September 22, 2021

VIA ELECTRONIC TRANSMISSION

Senator Mark R. Warner, Chairman
Senator Marco A. Rubio, Ranking Member
Select Committee on Intelligence
211 Hart Senate Office Building
Washington, D.C. 2051

Senator Richard J. Durbin, Chairman
Senator Charles E. Grassley, Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 2051

RE: Intelligence Authorization Act for FY 2022 (S. 2610)

Dear Senators:

We write to you to express our concerns that Section 321 of the Intelligence Authorization Act for FY 2022 (S. 2610) as currently drafted may perpetuate ambiguity in the law and unintentionally roll back the hard-won protections for FBI whistleblowers "to furnish information to either House of Congress, *or to a committee or Member thereof*." Accordingly, we urge you to amend the provision to ensure it is consistent with the Intelligence Committee's intent to improve protections for intelligence community whistleblowers.

In 2016, Congress unanimously passed the FBI Whistleblower Protection Enhancement Act to close longstanding loopholes allowing retaliation against FBI employees who made protected disclosures. For the first time, the bill specifically codified FBI whistleblower protections in statute for disclosures made to an FBI employee's supervisor *or to Congress*.[1] Section 2(1)(F) of that bill amended 5 U.S.C. § 2303(a) to expressly protect FBI employee disclosures "as described in section 7211"—which is a reference to the Lloyd-La Follette Act protections for all employees "to furnish information to either House of Congress, *or to a committee or Member thereof*."[2]

Note that the current law in this regard does ***not*** require FBI employees to first make their disclosures to any specific inspector general or particular committee for their rights to be protected. This effective approach should be the model for protecting all whistleblower disclosures to Congress. Statutory limits that make whistleblower rights contingent on reporting only to a narrow subset of duly elected representatives are a bad idea. Such limits would likely result in whistleblowers being discouraged from reporting at all, because they are unsure of the correct process and fear

[1] Public Law 114-302 (Dec 16, 2016).
[2] *Id*; 5 USC § 7211 (emphasis added).

retaliation, or they distrust the specified reporting process, person, or body. Section 321 of S. 2610 could be read to impose a new limit on the committees to which an FBI employee could make protected disclosures of wrongdoing—and such a limit would disincentivize whistleblowers from coming forward.

Whistleblowers have constitutional rights to petition their elected representatives in addition to their statutory protections. As a practical matter, it is often a reasonable default to contact one's own Congressman or Senator. The 2016 amendments fortify this constitutional right by protecting all employees who "furnish information to either House of Congress, *or to a committee or Member thereof*."[3] Yet, as currently written, Section 321 of S. 2610 could be read to limit those rights in a way that would confuse and discourage FBI whistleblowers from coming forward, setting an untenable precedent shrinking existing statutory protections for whistleblowers' access to Congress.

Likewise, Members of Congress have constitutional responsibilities to conduct oversight, both as individual elected officials and through their participation in various committees and subcommittees, to gather information necessary to inform the exercise of their duties and legislate more effectively. Information from whistleblowers can be vital to Members' constitutional functions, and it would be a mistake for Congress to place statutory limits on the flow of information necessary for its own members to fulfill their constitutional duty. The synergy between the value brave whistleblowers bring to Congress, and the Congressional responsibility to engage in meaningful oversight can only be protected by rejecting any proposal that would limit the scope of whistleblowers' access to Congress by requiring them to face a bottleneck in any specific committee.

According to Dan Meyer—Managing Partner of Tully Rinckey's Washington, DC office and member of Empower Oversight's Whistleblower Advisory Panel—limits on protected disclosures to certain committees create bottlenecks. Meyer worked with classified disclosures as the Director Civilian Reprisal Investigations (DCRI) for the Defense Department from 2003 to 2010. As he explained in a statement:

> **Repeatedly our whistleblowers would make disclosures that were not acted on.**
>
> In the best of circumstances, Congressional staff would redirect the allegations back to an inspector general, even our own. The IG would then do the investigation and return findings to either substantiate the allegations or do otherwise. But the matter was vetted. The Senate Armed Services Committee under Chairman Levin was very good with oversight in these situations; so was Judiciary under Chairman Grassley.
>
> Other Committees, not so good. They struggled with this mission. The disclosures would go up, but oversight would not be forthcoming. I don't think some Committees, at that time, were completely comfortable with doing investigations or referring them to IGs or even sharing and discussing disclosures between Republicans and Democrats.
>
> So, backlogs formed and there was pressure to not have a robust system of disclosure. That was the world on the eve of Edward Snowden's trip to Hong Kong in May 2013;

[3] *Id*; 5 USC § 7211 (emphasis added).

the system was failing as the Congress needed robust and disciplined disclosure the most. (emphasis added).

That is why it is essential that whistleblowers have multiple options to safely and legally make disclosures to multiple channels in Congress. Rigorous congressional oversight requires access to information by all elected members exercising their share of constitutional authority in the office to which they were elected.

This direct access to Congress is by design. The Founding Fathers and contemporary leaders in oversight and whistleblower protections alike share a recognition of how critical communication with Congress are to ensuring timely and effective action can be taken when a whistleblower has the courage to come forward. To limit this access would run counter the checks and balances in our constitutional system.

Requiring whistleblowers to first go to Executive Branch officials, such as an inspector general, is an abdication of congressional oversight responsibilities and should not be written into any statute. Not all disclosures are appropriate for inspector general review. Inspectors general have limited jurisdiction over allegations of misconduct of an elected official. There is no inspector general for the Executive Office of the President, for example. That is the job of Congress. Congress should not restrict its own elected members' access to vital whistleblower information, and certainly not in a statute that cannot be easily undone.

Accordingly, we urge that you work together constructively to amend Section 321 consistent with these concerns and protect FBI employees' rights to blow the whistle to Congress.

Sincerely,

Jason Foster
Founder & President

Empower Oversight
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Mike Zummer
Counsel

Protect the FBI

Danielle Brian
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cc: Senate Whistleblower Protection Caucus
Senators Ron L. Wyden & Charles E. Grassley, Co-Chairs