yes.

Mr. GROTHMAN. Real scary. Quoting right from your report again, quote, ″Case Agent 1 provided the DOJ attorney with inaccurate information that failed to disclose the extent and nature of Page's relationship with that agency,″ end quote. Correct?

Mr. HOROWITZ. Neither that case agent or anybody at the FBI shared with the Justice Department the information that Mr. Page had been previously in operational contact for another government agency.

Mr. GROTHMAN. Isn't that kind of scary? Kind of leads one not to trust the government, doesn't it?

Mr. HOROWITZ. That information came to the FBI in August 2016, well before any of the FISA applications and it should have prompted interactions with the other government agency to understand the nature of that relationship and how it might've impacted going forward with any FISA.

Mr. GROTHMAN. It's sad, isn't it? It kind of—it makes one not surprised at all why on all levels of our government, there's not trust in our government, right?

Mr. HOROWITZ. It certainly creates the very deep concern about authorities like FISA, the use of those authorities, and I think that's why you see some of the orders coming from the FISA court now.

Mr. GROTHMAN. OK. I'm almost out of time. Case Agent 1 was actually promoted in the middle of the investigation, right?

Mr. HOROWITZ. Case Agent 1 was promoted during the course of the investigation.

Mr. GROTHMAN. I know. Another case agent took over day-to-day and this new case agent questioned if it was prudent to renew the FISA warrant on Carter Page but got overruled by Case Agent 1, correct?

Mr. HOROWITZ. Two agents spoke about as we relayed in the report why, not only was the FISA going forward, but why Mr. Page was even still the subject of the investigation. It's not clear to us

who made the ultimate decision to nevertheless go forward with the next FISA renewal.

Mr. GROTHMAN. OK. You didn't name Case Agent 1 in your report, but could you at least tell us, did this guy's boss know what he did?

Mr. HOROWITZ. So, Case Agent 1's supervisor, who was a supervisory special agent, was responsible for double checking and following up on the Woods process where all of those errors were located, and that supervisory special agent also did not do their job in following up and identifying those issues.

Mr. GROTHMAN. Does the FBI Director Wray, does he know who this is, who this agent is?

Mr. HOROWITZ. Yes, he does.

Mr. GROTHMAN. And does the Attorney General know?

Mr. HOROWITZ. I believe he does.

Mr. GROTHMAN. OK. What did Director Wray say to you about this case agent? Did he say anything to you about him or her?

Mr. HOROWITZ. He was very concerned about, frankly, the activity for all of the individuals who had responsibilities and didn't conform to what they are required to do under FBI procedures.

Mr. GROTHMAN. Is he still at his promoted position?

Mr. HOROWITZ. I don't know as I sit here.

Mr. CONNOLLY. Thank you.

Mr. GROTHMAN. OK. Thanks. Thanks for giving me the extra time.

Mr. CONNOLLY. Absolutely. Thank you, Mr. Horowitz.

Mr. Armstrong, you are recognized for five minutes. I caution you that votes have been called, and time has expired, but there are still 232 have not voted, and you and I are the two among them.

Mr. ARMSTRONG. I would say you can go first because I'd rather do this, but thank you. And I appreciate your indulgence for letting me sit in on this. I would point out a couple things, one, in the whistleblower statute, there's the right to protect them to remain anonymous, and there's also the point to protect them from retaliation. And the reason for that is, in various different scenarios, such as a criminal investigation and charges being born out of that, there's ways that are even civil cases that they would be subpoenaed or have to appear in court. Also, sometimes they're disclosed before they're ever protected. So, if we're going to continue to talk about a trial and a fairness of a trial and calling witnesses, one of the fundamental issues for a trial, any trial, civil or criminal, is the right to confront your accuser. Also, we seem to think that there's this bifurcation of either the whistleblower doesn't testify or he comes into open hearing in front of the Senate. As somebody who's done this my whole life, there are significant safeguards that exist in between those two spectrums. So, to say that that is a binary choice is patently false. And this isn't some retaliation within some agency or somewhere else; we're talking about the impeachment of a duly elected President.

But, Mr. Horowitz, I've read your reports, and I want to take you back to June 2018 when the Clinton email server investigation report came out, and in that report, FBI officials involved sent messages on their FBI devices that created the appearance of political bias, and this was Strzok and Page, correct?

Mr. HOROWITZ. Among others.

Mr. ARMSTRONG. And you did not have confidence that Strzok's decisions at the end of the 2016 Presidential campaign to prioritize Trump/Russia over the new Clinton emails was free from bias and that he and other FBI employees brought discredit to themselves and hurt the FBI's reputation?

Mr. HOROWITZ. That was our finding.

Mr. ARMSTRONG. And you also sharply criticized Director Comey for his public statements about the Clinton email case when he wouldn't recommend charges and then, in October 2016, he told Congress new emails were found, right?

Mr. HOROWITZ. That's correct.

Mr. ARMSTRONG. And he usurped the authority of the Attorney General, chose to deviate from established procedures, engaged in his own ad hoc decisionmaking, and you concluded that following established procedures are most important when the stakes are the highest, correct?

Mr. HOROWITZ. That's correct.

Mr. ARMSTRONG. But yet the final report said this report did not find any evidence of political bias or improper consideration actually impacting the investigations?

Mr. HOROWITZ. We found that the decisions that were made by the prosecutors not to prosecute and some of the other decisions we looked at were not impacted by bias.

Mr. ARMSTRONG. And in your newest report, you said the Justice Department failed to interview key figures or vet critical information and sources in the Steele dossier. They wouldn't interview campaign officials because they feared that they were compromised, but at the same time, CIA Director Brennan had told the Russians directly. So, the Russians knew about the investigation, but the Trump campaign didn't, correct?

Mr. HOROWITZ. Frankly, I don't know what Mr. Brennan has said he spoke to the Russians about.

Mr. ARMSTRONG. And the CIA told the FBI that Carter Page was working for them?

Mr. HOROWITZ. I'm not sure.

Mr. ARMSTRONG. But the FBI never disclosed that to the FISA court?

Mr. HOROWITZ. I'm sorry. Could you ask that——

Mr. ARMSTRONG. The FBI never closed that Carter Page was working for the CIA to the FISA court?

Mr. HOROWITZ. I can't talk about anything other than what's in my report at this point because it would—anything else would be classified.

Mr. ARMSTRONG. Did the DOJ determine that there was no probable cause for a FISA warrant on Page?

Mr. HOROWITZ. The DOJ recently on the day we released our report sent a letter to the FISA court saying that, at least as with regard to the final two renewal applications, they concluded there was insufficient evidence to support the probable cause.

Mr. ARMSTRONG. Was there an intervention from the highest levels of the FBI ordering agents to look at the Steele dossier?

Mr. HOROWITZ. When the dossier came in, the discussions subsequent to that in advance of the FISA went all the way up to the

leadership of the FBI, and they were aware of the fact of the Steele reporting and its decision to rely on it.

Mr. ARMSTRONG. And that was actually Andy McCabe, right? Correct?

Mr. HOROWITZ. Mr. McCabe was involved in those discussions, and as we lay out in connection with the discussions with the intelligence community assessment, both Mr. McCabe and Mr. Comey had discussions with their counterparts about including the Steele reporting in the ICA.

Mr. ARMSTRONG. And the FBI affirmed that Steele was viewed as a reliable witness even though they knew in previous instances he had not been reliable, right?

Mr. HOROWITZ. The FBI laid out in their application why they found him to be reliable, but did not go to the handling agent to look at that statement, which the handling agent told us was not fully accurate.

Mr. ARMSTRONG. So, what they knew and what was put in the FISA warrant were two different things, and in order to keep the investigation into President Trump's campaign going, the FBI lied and omitted key information from the FISA court.

And, with that, I yield back.

Mr. CONNOLLY. I thank the gentleman for his assertion. It is now the chairman's time to ask questions, and I'm going to deal with you, Mr. Rosenzweig—I know—because you look bored.

Mr. ROSENZWEIG. It's not bored, Your Honor.

Mr. CONNOLLY. It's only fair. Somebody said, well, the whistleblower has a bias. Let me ask you this question, if someone's biased, does it mean that what they say is untrue?

Mr. ROSENZWEIG. No.

Mr. CONNOLLY. No. So, Ms. Hempowicz saying, "Frankly, that's interesting but irrelevant," is correct in the context of a whistleblower's veracity? We got to go fast.

Mr. ROSENZWEIG. Like Mr. Armstrong, I've been prosecuting cases all my life. The question is not bias or motive of the witness; it's whether or not what they say is corroborated by other evidence.

Mr. CONNOLLY. Thank you.

Mr. ARMSTRONG. I did defense.

Mr. ROSENZWEIG. What?

Mr. ARMSTRONG. Sorry. I did defense.

Mr. ROSENZWEIG. Oh, sorry. I do that now.

Mr. CONNOLLY. So, here's another one. It wasn't firsthand knowledge. So, if we required all whistleblowers to have firsthand knowledge, I dare say there wouldn't be many whistleblowers left.

Mr. ROSENZWEIG. We'd have very few.

Mr. CONNOLLY. Very few. Is there something in law or even standard practice that requires a whistleblower who comes forward to only produce firsthand knowledge or we dismiss them?

Mr. ROSENZWEIG. No. In fact, in most instances, they rely on secondhand knowledge, as does every human being in their everyday life.

Mr. CONNOLLY. So, all of a sudden, we have a new standard that crops up because we don't like the content of what the whistleblower has to say about the President of the United States; he or she didn't have firsthand knowledge. And that's a new standard

that would jeopardize whistleblowing in the Federal Government, period. Would that be a fair thing to say, Mr. Rosenzweig?

Mr. ROSENZWEIG. I would be very concerned if we threw the baby out with the bathwater and wound up, after the current controversy, in a situation where there were fewer whistleblowers who were disincentivized from coming forward.

Mr. CONNOLLY. By the way, I think Mr. Colapinto talked about nobody likes a rat, which is kind of an unfortunate turn of phrase, but the fact of the matter is, often whistleblowers might come in different packages, sizes, designs, and characters, not all of which are appealing. That doesn't—that doesn't—mean their testimony is, in fact, invalid, however, unpopular or unappealing they may be as a personality.

Mr. ROSENZWEIG. In criminal law, we call them confidential informants. In intelligence, we call them sources. In whistleblower law, we call them rats.

Mr. CONNOLLY. I think final for me—no, I have one more. Motive matters, Mr. Jordan said. Motive matters meaning if I don't like the motive, the testimony of the whistleblower in question is discounted, is invalidated. Look, I may have the darkest, meanest motive in the world, it doesn't per se discredit my testimony. Is that correct?

Mr. ROSENZWEIG. It's correct. It means we should look at it and carefully and determine whether it's true.

Mr. CONNOLLY. And whistleblowers are not necessarily witnesses at a trial. They're sources of information upon which we act. Is that fair, Mr. Horowitz?

Mr. HOROWITZ. That's correct.

Mr. CONNOLLY. So, when somebody says the President, for example, is entitled to this notion that I get to face my accuser, well, it's not quite the right analogy. We're not in that situation. The whistleblower is a source upon which others may act to determine veracity of questions. Is that correct?

Mr. HOROWITZ. When you're dealing with that kind of information, whether you're a prosecutor, an IG, or whomever, you're trying to corroborate and go from there. It doesn't necessarily mean that the whistleblower becomes a witness.

Mr. CONNOLLY. Right. We have to go vote. I rest my case. There's been nothing but red herrings about the whistleblower, and what bothers me—I'll end on this note—is the threat to disclose the identity of the whistleblower. Let me tell you, if that happens, because of who the whistleblower was talking about, we have jeopardized the entire protection of every whistleblower going forward, and I find that unbelievable hypocrisy when this Congress and previous Congress' on a bipartisan basis have spent years talking sanctimoniously about protecting whistleblowers. Well, it's the hard cases that require the protection, not the easy ones.

I thank you all so much for coming today, and we have some items, without objection, to enter into the record.

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