Exposing Corruption Exploring Solutions
Project On Government Oversight

Testimony of
Danielle Brian, Executive Director
Project On Government Oversight (POGO)
before the
Senate Homeland Security and Governmental Affairs Committee
on
"S. 372: The Whistleblower Protection Enhancement Act of 2009"

June 11, 2009

Thank you for inviting me to testify today. I am the Executive Director of the Project On Government Oversight, also known as POGO. POGO was founded in 1981 by Pentagon whistleblowers who were concerned about wasteful spending and weapons that didn't work. They needed a safe way of getting that information out to Congress and the public without their risking their jobs, and so we were created as the Project on Military Procurement. Over the years POGO has evolved, but we remain devoted to our roots of protecting brave truth-tellers inside the federal government.

Happily, Congress does not have to be persuaded there is a problem in the current system of protecting federal whistleblowers. Congress has been grappling with this issue for years. As a result, I will not focus on the "why," but will instead focus on the "how" and "who."

In general, POGO believes H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009," does a much better job providing meaningful protections for federal employees who blow the whistle than Senate companion bill S. 372. We prefer the House bill for two reasons: it allows federal whistleblowers real due process through access to jury trials after they have exhausted their administrative remedies; and it extends meaningful protections to national security whistleblowers, the eyes and ears inside the government who are looking out for our safety and security.

Federal Employees Should Have Access to Due Process Through Jury Trials
My colleague Tom Devine of the Government Accountability Project is focusing his testimony on our first reason for preferring the House companion bill: the many arguments for allowing federal employees access to the same due process rights as the tens of millions of employees in

the private sector and, perhaps more importantly, the many federal contractors they oversee.[1] As a fellow member of the Make It Safe Coalition, Mr. Devine speaks for POGO when he speaks in support of providing federal employees this essential due process right. We believe the mere existence of access to jury trials will both encourage those who know of wrongdoing but have hesitated to come forward because they didn't believe they had a fighting chance. We also believe it will deter those managers who are inclined to shoot the messenger and punish their employees for making disclosures. In the end, what we want is a system that will avoid the need for a courtroom, but will allow for it if necessary.

National Security Whistleblowers Are Left Out in the Cold

I will focus my testimony on the second reason we prefer the House companion bill: because it provides protections to national security whistleblowers. When the Whistleblower Protection Act was passed in 1989, those federal employees who work in the intelligence agencies—especially the FBI, CIA, DIA, and NSA—were carved out from getting even the pathetic protections accorded to other federal employees.[2] This was a terrible mistake. Now, an intelligence contractor working at the Defense Intelligence Agency is protected if he reports misconduct, but the federal employee overseeing him is not. This is unacceptable.

It is essential to cover national security whistleblowers with meaningful protections for several reasons. The first is that federal employees working in national security and intelligence are the people with whom we are entrusting our nation's most sensitive information. The government already determined that they are both serious and trustworthy when it issued them security clearances. It is wholly incongruous that the intelligence community has historically opposed giving these employees whistleblower protections by either trivializing the issues they raise as frivolous or, alternatively, suggesting they would recklessly spread state secrets if given whistleblower protections.

If we value these employees enough to entrust them with our secrets, we must also trust that they will protect those secrets when working to correct unaddressed problems or threats. We should give them the same protections we already give the contractors they oversee or with whom they work,[3] and the same access to courts we give them if they are discriminated against.[4] I would argue that national security whistleblowers make the most vital disclosures because of the safety, security, and civil-liberty implications of the problems they reveal. Some examples include the national security whistleblowers who revealed that Congress was being misled about A.Q. Khan's nuclear proliferation scheme[5]; the existence of the CIA's secret prisons[6]; our

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[1] American Recovery and Reinvestment Act (Public Law 111-5), Section 1553; Defense Authorization Act, 10 USC 2409(c)(2); False Claims Act, 31 U.S.C. § 3730 (h)

[2] 5 U.S.C. § 2302(a)(2)(C)(ii)

[3] Defense Authorization Act, 10 USC 2409(c)(2); False Claims Act, 31 U.S.C. § 3730 (h)

[4] Civil Rights Act (Pub. L. 88-352), Title IIV

[5] Lyndsey Layton, "Whistle-Blower's Fight For Pension Drags On: Former Defense Official Seeks Private Relief Bill," *Washington Post*, July 7, 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070602127.html (Downloaded June 8, 2009)

[6] Dafna Linzer, "CIA Office is Fired for Media Leaks; The Post was Among Outlets that Gained Classified Data," *The Washington Post*, April 22, 2006. http://pogoarchives.org/m/wi/wapo-cia-20060422.pdf

government's use of warrantless wiretaps[7]; TSA[8] and FBI[9] incompetence; and secret detentions at Guantanamo.[10] It is simply bad public policy to discourage those whistleblowers.

In each of the above cases, none of the whistleblowers had a safe and effective way to make these disclosures internally or to Congress. As a result, most of them made their revelations to the press or other outside organizations, lost their federal jobs or were otherwise retaliated against, or both. By not providing real protections for national security whistleblowers, we are driving them to the press and actually encouraging leaks of classified information. Congress learned about all of these disclosures from the press, not the other way around. That is a lose/lose situation. And, worse, how many other people of conscience working in the government have seen what has happened to these whistleblowers and have remained silent—leaving those problems to fester? That is perhaps the biggest—and most dangerous—loss of all.

Congress Needs Access to National Security Whistleblowers

An even more compelling reason to offer national security whistleblowers protections is that it is in the self-interest of the Congress to encourage those who are aware of wrongdoing to make their disclosures to Congress. It helps you do your job better. In fact, the Congress cannot do its job overseeing the national security and intelligence operations of the executive branch *without* hearing from whistleblowers, and communicating informally with other federal employees in those agencies. Formal briefings from agency heads to Congress have their place, but they do not truly inform the Congress of the real goings-on at an agency. House Intelligence Committee Chairman Silvestre Reyes recently articulated this point, which is particularly acute in the intelligence arena, in a letter he sent this April to every CIA employee. He wrote,

> One important lesson to me from the CIA's interrogation operations involves congressional oversight. I'm going to examine closely ways in which we can change the law to make our own oversight of CIA more meaningful; I want to move from mere notification to real discussion.[11]

I would submit that the most effective way to encourage real oversight would be to protect those national security whistleblowers who come to the Congress.

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[7] Michael Isikoff, "The Fed Who Blew the Whistle: Is He a Hero or a Criminal?," *Newsweek,* December 13, 2008. http://www.newsweek.com/id/174601 (Downloaded June 8, 2009)

[8] Stephen Losey, "Air Marshal's Firing Prompts Whistleblower Suit," *Federal Times,* November 7, 2006. http://www.federaltimes.com/index.php?S=2331806 (Downloaded June 8, 2009); "Ex-air marshal to sue over 'SSI' label," *The Washington Times,* October 29, 2006. http://washingtontimes.com/news/2006/oct/29/20061029-115609-8718r/ (Downloaded June 8, 2009)

[9] Testimony of Michael German, Policy Counsel, American Civil Liberties Union, Former Special Agent, Federal Bureau of Investigation before the Subcommittee on Crime, Terrorism, and Homeland Security House Judiciary Committee on "The FBI Whistleblowers: Corruption and Retaliation Inside the Bureau,", May 21, 2008. http://www.aclu.org/images/general/asset_upload_file419_35426.pdf (Downloaded June 8, 2009); Michael German, "Statement of Michael German," *American Civil Liberties Union.* http://www.aclu.org/whistleblower/statements/2.html (Downloaded June 8, 2009)

[10] Tim Golden, "Naming Names At Gitmo," *The New York Times,* October 21, 2007. http://query.nytimes.com/gst/fullpage.html?res=9406EEDA103CF932A15753C1A9619C8B63&sec=&spon= (Downloaded June 8, 2009)

[11] Letter from Silvestre Reyes, Chair House Intelligence Committee, to CIA employees, April 29, 2009. http://www.fas.org/irp/congress/2009_cr/reyes042909.pdf (Downloaded June 8, 2009)

For the past two years, POGO has had the pleasure of hosting monthly bi-partisan training sessions for Hill staff on how to conduct oversight. Each session includes experienced retired or current staffers—always both a Democrat and a Republican—who discuss techniques in the art of congressional oversight. In every session, these seasoned veterans tell the newer staff that they cannot do their jobs well if they do not learn how to work with whistleblowers and to develop informal lines of communication with people at the agencies they oversee. It is often pointed out by our panelists that this is even more true in the national security arena, where agencies are under less scrutiny by the public and the media – making it even more important that Congress conduct rigorous oversight.

Whistleblower Protections Do Not Protect Leaks of Classified Information

I want to be very clear that the Make It Safe Coalition is in consensus that we do not support a law to protect people who disclose classified information to anyone who isn't cleared to receive it. Although there is nothing in H.R. 1507 that would permit employees to make unauthorized disclosures of classified information, we would support adding language to the bill to make this explicit.

Passage of whistleblower protections for national security whistleblowers will in no way supersede existing rules and systems established to protect the integrity of the handling of classified information. During last month's hearing on the House companion whistleblower protection legislation, the Congress heard testimony from former FBI agent Mike German to that end. He testified that,

> FBI and other intelligence community employees have the training and experience required to responsibly handle classified information and the severe penalties for the unlawful disclosure of classified information will remain intact after this legislation passes.[12]

Furthermore, concerns that a national security whistleblower's case cannot safely be heard in court were fully debunked in a March 1996 GAO report that concluded "Congress Could Grant Intelligence Employees Standard Federal Protections Without Undue Risk to National Security," because the courts have long established procedures for handling classified information.[13] In fact, National Whistleblowers Center General Counsel David Colapinto testified that he and his colleagues regularly bring cases on behalf of national security employees to the courts under Title VII because

> Title VII permits employees of the FBI, National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA") and all other federal intelligence or law enforcement agencies excluded from the protections of the Civil

[12] Testimony of Michael German, Policy Counsel, American Civil Liberties Union, Former Special Agent, Federal Bureau of Investigation, before the House Committee on Oversight and Government Reform on "The Whistleblower Protection Enhancement Act of 2009 (H.R. 1507)," May 14, 2009, p.5. http://www.aclu.org/safefree/general/39593leg20090514.html#attach (Downloaded June 8, 2009)

[13] General Accounting Office, *Report to the Honorable Patricia Schroeder on Intelligence Agencies: Personnel Practices at CIA, NSA, and DIA Compared with Those of Other Agencies* (GAO/NSIAD-96-6), March 1996, p. 35. http://www.gao.gov/archive/1996/ns96006.pdf (Downloaded June 8, 2009)

Service Reform Act ("CSRA") and the Whistleblower Protection Act ("WPA") to bring Title VII discrimination and retaliation claims in federal court.[14]

Lawful Disclosures to Congress Should Be Protected

Disclosure to Congress is not the same thing as making the information public. By virtue of your being elected to office, you have both a right and a duty to hear the vast majority of our nation's secrets, and many of your staff have been similarly cleared, regardless of the committees on which you serve. For those particularly sensitive Special Access or Compartmentalized Programs, you as Members of Congress have a right to demand to be read into them.[15] POGO believes strongly that the Congress should not blindfold itself by statutorily limiting its access to information by adding new restrictions.

It is in the provision specifying the protection of disclosures to Congress that the Senate language in S. 372[16] is preferable to the comparable language in H.R. 1507.[17] The House language is too confusing for a whistleblower because it specifies that particular disclosures are only protected if they are made to members of specific committees. Our problem with this language is that most people do not know who sits on what committee, or even which committee has jurisdiction over which agency. Why would the Congress not want to protect a person of conscience who wants to make a disclosure to a specific Member as a constituent or because they believe that Member of Congress is a particularly effective elected official? Shouldn't that whistleblower be protected from retaliation because they came to you in good faith? While the Senate language avoids these problems by not specifying particular committees, it does retain problematic language in that disclosures are only protected if they are made to "authorized" Members of Congress or their staff. Who authorizes them? The executive branch? History has shown the Executive has repeatedly and mistakenly asserted its power to do so.[18]

During four days of deliberations over the Intelligence Community Whistleblower Protection Act (ICWPA), the Congress dispensed of the perennial executive branch assertion that it is unconstitutional for national security whistleblowers to make even lawful disclosures to Congress.[19] In the ensuing legislation, the Congress enumerated six principles regarding the right of Congress to receive classified information. The statute states,

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[14] Testimony of David K. Colapinto, General Counsel, National Whistleblowers Center, before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009," May 14, 2009. p.6.

[15] Congressional Research Service Memorandum, *Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions*, January 18, 2006; Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* (RL30319), September 17, 2007; Congressional Research Service, *The Protection of Classified Information: The Legal Framework* (RS21900), December 21, 2006; Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals* (RS20748), April 5, 2006; Congressional Research Service, *Congressional Access to Executive Branch Information: Legislative Tools* (RL30966), May 17, 2001.

[16] S. 372, Sec. 1(b)(1)(C)(ii)(I-III)

[17] H.R. 1507, Sec. 10(f)(3)(A-C)

[18] Louis Fisher, *Congressional Access to National Security Information: Precedents from the Washington Administration* (2009-002846), May 22, 2009. p.1.

[19] Testimony of Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress Appearing before the House Committee on Oversight and Government Reform on 'The Whistleblower Protection Enhancement Act of 2009,'" May 14, 2009, p 14.

> Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community.[20]

The Library of Congress Law Library Constitutional Scholar Louis Fisher recently wrote that,

> The Department [of Justice]'s position about presidential control over national security information has a direct bearing on the constitutional capacity of Congress to perform its oversight and investigative duties. It also rests on very incomplete and misleading historical grounds. . . . The President does not have plenary or exclusive authority over national security information. The scope of the President's power over national defense and foreign affairs depends very much on what Congress does in asserting its own substantial authorities in those areas.[21]

The executive branch has also repeatedly asserted that protecting national security whistleblowers would improperly allow a mid-level agency employee to "unilaterally" make "unauthorized" disclosures to Congress.[22] This is a particularly troubling complaint. Intelligence agency officials make these "unilateral" decisions every day when they discuss classified information with their colleagues at executive branch agencies and with their many contractors. It appears the intent of this assertion is to ensure that the same information being discussed across Washington is simply not discussed with the Congress.

As you consider this legislation, I urge you to reject any remnants of the misperception that the executive branch has sole authority to control classified information, and assert the right of any Member of Congress or their properly-cleared staff to receive disclosures of classified information from whistleblowers. It is also important to note that currently, even unclassified disclosures from national security whistleblowers to the Congress are exempt from WPA protections.

"Separate But Equal" Protections for National Security Whistleblowers Do Not Work

Under the Civil Service Reform Act and the ICWPA, a "separate but equal" system for FBI and intelligence whistleblowers was created as an alternative to the WPA. Unfortunately, this system is not working. For almost a decade after Congress created the "separate but equal" system, the FBI failed to even implement that system.[23] We are unaware of any employees who have successfully resolved a whistleblower retaliation case using the FBI's system, and the FBI does

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[20] Intelligence Community Whistleblower Protection Act (Public Law 105-272), Section 701.

[21] Louis Fisher, *Congressional Access to National Security Information: Precedents from the Washington Administration* (2009-002846), May 22, 2009. pp 1, 7.

[22] Most recently, in the testimony of Rajesh De, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud and Abuse: H.R. 1507, The Whistleblower Protection Enhancement Act of 2009," May 15, 2009. p.9.

[23] In 1989, Congress amended 5 U.S.C. §2303 requiring the President to provide FBI employees with administrative rights and remedies consistent with those available to Title 5 employees under 5 U.S.C. §§ 1214 and 1221. After FBI whistleblower Frederic Whitehurst filed a lawsuit in federal court alleging retaliation in violation of the First Amendment and the Privacy Act, President Clinton issued an order directing the Attorney General to implement the FBI procedures under 5 U.S.C. § 2303. See Delegation of responsibilities concerning FBI employees under the Civil Service Reform Act of 1978. Pres. Mem. of April 14, 1997, 62 Fed. Reg. 23123.

not make any such records publicly available. Over the past seven years, fewer than ten CIA employees have used the system of reporting their concerns to the CIA IG, who reports his findings to the congressional Intelligence Committees, and in only one single case did the IG recommend corrective action to the Agency head.[24] Yet, during this time major disclosures of wrongdoing at the CIA have repeatedly been revealed by whistleblowers directly to the press. Then-Acting DoD IG Thomas Gimble testified before the House in 2006 that, "Despite its title, the ICWPA does not provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name 'Intelligence Community Whistleblower Protection Act' is a misnomer; more properly, the ICWPA is a statute protecting communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity."[25] These systems do not work, and are no substitute for due process.

Furthermore, the Department of Justice IG has recently reviewed the FBI's alternative whistleblower disclosure and protection system, and concluded that,

> …30 percent of survey respondents who had observed misconduct said they either never reported misconduct they observed or reported less than half of the misconduct they observed. . . . We found there continues to be a significant percentage of FBI employees who believe that there is a double standard of discipline for higher-ranking and lower-ranking FBI employees. In our review, we found that allegations of misconduct against SES employees were unsubstantiated at a much higher rate than allegations against non-SES employees. Even more significant, SES employee's penalties were mitigated on appeal at a much higher rate than non-SES employees' penalties. Moreover, when we examined the appellate officials' decisions to mitigate penalties for SES employees, we found that the mitigation in most of these SES cases was unpersuasive and unreasonable.[26]

The brave, honest public servants deserve better than this second-class system.

Let me briefly put faces on a few of these national security whistleblowers.

Richard Barlow

Working as a CIA counter-proliferation intelligence officer in the 1980s, Richard Barlow learned that top U.S. officials were allowing Pakistan to manufacture and possess nuclear weapons, and that the A.Q. Khan nuclear network was violating U.S. laws. He also discovered that top officials were hiding these activities from Congress. After engineering the arrests of Khan's nuclear agents operating in the U.S., Mr. Barlow left to work for the Office of the Secretary of Defense. Top officials at the DoD continued to lie about Pakistan's nuclear program. Mr. Barlow objected and suggested to his supervisors that Congress should be made aware of the situation. Because

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[24] Testimony of David K. Colapinto, General Counsel, National Whistleblowers Center, before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009," May 14, 2009. p.4

[25] Statement of Thomas F. Gimble, Acting Inspector General, Department of Defense before the House Committee on Government Reform Subcommittee for National Security, Emerging Threats, and International Relations on National Security Whistleblower Protection, February 14, 2006. http://www.dodig.mil/IGInformation/PressReleases/DODIG_Testimony_Final_0206.pdf (Downloaded June 8, 2009)

[26] Department of Justice, Office of Inspector General, *Review of the Federal Bureau of Investigation's Disciplinary System* (Report Number I-2009-002), May 2009. pp. xiii-xiv.

Barlow merely *suggested* that Congress should know the truth, Mr. Barlow was fired. In 1998, following seven years of congressionally directed investigations by three IGs and the GAO, a virtually unanimous bipartisan majority in Congress and the President of the United States concluded that Mr. Barlow deserved to be compensated with relief. However, a bill to pay him minimal damages was blocked in the federal claims court where the executive branch invoked the President's State Secrets Privilege.[27]

Robert MacLean
Robert MacLean was a ten-year federal law enforcement officer, and U.S. Department of Homeland Security (DHS) Federal Air Marshal (FAM) with an unblemished record. He protested plans to secretly neutralize budget shortfalls and save money by canceling air marshal coverage on long-distance flights, even though it was during a suicide terrorist hijacking alert. He protested up the chain of command to a supervisor and to three DHS Office of Inspector General field offices, all whom declined to act and said he should drop the issue. Mr. MacLean ultimately alerted the press of this dangerous DHS plan. After public congressional pressure, DHS's plans were canceled. On April 11, 2006—three years later—the agency fired him because they had retroactively labeled the information in his 2003 disclosure as Sensitive Security Information (SSI). His case has been pending before the Merit Systems Protection Board for three years without a hearing.[28]

Thomas Tamm
In late 2003, Thomas Tamm, a Department of Justice lawyer, became aware of the existence of a secret program that bypassed existing procedures for obtaining judicial approval for national security wiretaps of alleged spies and terrorists. Mr. Tamm, whose Justice career had earned him top honors and whose father and uncle both held high posts in the FBI, agonized about the legality of the program. He was rebuffed when he tried to tell a former colleague working for the Senate Judiciary Committee about his concerns. Ultimately he decided his only recourse was to alert *The New York Times* to what he knew. The story earned a Pulitzer, and Congress ultimately acted to constrain the Justice Department's surveillance tactics. But Mr. Tamm became a target of intense FBI inquiries, even a 2007 search of his home by 18 FBI officials in which his wife and children were questioned and his computers and laptops were seized. Mr. Tamm lost his job and has racked up tens of thousands of dollars in legal fees.[29]

Passing strong whistleblower legislation is a significant step forward. It will not, however, be enough. In addition, the President should issue an Executive Order that includes strict administrative, civil, and criminal penalties for officials who retaliate against whistleblowers. The Executive Order should also include rewards such as commendations, public recognition,

[27] Project On Government Oversight, "Richard Barlow Resource Page." http://www.pogo.org/investigations/government-oversight/rbarlow.html
[28] Project On Government Oversight, "Robert MacLean v. Department of Homeland Security (DHS)," July 29, 2003. http://www.pogo.org/pogo-files/alerts/homeland-security/hs-aviation-20030729.html
[29] The Ridenhour Prizes, "The Ridenhour Truth-Telling Prize." http://www.ridenhour.org/recipients_03g.shtml (Downloaded June 8, 2009)

and monetary awards for federal employees who disclose waste, fraud, and abuse, or who suggest ways to improve the operations of their agency.[30]

Finally, we cannot forget these people whose careers—or even lives—have been shattered because this law has been so late in coming. For real reform, we not only need to pass real protections so that there are no future Barlows, MacLeans, or Tamms, but we also need to review cases such as these and find some way to make amends for the untenable situation we forced these people into—people who were just doing their jobs and upholding their oath of service to their country. That would be a message sent around the federal government that whistleblower protections are more than a campaign promise, they are a reality.

[30] Project On Government Oversight, "POGO's Recommended Good Government Reforms for Presidential Transition Teams," October 16, 2008. http://www.pogo.org/pogo-files/reports/good-government/pogos-recommended-good-government-reforms/gg-ptp-20081016.html.