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House Subcommittee on National Security, Emerging Threats and International Relations

National Security Whistleblowers
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Chairman Shays and the distinguished members of the Subcommittee, I am pleased to be here today to offer the Project On Government Oversight's thoughts on the current situation with regard to national security whistleblowers.

Founded in 1981, the Project On Government Oversight is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. Over our organization's 25-year history, we have worked with thousands of whistleblowers and government officials to shed light on the government's activities and systemic problems which harm the public.

In recent years, our organization's accomplishments include improving security standards at the nation's nuclear facilities, strengthening protections against government contractor fraud, preventing cases of excessive government secrecy, recovering millions of dollars in unpaid federal land oil drilling fees, and helping to eliminate wasteful military spending. Without exception, our organization's accomplishments would not have been possible without the assistance and expert guidance of government insiders and whistleblowers.

Unprecedented media attention has captured the public's eye concerning national security whistleblowers, whether it be Able Danger, secret detention centers in Europe, or NSA spy programs. In response to these national news stories, many members of Congress and high-ranking government officials have decried the leaking of classified information to the press, expressing concern about the possible harms to our government's ability to conduct the War on Terrorism effectively. The Project On Government Oversight shares some of these concerns. However, our organization believes that criminal leak investigations and prosecutions will harm our government over the long run by chilling criticism and scrutiny of potentially illegal or unethical activity. The larger goal of preserving our Constitutional system of checks and balances will undoubtedly suffer.

Ideally, leaks of classified information to the news media would not happen. Unfortunately, we are living in an imperfect world as it relates to whistleblowers who seek to stop corruption, law breaking, incompetence, and abuse of power. Front page stories on classified government programs confirm that some national security whistleblowers prefer disclosing possible wrongdoing to the national news media rather than to the Congress or internal government watchdogs.

What drives these individuals to disclose classified information to the press and the public? We suspect an important reason lies in the long-term failure of the government to create effective whistleblower protection programs, particularly for national security whistleblowers.[1]

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[1] Congressional Research Service, "National Security Whistleblowers," December 30, 2005. http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf

Over time, many members of Congress have expressed a desire to protect their ability to oversee the Executive Branch by fostering whistleblower protections. In practice, however, the Congress has created few meaningful incentives for national security whistleblowers to come to Congress with evidence of illegal activities, corruption, or incompetence.

The need for effective whistleblower protections is even more urgent given the War on Terrorism and the challenges national and homeland security agencies face in retooling their efforts. Since the September 11, 2001, terrorist attacks, our government has increasingly expanded the cloak of secrecy which keeps its activities hidden from the public. In some cases, this expanded secrecy was a reasonable response to our heightened awareness of the new threats that face us. However, in many cases, government agencies are simply taking advantage of the nation's mood to take their activities out of the public realm where they would be held accountable by Congress, watchdog groups, and the news media.[2]

As a result, we are now much more reliant upon government employees to bring forward evidence of corruption or incompetence from inside the government. Many whistleblowers have responded. According to a 2004 study by the Government Accountability Office, civilian whistleblowers have come forward in greater numbers since 9/11 – almost 50% more have sought protection annually from one key whistleblower protection agency, the U.S. Office of Special Counsel. According to that report, "officials stated that the large increase was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns."[3]

All indications show that we have more whistleblowers coming forward. Less clear is whether we are hearing what they have to say. The federal government's policies support and reinforce wrongdoers who would seek to silence and marginalize whistleblowers. Complicit in the current situation is a largely apathetic Congress which has created a largely inconsistent and frayed patchwork of protections across the federal government.

Congress has frequently considered what are called whistleblower protection policy reforms. However, many of those reforms only create a process for the whistleblower to report wrongdoing internally at their agency. Internal reporting and investigations *may* result in the government correcting whatever problems have occurred. Whether the agency chooses to fix the problem or to bury it, the whistleblower almost certainly pays a heavy price. And the reforms fail to reverse retaliation against whistleblowers who, in many cases, have had their careers destroyed.

Those who retaliate against whistleblowers are rarely held accountable for their actions. Even when a whistleblower was right, they are rarely compensated for the loss of their job, income or security clearance. As a result, there are few incentives for employees to blow the whistle.

Fear of retaliation is a very real concern. According to a Merit Systems Protection Board study, the number one reason government employees said they would not report wrongdoing was because they "did not think anything would be done to correct the activity." The next three top reasons given were: "afraid of being retaliated against," "reporting activity would have been too great a risk for me," and "I was afraid my identity would be disclosed."[4]

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[2] For example, the Department of Homeland Security's "For Official Use Only" policy effectively puts employees in the position of facing criminal or civil prosecution for disclosing information that would be made public under the Freedom of Information Act. For more, see POGO's comments on the regulations. http://www.pogo.org/p/government/gl-050101-dhs.html

[3] Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf

[4] Project On Government Oversight, "Homeland and National Security Whistleblower Protections:

Employees at agencies such as the Department of Homeland Security, or civilian employees of the Pentagon must seek protection under the defunct Whistleblower Protection Act, a law rendered useless by a crippling series of activist judicial interpretations and dysfunctional whistleblower agencies. While these employees are able to seek legal recourse, their cases almost always end up at a dead end. Finally, critical slices of the government workforce have not even been given these weak protections, as Chairman Shays has pointed out in his past proposals to extend protections to Airport Baggage Screeners, who are on the front lines of our nation's airports.

Whistleblowers at key national security agencies including the Federal Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency, Transportation Security Administration, and National Security Agency have been excluded from the meager legal protections afforded the rest of the federal workforce. As a result, when they lose their security clearance, are fired, or are otherwise retaliated against, they have no independent legal recourse for challenging retaliation. They are put in the untenable position of asking their employer to reverse the decision to retaliate against them.

In 1998, on the heels of a series of CIA scandals, members of Congress voiced concerns about leaks of classified information to the news media. As a result, the intelligence committees in the House and Senate held hearings and eventually passed the Intelligence Community Whistleblower Protection Act. [5]

This Act provides no protections against retaliation at all. Instead, it recommends that intelligence employees disclose matters of serious concern to their Inspectors General and to the heads of their agency before approaching intelligence committees in the Congress. Unfortunately, under threat of veto, Senate provisions which would have required that intelligence employees be notified about the option of disclosing to the Congress were eliminated.[6] No institution is aggressive at self-policing – let alone the intelligence agencies. So intelligence whistleblowers are relegated to reporting misconduct internally, and hoping that the wrong will be fixed and that they will not be punished for reporting the problem.

Chairman Shays recently noted: "The Cold War paradigm of 'need to know' must give way to the modern strategic imperative – the need to share."[7] "Need to share" should not only be a driving principle inside national security agencies, but also the principle that drives Congressional oversight of those agencies given the major changes and reforms underway. Yet, the Executive Branch continues to go to great lengths to prevent employees from communicating their concerns directly with the Congress, and has been remarkably successful in doing so.

More significantly, the Congress has often failed to punish the Executive Branch for lying or misleading Congress. In fact, in regard to whistleblowers, it has allowed the Executive Branch to crush individuals who sought to inform Congress that it is being misled.

You are hearing important and compelling stories from national security whistleblowers today. The fact that a new National Security Whistleblowers Coalition has been organized is the best evidence that change is urgently needed. Let me give you just one more example.

The Unfinished Agenda," April 28, 2005.

[5] The Intelligence Community Whistleblower Protection Act was included in the 1999 Intelligence Authorization bill, H.R. 3694. http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR03694:@@@D&summ2=m& and http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ272.105

[6] See Senate debate on the Intelligence Community Whistleblower Protection Act, March 9, 1998, via the Federation of American Scientists web site. http://www.fas.org/sgp/congress/s1668.html

[7] Statement of Rep. Christopher Shays, "Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing," Subcommittee on National Security, Emerging Threats, and International Relations, August 24, 2004.

The case of Richard Barlow is an illustrative tale, particularly given the brewing controversy over Iran's emerging nuclear weapons program. If Congress and the Executive Branch had heeded Barlow's concerns about Pakistan, nuclear weapons programs in North Korea, Iran, and Libya probably would have never gotten off the ground. During the late 1980s, Mr. Barlow worked in the CIA and in the Office of the Secretary of Defense investigating and reporting on Pakistan and the A.Q. Khan nuclear weapons network. What he found was a disturbing pattern of technology and materials purchases in the U.S. and other countries aimed at moving Pakistan's nuclear weapons program forward.

After Mr. Barlow succeeded in capturing two of A.Q. Khan's agents, he faced resistance across the government because he was drawing unwanted attention to what was then a dirty secret. Namely, that numerous government agencies at that time were turning a blind eye to the threat posed by the expansion of Khan's nuclear program. Pakistan was considered a central ally in the region for U.S. efforts to liberate Afghanistan from Soviet Union occupation.

In 1989, Mr. Barlow's career crashed against the Executive Branch's lies. Mr. Barlow raised concerns internally about Defense Department officials who had lied to Congress concerning Pakistan's nuclear programs. By merely suggesting that Congress should know, but never actually going to Congress, Mr. Barlow's stellar career was over. Mr. Barlow's higher ups took away his security clearances and then proceeded to punish him for years with retaliatory investigations designed to smear his reputation. As an intelligence professional, the loss of his clearance meant he had no way to be employed – either inside or outside the government. For over 15 years, he has sought help to reverse the damage done in retaliation for thinking about informing Congress of a lie. A significant lie.

For the past year, the Senate Homeland Security and Governmental Affairs Committee has been considering whether or not to grant Mr. Barlow his retirement. Despite appeals from former high-level officials who saw first-hand what happened to Mr. Barlow, the Senate has failed to act. While the Senate has waffled on whether to provide Mr. Barlow his retirement, Congress has earmarked billions of dollars in funds for such ridiculous projects as the Tiger Woods Foundation, the Waterfree Urinal Conservation Initiative, the Arctic Winter Games, stainless steel toilets, wood utilization research, and the Paper Industry Hall of Fame.[8]

Where are the Congress' priorities?

Finalizing the decision to give Mr. Barlow his retirement would send a clear signal to national security employees that efforts to challenge lying to Congress and other illegal activities will not be punished. As things currently stand, some in the intelligence community appear to be seeking safer havens in airing their concerns to the national news media.

Recent leaks to the news media underscore that important unresolved questions continue to fester behind the closed doors of our national security agencies and require intervention by the Congress. Last week's NSA spying hearings in the Senate prompted Timothy Lynch of the Cato Institute to say: "The overriding issue that's at stake in these hearings is the stance of the administration that they're going to decide in secrecy which laws they're going to follow and which laws they can bypass."[9]

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[8] Citizens Against Government Waste, "Pig Book Oinkers of 2005," and Taxpayers for Common Sense, "Statement on Defense Spending Bill," December 22, 2005. http://www.taxpayer.net/TCS/PressReleases/2005/12-22defensebill.htm & http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005Oinkers

[9] Babington, Charles, "Activists on Right, GOP Lawmakers Divided on Spying," Washington Post, February 7, 2006.

If members of the Congress and the Executive Branch really are committed to stemming leaks of classified information to the news media, they will do much more than launch witch hunts to root out leakers. They will create safe, legal, and discreet ways for national security whistleblowers to voice their concerns. Doing so would be in keeping with the goal of fostering a U.S. national security culture that is more agile and which embraces information-sharing over secrecy.

In particular, Congress needs to address the issue of security clearance retaliation. Taking away an employee's security clearance has become the weapon of choice for wrongdoers who retaliate. When a security clearance is revoked, the employee is effectively fired, since they are unable to do their job or pursue other job opportunities in their area of expertise. Currently, the employee is unable to appeal to an independent body to challenge the retaliation and internal hearings are Kafkaesque. Among the practices we have been made aware of in recent years: whistleblowers are not told the charges against them, they are not allowed to dispute those charges, or they are prevented from presenting their case before internal panels which decide.

We believe employees should be given the opportunity to have a fair hearing by an impartial body that can rule on whether the security clearance revocation is retaliatory, and require its restoration. Pending legislation in the Senate – the Federal Employees Disclosure Act (S. 494) – would take steps toward accomplishing this goal. The courts and the Justice Department have acknowledged that independent judicial reviews of security clearance cases can be conducted.

Congress should create penalties for those who retaliate against whistleblowers who communicate with Congress. Laws like the Lloyd LaFollette Act which protect disclosures to Congress by government employees are toothless without enforcement.

Other reforms that the Project On Government Oversight recommends are included in our 2005 report "Homeland and National Security Whistleblower Protections: the Unfinished Agenda."