

Chairman Jordan, Ranking Member Plaskett, and members of the Subcommittee:

Thank you for the invitation to testify today. I currently serve as the president of Empower Oversight, and we're honored to represent Stephen Friend and Marcus Allen.

I. History of FBI Whistleblower Protections

FBI whistleblowers have second-class status compared to those in most federal agencies. When Congress adopted the modern system of whistleblower protections in 1978, it prohibited retaliation against FBI whistleblowers. But it gave them none of the process every other federal law enforcement agency received, like the DEA, the ATF, the Marshals, and the Secret Service. Whistleblowers at those agencies can file retaliation complaints with the independent Office of Special Counsel (OSC). FBI whistleblowers can't. Whistleblowers at those agencies can appeal retaliation to the Merit Systems Protection Board (MSPB). Until just last year, FBI whistleblowers couldn't.

In December, the NDAA for Fiscal Year 2023 finally gave FBI whistleblowers the right to appeal to MSPB.¹ But Congress should watch closely to ensure this new jurisdiction applies as intended to *all* FBI retaliation cases. Many have been wending their way for years through DOJ's long process. But the laws prohibiting retaliation have been on the books the whole time. The FBI can't claim these are new rights just because they now have to justify their actions before MSPB.

I think time has demonstrated it was a mistake to exclude the FBI from the standard whistleblower protection process. It discourages integrity and encourages deceit and even corruption. Congress should treat the FBI the same as other federal law enforcement agencies, eliminating its special exception and giving its employees access to OSC to investigate retaliation. The hardworking employees of the FBI deserve equal protection of the law.

Even that process won't fix the FBI's latest troubling practice of suspending security clearances to retaliate against whistleblowers. Mr. Friend and Mr. Allen are just two public examples of this trend. When the FBI suspends a clearance it also immediately suspends the employee indefinitely without pay. To make matters worse, it holds them and their families hostage by requiring them to get

¹ Pub. L. 117-263, Title LIII, Sec. 5304(a) (2022).

permission to take another job—permission the FBI routinely denies. Congress needs to ensure the FBI stops this abuse.

II. Recent Committee Treatment of FBI Whistleblowers

In light of all these obstacles for FBI whistleblowers, Congress should be doing everything it can to welcome their disclosures here. It takes immense courage to put your career on the line to draw attention to problems. So when Mr. Friend and others came to this Committee to share their disclosures, I know it was a decision they didn't make lightly.

But FBI employees coming to Congress have been shamefully treated by Democrats on this Committee. It's one thing to hear allegations and find them unpersuasive, or even distasteful. An office might choose to ignore allegations. But to go out and actively smear the individuals making disclosures is far worse. That's what the Democrats did when they released a March 2 report entitled "GOP Witnesses: What Their Disclosures Indicate About the State of the Republican Investigations." Their report was inaccurate, both on the law and the facts.

The law doesn't define the term "whistleblower." Rather, it protects from retaliation individuals who engage in protected activity. For over a century, simply making disclosures of any information to Congress has been a protected activity.² Furthermore, an appropriations rider prohibits money from paying the salary of any federal employee who "prohibits or prevents" any other federal employee from communicating with Congress.³ Democrats on this Committee seem to deny "whistleblower status" to individuals engaged in the precise activity the Legislative Branch has considered protected for over a century.

Even in a technical sense, the Democrat report's reliance on "evidence" for whistleblower status is misplaced. Simply communicating a reasonable belief of misconduct is protected whistleblower activity. This applies regardless of whether the whistleblower produces evidence backing up their allegations. Only protecting whistleblower disclosures accompanied by conclusive evidence, as the Democrats seems to require, would have disastrous consequences for retaliation in the federal government.

² U.S. House of Representatives, Committee on the Judiciary, *GOP Witnesses: What Their Disclosures Indicate About the State of the Republican Investigations*, Mar. 2, 2023, Appendix B: Referenced Documents, p. 251 ("Prepublication Review Policy Guide," Federal Bureau of Investigation, Information Management Division, Jan. 8, 2020, at 10).

³ Consolidated Appropriations Act, 2023, Pub. L. 117-328, Div. E, Sec. 713.

My experience working for Congress was that whistleblowers brought allegations, and where the committees found those allegations worth congressional action, we conducted investigations. No one expects a private citizen to investigate a crime before going to the police, and we didn't expect a whistleblower to investigate their own agency. That's also essentially how the process for remedying retaliation works at the MSPB, where making a nonfrivolous allegation leads to discovery, interviews, and more. Simply put, the burden is not on the whistleblower to produce the evidence at the outset—that's why there's an investigative process.

The Democrats also got the facts wrong. For example, their report claimed DOJ OIG declined to investigate Mr. Friend's claims, when in fact DOJ OIG will be interviewing Mr. Friend tomorrow. DOJ OIG says no one from the Democrat staff even contacted their office to verify the status of its investigation into Mr. Friend's allegations before issuing their report. Inexcusably, a number of mainstream media sources simply repeated the Democrats' wrong information without bothering to check the facts for themselves.

III. Conclusion

FBI whistleblowers have traveled a hard road over the years. They should be treated by Congress the same as other whistleblowers, both in statute and in practice. Issuing reports smearing those who come forward from the FBI and questioning their credibility will without doubt deter others from taking that same path.

For Congress to perform its Constitutional duty of oversight, it must have firsthand information about how federal agencies are operating. But why would future whistleblowers bring their disclosures to Congress if they think they might be treated how these whistleblowers have been? Attacking whistleblowers hurts this Committee and others like it. It hurts the House of Representatives as an institution. And it hurts Congress as a whole.

Thank you.