Needed: A Whistleblower Protection Paradigm Shift

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It seems like ancient history now, but it was less than 18 months ago—Aug. 12, 2019, to be exact—that an anonymous federal whistleblower submitted a complaint to the office of the Intelligence Community Inspector General's (IC IG), in effect alleging that President Donald Trump had pressured Ukraine to investigate Trump's main political rival—former Vice President Joe Biden. Later, it was discovered that part of this pressure campaign included the withholding of congressionally appropriated funding for Ukraine to buy weapons to defend itself against Russia's de facto invasion of its territory.

Meanwhile, Trump and his allies—both on Capitol Hill and in the Trump-friendly slice of the media-echo chamber—would spend the next several months attacking the whistleblower, with two prominent pro-Trump Republicans—House Intelligence Committee ranking member Rep. Devin Nunes (R-California) and Sen. Rand Paul (R-Kentucky)—attempting to "out" the individual (the whistleblower's identity has never been officially confirmed either by his counsel or any executive branch official). Other federal officials who did testify openly about the president's misconduct in "Ukrainegate" faced direct retaliation, most outrageously Army Lt. Col. Alexander Vindman, then of the National Security Council (NSC) staff, who retired in July 2020 in the wake of ongoing harassment and career retaliation for testifying in the House impeachment inquiry.

All of this naturally raises questions: How long has whistleblower retaliation been a feature of American political life? What laws exist to protect IC whistleblowers in particular? Are those safeguards actually effective? If not, what should be done to provide truly meaningful and effective protections for government employees or contractors seeking to expose wrongdoing in the IC? As a former CIA whistleblower myself, it will probably come as no surprise that I have some thoughts on these and related issues. First, some historical background.

Founding Era History

It's been argued that Trump and his administration have engaged in a campaign of political "norm busting" and illegal acts. While the Trump administration behaved more brazenly than others, "norm busting"—and the commission of illegal or unconstitutional acts by presidents or their appointees, as well as members of Congress—has been going on since the dawn of the Republic.

Even before the Constitution existed, some of the Founders realized that giving encouragement to those who wished to expose wrongdoing should be a priority. On July 30, 1778, the Continental Congress passed the first national statute encouraging whistleblowers to come forward. It read in part:

Resolved, That it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.

It was ironic, then, that when the secretary to the Committee on Foreign Affairs—none other than the legendary Thomas Paine—exposed criminal profiteering by Continental Congressman Silas Deane later that same year, Paine's reward was to be fired by Congress for violating his oath "to disclose no matter…he shall be directed to keep secret." (see Harlow Giles Unger, *Thomas Paine and the Clarion Call for Independence* (DeCapo Press: New York, 2019), pp. 87-93).

Many other Continental Congress members had engaged in shady business practices involving official funds similar to Deane's. Instead of protecting the whistleblower Paine, they retaliated against him, protecting one of their own. The theoretical ideal of exposing wrongdoing collided with the reality of political self-interest, and sadly for Paine, reality won. Paine was a victim of the fundamental power asymmetry that inevitably confronts would-be whistleblowers.

The "Ukrainegate" whistleblower has—so far as we know—managed to avoid the kind of fate meted out to Paine and Vindman, although his lawyers did get death threats. Anonymity, along with engaging competent counsel and very likely some luck, shielded that whistleblower from many—though not all—of the kinds of negative, life-altering consequences that whistleblowers often face. Anonymity helps mitigate, but does not eliminate, the power asymmetry that confronts federal whistleblowers seeking to expose mismanagement, waste, fraud, abuse, or other criminal conduct within the American national security establishment.

Recent History

Two hundred and twenty years after enacting that first, ultimately failed whistleblower law, Congress passed the first law to protect from reprisal government whistleblowers who deal with classified information: The 1998 Intelligence Community Whistleblower Protection Act (ICWPA). The original ICWPA was narrow in scope, applying only to CIA employees. Further, it rendered anonymity impossible by requiring those seeking to report an "urgent concern" to go through the CIA IG *first*, and, if dissatisfied with the IG response, they could only go to Congress *after* informing the director of the CIA. Depending on the motives of the CIA's chief, such a system carried serious risk of retaliation and even public exposure.

Over a decade passed before Congress took another half-step in promulgating further IC whistleblower protections via the Fiscal Year 2010 Intelligence Authorization Act (PL 111-259). While that law bars the IC IG from disclosing an IC whistleblower's identity (with some important exceptions), it only binds the IC IG—it doesn't apply to other elected or appointed

officials or Congress. This is why it was possible for Nunes and Paul to attempt to "out" the whistleblower: They faced no criminal charges if they exposed the whistleblower's identity.

For Nunes, Paul and other House or Senate members contemplating such an act, the only potential peril was political. Theoretically, they could have faced expulsion from a Congressional chamber controlled by the other party had they been able to carry out their threat…an unlikely scenario given how few House or Senate members have actually been expelled over the last 240 years.

The "Ukrainegate" scandal illuminated other limits of current law, too. Most notably, then-Acting Director of National Intelligence (DNI) Joseph Maguire slow-rolled transmission of the anonymous whistleblower complaint to the House and Senate Intelligence Committees after the White House tried to assert executive privilege over the material. One wonders if the complaint ever would have made it to Congress if a true Trump loyalist like current DNI John Ratcliffe had been in charge when the "Ukrainegate" whistleblower filed their complaint.

So what additional protections are needed?

Last year at Cato Unbound, Jesselyn Radack, Christopher Coyne, and I had an exchange about these and other whistleblower-related reform issues that crystalized in my mind some proposals that, if implemented, would make it far easier for would-be federal whistleblowers to expose wrongdoing without facing retaliation. These reforms would address the IC in particular via principles and rules that ought to apply to whistleblowers generally across the national security space and, indeed, to the government generally.

Whistleblower Protections and Avenues: The Congressional Oversight Reform Angle

As congressional overseers of the IC, the House and Senate Intelligence Committees have been, for at least the last 25 years, a pathetic shadow of the Church Committee. This is particularly true regarding investigating, and where appropriate punishing (via impeachment or criminal referrals to the Justice Department), Executive branch officials who retaliate against IC whistleblowers or otherwise take action to impede constitutionally sanctioned congressional investigations of IC activities.

An illustrative, though hardly exhaustive, list of such episodes includes:

The "NSA Five" and the pre-9/11 TRAILBLAZER-THINTHREAD digital network exploitation program debacle at NSA, about which I've written at length.

Former DOJ official Thomas Tamm, who exposed the unconstitutional NSA STELLAR WIND domestic surveillance program to the *New York Times* and was hounded out of government service for it.

The collusion of the House and Senate Intelligence Committees with NSA in keeping from the public the fact of NSA domestic spying targeting Americans, revealed by Edward Snowden.

Then-CIA Director John Brennan's spying on Senate Intelligence Committee staff investigating the CIA's infamous Bush 43-era torture program.

In each of the cases listed above, no executive branch official was fired, much less impeached or prosecuted, for their role in the incidents in question.

A key reason for this congressional oversight failure pattern is that too often, the House and Senate Intelligence Committees have become cheerleaders for the departments and agencies they interact with, rather genuine overseers, as intended by Senator Frank Church and the others who served on that committee.

I witnessed this first hand over 20 years ago as a CIA whistleblower myself, when despite smuggling out of CIA headquarters over 100 classified documents and delivering them to the Senate Intelligence Committee I got no oversight action on the issue I raised—but the committee staff did inform CIA of my visit. Had I not demanded a letter from the committee in advance authorizing me to turn over the documents, I might well have been subjected to prosecution.

Based on the aforementioned history, the respective rules of the House and Senate should be amended to:

Allow IC whistleblowers (whether federal employees or contractors) to go to *any* relevant House or Senate committee, or the Government Accountability Office (GAO). While GAO's FraudNet has taken many complaints from federal employees and contractors during the course of its existence, current law does not expressly allow IC employees or contractors to make complaints directly to GAO. That must change.

Have the option of reporting complaints to House or Senate members of their states of residence if they believe the committee of jurisdiction is too partisan or politicized to safely handle their disclosure and maintain the whistleblower's anonymity.

Require each House and Senate personal office to have at least one staffer cleared to receive any classified information from national security whistleblowers (including TS/SCI, SAP or covert action-related material), including complaints involving waste, fraud, abuse, mismanagement, or criminal conduct.

The real key to this part of the proposal is #2, as it would help address the power asymmetry problem discussed earlier.

Politically, if a whistleblower were able to take their complaints to their own House member or one of their senators (assuming they trusted them), it would instead become a de facto constituent case work issue as well as a substantive policy issue. The receiving House or Senate member would also be faced with the reality that a constituent—a voter with family members and friends who might also be voters in the district/state—needed their help and protection. Failure by the House or Senate member to act on the constituent whistleblower's allegations would thus carry direct, and hopefully inescapable, political consequences.

Whistleblower Protections and Avenues: The Executive Branch Reform Angle

Recent experience has clearly demonstrated the limitations and perils of the IG Act of 1978, the ICWPA, and the FY10 Intelligence Authorization Act whistleblower protections. Those statutes should be replaced with a safer and streamlined approach to providing whistleblowers with

secure channels to submit their complaints and ironclad penalties to deter retaliation. The new IC whistleblower protection statute would:

Mirror the new House and Senate rules outlined above regarding congressional options for making disclosures, and include the Office of Special Counsel as a designated, protected channel for making IC-related whistleblower disclosures, and expressly prohibit the president or his designee from firing any employee or contractor working for the Office of Special Counsel or IG office in any IC department or agency for refusing to turn over information regarding an IC whistleblower's complaint.

End requirements that IC whistleblowers notify agency leadership or agency/department IG before making disclosures to Congress.

Define as a "high crime or misdemeanor" any attempt by any elected or appointed federal official, including the president, vice president, or members of Congress (to include any employees or contractors of the House or Senate) to deanonymize an IC whistleblower who has, in good faith, filed a complaint lawfully, and for any other civil officer of the government, a felony punishable not less than 20 years in prison and not less than a $1,000,000 fine.

Provide cleared, private counsel for any IC whistleblower needing one to assist them in dealing with the whistleblowing process, including any testimony before any governmental body or proceeding, and require expedited security clearance processing for the attorney, not to exceed 30 days total from the time the request for clearing of counsel is made.

These measures would further address the power asymmetry problem I've discussed by creating meaningful, distributed, and statutorily protected pathways for IC whistleblowers to try to keep their complaints within executive branch channels if possible, but if not, make those complaints to Congress with a higher degree of protection and support than has ever been the case before.

But what if both the legislative and executive branches fail to act on a valid complaint? What if the same party controls the White House and both chambers of Congress and the leaders of the ruling party elect to subvert these new laws? That's where the "public interest disclosure" option comes into play.

Whistleblower Protections and Avenues: The Public Interest Disclosure Angle

More often than not over the last century, we've only learned of corrupt government acts because one individual, or at best a very small group of people, have decided their conscience simply won't permit them to "go along to get along." But those like Daniel Ellsberg, Chelsea Manning, or Edward Snowden, who gave up on official channels and put their faith in the press to help them expose wrongdoing, ended up facing prosecution under laws such as the Espionage Act—a radically over-broad, World War I-era law that has been repeatedly misused to prosecute executive branch whistleblowers.

In the cases of Ellsberg, Manning and Snowden, federal officials themselves had concealed waste, fraud, abuse, mismanagement or even criminal conduct behind the classification system embodied in mechanisms like Executive Order 13526 or the NSA Act of 1959. The following

model legislation, which draws some language directly from EO 13526, is designed to preclude that possibility:

Section 1. Notwithstanding any other provision of law, in no case shall information be classified, continue to be maintained as classified, fail to be declassified, or otherwise deemed not releasable to the public in order to:

(a) conceal violations of law, inefficiency, or administrative error;

(b) prevent embarrassment to a person, organization, or agency;

(c) restrain competition; or

(d) prevent or delay the release of information that does not involve the protection of information the release of which could pose a clearly articulable, documentable and foreseeable imminent threat of physical harm or death to an individual.

Section 2. Any record—whether designated a permanent or temporary record—which is inappropriately marked, designated or otherwise declared to be classified by an original classifying authority or their designee, or that is withheld from public release under another statute, that meets any of the criteria in Section 1 is illegally so designated. Release of illegally designated records shall be deemed in the public interest and lawful;

Section 3. Any release made pursuant to Section 2 must initially be made to either

the department or agency inspector general of the department or agency against whom the allegation and related disclosure pertain; or

the Intelligence Community Inspector General, unless the employee or contractor seeking to make such a disclosure has a good faith belief that the department or agency inspector general, or the Intelligence Community Inspector General, would not take seriously the allegation or protect the person seeking to make a disclosure; or

a Member of Congress or Congressional committee.

Section 4. Upon confirmation of the receipt of a record by

the department or agency inspector general of the department or agency against whom the allegation and related disclosure pertain; or

the Intelligence Community Inspector General; or

the Member of Congress or Congressional Committee,

any executive branch employee or contractor shall be held harmless for any subsequent disclosure of any record inappropriately marked, designated or otherwise classified, or withheld from public release under another statute, that meets any of the criteria in Section 1.

Section 5. The entity that receives a record pursuant to Section 2 shall

within 72 hours provide public notice of the fact that such a record has been received, including the nature of the allegation and the department or agency involved; and

within 15 calendar days from the date of public notice declare affirmatively or negatively whether an investigation into the allegations contained in the disclosure shall be conducted.

Section 6. Should

no announcement by the entity in receipt of the record and complaint made pursuant to this Act be forthcoming within 15 calendar days from the date of the public notice of the disclosure; or

more than 180 days pass without the public release of the findings of any investigation conducted pursuant to a disclosure and complaint made pursuant to this act;

any executive branch employee or contractor shall be held harmless for any subsequent public disclosure of records inappropriately marked, designated or otherwise declared to be classified by an original classifying authority or their designee, or that is being withheld from public release under another statute, that meets any of the criteria in Section 1.

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This approach would put pressure on the complaint-receiving entity to 1) quickly let the public know it has received a complaint and 2) within three weeks announce whether or not it was conducting an investigation into the allegations. If an IG or the Congress failed to act and produce at least a preliminary report by 180 days after the initial disclosure, *any* executive branch employee or contractor—including the original whistleblower—could reveal the information to the press or public legally. This is designed to address a circumstance whereby the original whistleblower is unable, for whatever reason, to make the disclosure themselves.

To be sure, a prospective IC whistleblower seeking to make a disclosure under the kind of statute proposed here would need to conduct due diligence, ensuring that their claim was thoroughly documented. And no doubt critics of this proposal will describe it as "radical" or otherwise unworkable. Neither argument holds water.

As to the latter, what is radical is the current situation. National security and especially IC whistleblowers have few if any safe options for exposing wrongdoing by their employers. The reforms I'm proposing would create multiple pathways for making protected disclosures while ensuring that elected or appointed officials could no longer count on misusing the classification system to conceal their incompetence or criminality.

This proposal is also workable in the practical sense. It utilizes established legislative and administrative practices, developed over more than two centuries, to create a new, vastly superior framework for ensuring greater government transparency and efficiency in the intelligence arena. It does so by creating new, self-executing legislative mechanisms for protecting those who seek to expose waste, fraud, abuse, mismanagement, and criminal conduct previously protected from exposure under an illegitimate blanket of secrecy.

Whistleblower Protection Reform: A Matter of Political Will

Various elements in official Washington—in the executive and legislative branches—will oppose pretty much everything I've proposed. Specifically:

Every manager in the IC would be terrified by the prospect that they could actually go to jail for railroading a whistleblower who exposed waste, fraud, abuse, mismanagement or criminal conduct going on in a program or activity under their jurisdiction. They will claim such reforms will "irreparably damage" U.S. national security. It's a lie, but they'll say it anyway, just as they have on previous occasions (i.e., Snowden's revelations, for example). But unelected bureaucrats have always opposed real reform in the national security arena—from racial integration of the armed forces to women in combat roles to allowing LGBTQ people to serve openly in the military. Their resistance to those reforms was wrong on moral, practical and political grounds—and their resistance to meaningful IC whistleblower protection reforms would be just as illegitimate.

Current (and very likely some former) House and Senate Intelligence Committee members will claim my proposals would undermine the Intelligence Committees. As outlined thus far in this piece, if those committees had not long ago morphed from overseers into cheerleaders for the agencies they are supposed to police, my proposals would not be needed. Because they have, these proposals are absolutely necessary…and long overdue.

Some are going to question exactly how good an idea it is to allow individual House or Senate office staffers with clearances to take whistleblower complaints about covert actions gone wrong or SAPs that waste taxpayer money and potentially make war more, not less, likely. My response is since the established committees of jurisdiction have demonstrably and repeatedly failed to be welcoming to whistleblowers, if not outright hostile to them (see again the Snowden experience), an oversight paradigm shift in the form of multiple, protected pathways for whistleblowers to report their concerns is key to restoring an ethic of oversight in the Congress *as a whole*.

The true obstacle to the enactment of this proposal is of a political character.

Current Justice Department policy insists that no sitting president can be indicted. This proposal would override that DOJ policy as it pertains to IC whistleblowers. While it may be possible to find a House or Senate member to offer such a proposal, how many of their colleagues would sign on to such legislation—realizing they could potentially be prosecuted for knowingly exposing an IC whistleblower—much less vote for it?

If you're wondering whether the Constitution's speech and debate clause might serve as a shield against prosecution for outing a whistleblower, I think the answer is no, based on the *Gravel v U.S.* (408 U.S. 606, 1972) precedent, in which the Court held that "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."

My view is that if a House or Senate member (or their staffs) are truly committed to protecting whistleblowers, they should have no problem supporting a bill that would ensure that any of their

colleagues who tried to "out" a whistleblower for political retaliatory purposes would potentially face jail time for doing it.

Would any president sign such legislation if it reached his or her desk? Or are the kinds of political impulses that led to Paine and Vindman being ejected from government service destined to doom this proposed reform effort?

Again, this is a matter of political will. Presidential vetoes can be overridden. And if a sitting chief executive were to veto such a "good government" and accountability-focused bill, that should make us wonder whether said chief executive has something to hide, and if so, whether that person should be allowed to remain in office.

In describing the dysfunction and breakdown of IC oversight that caused him to go public regarding NSA's mass warrantless surveillance against Americans, Snowden offered this assessment in his memoir, *Permanent Record*:

The constitutional system only functions as a whole if and when each of its three branches works as intended. When all three don't just fail, but fail deliberately and with coordination, the result is a culture of impunity. (p. 232)

The current "culture of impunity" that politicians and IC bureaucrats enjoy vis a vis whistleblower retaliation must be replaced with an inescapable system of deterrence and consequences—one that makes the potential cost of retaliation swift, sure, and severe, and thus simply not worth the effort.

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