



**Testimony of Liz Hempowicz, Director of Public Policy
Project On Government Oversight
before the House Committee on Oversight and Reform
on “Improving Government Accountability and Transparency”
May 3, 2021**

Chairwoman Maloney, Ranking Member Comer, and members of the Committee, thank you for inviting me to testify in this legislative hearing. I am Liz Hempowicz, director of public policy at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

This hearing is timely, as is the legislation before the committee. I strongly urge the committee to advance the Whistleblower Protection Improvement Act, the IG Independence and Empowerment Act, and the Accountability for Acting Officials Act, either on their own or as part of the Protecting Our Democracy Act, the sweeping anti-corruption package introduced in the last Congress.¹ Doing so would strengthen whistleblower protections so that civil servants and other insiders may more safely expose waste, fraud, abuse of power, and corruption so that it may be addressed. Doing so would also limit any president’s ability to corruptly bypass the Senate advice and consent process when appointing officials to fill vacancies in high-level posts, which our founders intended to serve as a critical check against an all-powerful executive branch.² In addition to discussing the vital reforms this legislation would enact, I will also offer recommendations to strengthen some of these reforms even further.

The public is gravely concerned about political corruption in government. In a poll conducted last September, “political corruption” was ranked the second-most important issue among voters, beating out the COVID-19 pandemic, health care and drug costs, national security, and climate change.³ In a poll conducted a year earlier, respondents identified political corruption as the biggest problem facing the country.⁴ These are two examples in a growing trend. Congress

¹ IG Independence and Empowerment Act, H.R. 2662, 117th Cong., (2021). <https://www.congress.gov/bill/117th-congress/house-bill/2662/text>; Protecting Our Democracy Act, H.R. 8363, 116th Cong., (2020). <https://www.congress.gov/bill/116th-congress/house-bill/8363/text>

² Phillip Bump, “The president was never intended to be the most powerful part of government,” *Washington Post*, February 13, 2017. <https://www.washingtonpost.com/news/politics/wp/2017/02/13/the-president-was-never-intended-to-be-the-most-powerful-part-of-government/>

³ “CNBC ‘State of Play’ Poll - National Likely Voters September 4-6, 2020,” Change Research. https://changeresearch.com/wp-content/uploads/2020/09/CNBC-CR_National-Toplines_Wave-13_September-4-6-Wave-13_-9_4-6.pdf (accessed April 25, 2021)

⁴ Memorandum from ALG Research and GS Strategy Group to Interested Parties describing results of nationwide survey of likely voters in 2020 general election, November 8, 2019, 1. <https://campaignlegal.org/sites/default/files/2019-11/CLC%20FEC%20MEMO.pdf>

should see this as a mandate to examine and strengthen the system of checks and balances that exists to serve as a safeguard against the corruption the public is so concerned about.

Rooting Out Corruption

Since our nation's founding, whistleblowers have been an integral part of our constitutional system of checks and balances. The Continental Congress passed the first whistleblower protection law just after finalizing the Declaration of Independence.⁵ Today, whistleblowers continue to serve a critical role in exposing and even preventing corruption within government by reporting waste, fraud, illegalities, or abuses of power that might otherwise go unnoticed or unaddressed.

However, as this committee knows well, when whistleblowers come forward to expose corruption, they often face retaliation. As a former member of this committee, Mark Meadows, then a co-chair of the House Whistleblower Protection Caucus, put it several years ago, "retaliation is almost certain" for those who blow the whistle.⁶ In 2020, the Government Accountability Office (GAO) found that employees who filed whistleblower complaints were terminated at higher rates than other federal workers governmentwide.⁷ While termination is one of the most extreme forms, there are many degrees of retaliation, from creating a hostile work environment to revoking security clearances. That retaliation is often expressly illegal.⁸ Yet it is so pervasive as to be "almost certain." Congress can and must do more to protect whistleblowers from retaliation before it occurs and make it easier for those who have been retaliated against to recover from that retaliation.

Whistleblowers across the federal government are frequently subjected to retaliatory investigations. These investigations are only considered illegal retaliation for whistleblowers at the Department of Veterans Affairs.⁹ Retaliatory investigations are used to harass whistleblowers; they also tie up resources unnecessarily.¹⁰ They can, and increasingly do, lead to referrals for criminal prosecution, which are beyond the scope of the Whistleblower Protection Act. In POGO's view, criminal referrals can have an even greater chilling effect than

⁵ Stephen M. Kohn, "The Whistle-Blowers of 1777," *New York Times*, June 12, 2011.

<https://www.nytimes.com/2011/06/13/opinion/13kohn.html>

⁶ Mark Meadows, Remarks at the 2017 National Whistleblower Day Luncheon (United States Senate, Washington, DC, July 28, 2017). <https://youtu.be/X1kATHkANfw?t=111>

⁷ Yvonne D. Jones et al., Government Accountability Office, *Whistleblowers: Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers*, GAO-20-436 (May 2020), 9. <https://www.gao.gov/assets/710/707219.pdf>

⁸ 5 U.S.C. § 2302 (b)(8) (2020). <https://www.law.cornell.edu/uscode/text/5/2302>

⁹ 38 U.S.C. § 731(c)(3) (2020). <https://www.law.cornell.edu/uscode/text/38/731>

¹⁰ In *Caught Between Conscience and Career*, POGO, the Government Accountability Project, and Public Employees for Environmental Responsibility highlighted the case of Air Force whistleblower William Zwicharowski. After he filed a complaint, he was subjected to a retaliatory investigation that included "the unusual seizure of Mr. Zwicharowski's computer and needless comprehensive forensic analysis of the computer" to "gather evidence of unrelated misconduct." See Nick Schwellenbach, ed., *Caught Between Conscience and Career* (Washington, DC: Project On Government Oversight with Government Accountability Project and Partnership for Public Service, 2019), 129, footnote 9. <https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/>

termination. Congress should designate retaliatory investigations as a prohibited personnel practice so that whistleblowers may have access to appropriate relief from purely retaliatory investigations.

Because retaliation is so rampant despite the laws prohibiting it, maintaining anonymity is one of the best ways for whistleblowers to protect themselves from professional and personal retaliation. I know the members of this committee understand the importance of maintaining a whistleblower's anonymity: Both the Majority and the Minority committee websites promise to maintain the confidentiality of whistleblowers who disclose wrongdoing to the committee.¹¹ To best protect whistleblowers, it is necessary to hold accountable those who release a whistleblower's identity and to allow whistleblowers to seek additional relief when they have been subjected to this form of reprisal.

Whistleblowers who have suffered retaliation and wish to pursue legal recourse may find themselves doubly victimized by a flawed enforcement system. That's because federal whistleblowers are the only major sector of the labor force that does not have the right to have their cases tried before a jury.¹² Instead, they must go to the Merit Systems Protection Board (MSPB), which adjudicates whistleblower retaliation complaints and other federal employment disputes. But the board has lacked a quorum since January 2017 and has had no members since March 2019.¹³ As of the end of 2020, it had a backlog of over 3,000 cases.¹⁴ These persistent vacancies mean that countless federal whistleblowers are stuck in bureaucratic limbo, unable to fully avail themselves of whistleblower protections.

Even after new board members are appointed, it will take years to work through the backlog. Federal whistleblowers desperately need a safety valve to bypass the MSPB and seek justice in court from a jury. But the backlog isn't the only problem for whistleblowers at the MSPB, where administrative judges have been hostile to the law's mandate to make whole whistleblowers who have been retaliated against. For example, in February of this year, the independent Office of Special Counsel (OSC) called attention to the fact that the MSPB has been holding whistleblowers to a higher evidentiary burden than the law requires.¹⁵ Whistleblowers seeking

¹¹ "Tip Line," House Committee on Oversight and Reform. <https://oversight.house.gov/contact/tip-line> (accessed April 25, 2021); "Blow the Whistle," Committee on Oversight and Reform [Minority]. <https://republicans-oversight.house.gov/whistle> (accessed April 25, 2021)

¹² See, for example: David Colapinto (cofounder and general counsel, National Whistleblower Center), interview with Tom Temin, February 17, 2020. <https://federalnewsnetwork.com/workforce-rights/governance/2020/02/despite-laws-federal-whistleblowers-still-face-problems/>; Jon O. Shimabukuro, L. Paige Whitaker, and Emily E. Roberts, Congressional Research Service, *Survey of Federal Whistleblower and Anti-Retaliation Laws*, R43045 (April 22, 2013). <https://fas.org/sgp/crs/misc/R43045.pdf>

¹³ Nicole Ogrysko, "Senate forces 'first' for MSPB as the agency loses all members," Federal News Network, March 1, 2019. <https://federalnewsnetwork.com/workforce-rights/governance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/>

¹⁴ Merit Systems Protection Board, *Annual Report for FY 2020* (January 19, 2021), 1. <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1801367&version=1807638&application=ACR OBAT>

¹⁵ Brief of the United States Office of Special Counsel as Amicus Curiae Supporting Petitioner at 5, *Salazar v. U.S. Department of Veterans Affairs, M.S.P.B.* (SF-1221-16-0649-W-7) (2021). <https://osc.gov/Documents/PPP/Amicus%20Curiae%20Briefs/OSC%20Amicus%20Curiae%20Brief%20in%20Salazar%20v.%20U.S.%20Department%20of%20Veterans%20Affairs%20%28MSPB%29%20filed%20February%2012%2c%202021.pdf>

justice at the MSPB only prevail at a rate of 10.8%, about one-third the success rate for corporate whistleblowers, who can take retaliation complaints to federal court.¹⁶

Granting federal whistleblowers access to jury trials isn't a radical idea. Federal contractors, all state and local employees, and nearly all corporate workers have a right to bring a retaliation complaint to a jury of their peers.¹⁷ It is long past time for federal employees to have this same right, the importance of which is underscored by the problems caused by the MSPB being inactive.

Even with a fully functioning MSPB, many whistleblower reprisal cases take years, and it is often not practical for whistleblowers to fight to enforce their legal protections. Access to jury trials, while necessary and overdue, may present a similar problem. Accordingly, Congress should ensure that whistleblowers facing reprisal are entitled to interim relief while they seek to enforce their legal protections. Congress should make this interim relief available to whistleblowers who can show, in their retaliation complaint to the Office of Special Counsel, that the personnel action they confront is likely being taken because they blew the whistle—also known as showing a *prima facie*, or sufficient on its face, case of retaliation. But again, this is only possible when the MSPB has a quorum.

The Whistleblower Protection Improvement Act would go a long way toward addressing each of these critical issues. The bill would designate retaliatory investigations as a prohibited personnel practice, which would allow whistleblowers to challenge frivolous investigations and allow government investigators the opportunity to explain if there are legitimate reasons for an investigation. The bill would also give federal whistleblowers an actionable right to protect their anonymity from disclosure, affording whistleblowers a measure of proactive protection from further retaliation. By making the approval of temporary relief less discretionary as long as the whistleblower can meet the legal standard and creating a process to appeal any denial of such relief, the bill would give whistleblowers a realistic opportunity to obtain temporary relief. This is the best way to make a difference for whistleblowers while avoiding unnecessary conflict.

Perhaps most significantly, the bill would also give federal whistleblowers the ability to petition a jury of their peers for relief from retaliation and would make it easier for whistleblowers to receive temporary relief from retaliation while seeking to enforce their legal protections. The bill would also address other serious weaknesses in the whistleblower system, such as the lack of enforcement for protections against retaliation for communicating with Congress.¹⁸

¹⁶ Tom Devine and Samantha Feinstein, International Bar Association, *Are whistleblowing laws working? A global study of whistleblower protection litigation* (Washington DC: Government Accountability Project and International Bar Association, March 2021), 12. <https://www.ibanet.org/Document/Default.aspx?DocumentUid=49c9b08d-4328-4797-a2f7-1e0a71d0da55>

¹⁷ 41 U.S.C. § 4712(c)(2) (2020). [https://uscode.house.gov/view.xhtml?req=\(title:41+section:4712+edition:prelim\);](https://uscode.house.gov/view.xhtml?req=(title:41+section:4712+edition:prelim);) Jon O. Shimabukuro, et al., *Survey of Federal Whistleblower and Anti-Retaliation Laws* [see note 12].

¹⁸ “*Virtual Discussions: Modernization Fix Congress Cohort Listening Session*” Meeting of the House Select Committee on the Modernization of Congress, 117th Cong. (March 25, 2021) (testimony of Liz Hempowicz, Director of Public Policy). <https://www.pogo.org/testimony/2021/03/pogo-calls-on-congress-to-improve-its-capacity-for-oversight/>

In addition to being essential to helping make it safe for federal employees to speak out about waste, fraud, corruption, or other abuses they witness, stronger whistleblower protections are favored among the public. Last fall, a Marist poll found that 86% of likely voters favor stronger whistleblower protection rights.¹⁹

Recognizing whistleblowers' invaluable role in the fight against corruption and in efforts to ensure our federal government is responsibly spending public money, I strongly urge this committee and Congress to prioritize passing the Whistleblower Protection Improvement Act.

Additional Reforms to Address Inspectors General and Whistleblower Protections

While the Whistleblower Protection Improvement Act would represent a dramatic improvement to the system in place to protect those who come forward to blow the whistle on corruption in our government, there is one glaring omission. The bill exempts investigations by inspector general offices from the prohibition on retaliatory investigations, except for investigations into staff of an inspector general office. This must be addressed. Inspector general offices across government have played a role in this retaliatory tactic.

In some cases, the inspectors general may be unaware that a whistleblower was the subject of an investigation opened in response to a referral by an agency. In other instances, inspectors general have intentionally used their investigative authorities to intimidate whistleblowers.

For example, the Nuclear Regulatory Commission referred whistleblower Larry Criscione to the agency's office of inspector general for communicating with Congress about nuclear safety violations. Criscione had disclosed to Congress that the nation's nuclear power plants were unprepared to withstand upstream dam breaks that could cause meltdowns and result in massive evacuations.²⁰ The inspector general not only asked him to identify the congressional offices and staff he had briefed, but referred him for criminal prosecution.²¹ Furthermore, the inspector general's office failed to inform Criscione that the U.S. Attorney's Office declined to take up the potential criminal referral. This left him to worry about the nonexistent investigation for over six months until he learned of his exoneration.

If the law does not address inspector general involvement in or initiation of retaliatory investigations, we are leaving whistleblowers exposed to retaliation. I urge the committee to consider modifications to the Whistleblower Protection Improvement Act that would allow offices of inspector general to pursue legitimate law enforcement objectives without becoming hatchet-men for retaliation.

¹⁹ "Marist Survey Results," Whistleblower Network News. <https://whistleblowersblog.org/whistleblower-news-network-survey/> (accessed April 25, 2021)

²⁰ Tom Zeller Jr., "Leaked Report Suggests Long-Known Flood Threat To Nuclear Plants, Safety Advocates Say," *HuffPost*, October 19, 2012. https://www.huffpost.com/entry/nuclear-plant-flood-threat-leak_n_1983005

²¹ Government Accountability Project, "Internal NRC Investigation Fails to Resolve Threat of Meltdowns at 19 Nuclear Power Plants," Press Release, September 19, 2017. <https://whistleblower.org/press/whistleblower-agency-calls-for-further-review-of-nuclear-safety-concerns/>; Greg Gordon, "Will Hillary Clinton benefit from an 'un-American double standard'?", *McClatchy*, September 29, 2015. <https://www.mcclatchydc.com/news/nation-world/national/article36921711.html>

This is not to suggest that inspectors general overall don't also play a central role in the fight against government corruption. And these independent government watchdogs also need stronger protections.

This committee's Government Operations Subcommittee recently held a hearing to examine ways to reform the inspector general system to improve independence, expand the investigative authority of inspectors general, and better ensure accountability for the watchdogs themselves.²² In that hearing, I testified about how the public and Congress depend on inspectors general to ensure our federal agencies are functioning effectively. And to do this job well, inspectors general must be confident they will not face retaliation if their findings are not flattering to agency or political leadership. The law does not currently prohibit that kind of retaliation, leaving our top internal watchdogs open to political interference.²³

There are now multiple pieces of bipartisan legislation before this committee that would address the issues raised in that hearing. The recently introduced IG Independence and Empowerment Act represents a comprehensive approach to some of the biggest issues the inspector general community faces today, and I urge Congress to prioritize enacting it.²⁴ Doing so would better equip our independent watchdogs to rigorously expose, prevent, and detect government corruption.

Preventing Corruption

In order to deliver on its mandate to strengthen the system of checks and balances meant to prevent and address government corruption, Congress must also close the loopholes that allow presidents to abuse the appointment process to evade congressional oversight.

When Congress passed the Federal Vacancies Reform Act in 1998, often referred to as the Vacancies Act, the goal was to provide just enough flexibility so that the president can responsibly exercise their appointment power.²⁵ The Vacancies Act dictates whom the president can select to fill in when there is a vacancy in a position that requires presidential appointment and Senate advice and consent. The law also dictates how long an appointee can perform that work as the "acting" office holder.²⁶

However, it's clear that the law is not working as intended. Instead, presidents' use of the law has stretched it so far beyond the statutory text that courts are increasingly ruling that presidential Vacancies Act appointments have been illegal.

²² *Restoring Independence: Rebuilding the Federal Offices of Inspectors General: Hearing before the House Oversight and Reform Committee Subcommittee on Government Operations* 117th Cong. (April 20, 2021). <https://oversight.house.gov/legislation/hearings/restoring-independence-rebuilding-the-federal-offices-of-inspectors-general>

²³ *Restoring Independence* (testimony of Liz Hempowicz) [see note 22].

²⁴ IG Independence and Empowerment Act [see note 1].

²⁵ Steve Vladeck, "The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence," *Lawfare*, May 23, 2018. <https://www.lawfareblog.com/federal-vacancies-reform-act-and-va-study-uncertainty-and-incompetence>

²⁶ Congressional Research Service, *The Vacancies Act: A Legal Overview*, R44997 (Updated May 28, 2020). <https://fas.org/sgp/crs/misc/R44997.pdf>

The appointment process is meant to ensure rigorous congressional oversight and participation in the process of staffing top executive offices. Abuses of the Vacancies Act impose dangerous instability on businesses and communities that rely on the legitimacy of government actions. This is because the law makes legally void any action taken by an improperly installed acting official.²⁷ Vacancies Act abuses also leave the executive branch exposed to exactly the kind of corruption our founders intended to prevent by requiring the Senate’s advice and consent in the nomination process.²⁸

The most recent—and most egregious—examples of Vacancies Act abuses occurred under the Trump administration.²⁹ But they fit a bipartisan pattern of abuses that have increased executive power, often at the expense of congressional authorities or prerogatives.³⁰ The recent, more egregious abuses were preceded by Vacancies Act violations under Presidents Barack Obama and George W. Bush.³¹

Part of the problem with the Vacancies Act is that the legal limits on the president are not regularly enforced. The Government Accountability Office, which is tasked with reviewing potential violations of the law, has no mechanism to enforce its provisions. Instead, the GAO notifies the executive branch and Congress of a Vacancies Act violation. To enforce the part of the Vacancies Act that invalidates any actions taken by an official whose appointment violates the law, an individual with legal standing must bring a lawsuit.³² Vacancies Act case law is full of examples of how difficult it can be to establish that standing.³³

This lack of enforcement creates practical problems for individuals and businesses that rely on and are affected by our government’s actions every day. As we saw under the Trump administration, abuses of the Vacancies Act began to actively undermine the legality of government actions on an almost incomprehensible scale.

²⁷ 5 U.S.C. § 706(2)(A) (2020). <https://www.law.cornell.edu/uscode/text/5/706>

²⁸ Phillip Bump, “The president was never intended to be the most powerful part of government” [see note 2].

²⁹ Derek B. Johnson, “GAO: DHS acting secretary, top deputy were appointed illegally,” *Federal Computer Week*, August 14, 2020. <https://fcw.com/articles/2020/08/14/johnson-dhs-leaders-gao-appointment.aspx>; Rebecca Jones, “The Dangers of Chronic Federal Vacancies,” Project On Government Oversight, August 6, 2019. <https://www.pogo.org/analysis/2019/08/the-dangers-of-chronic-federal-vacancies/>

³⁰ William P. Marshall, “Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters,” *Boston University Law Review*, vol. 88 (2005) 519. <https://www.bu.edu/law/journals-archive/bulr/documents/marshall.pdf>

³¹ Letter from Government Accountability Office General Counsel Susan A. Poling to President Obama informing the president of a current Vacancies Reform Act violation, March 30, 2015. <http://www.gao.gov/assets/670/669447.pdf>; Thomas Berry, Cato Institute Center for Constitutional Studies, *The Illegal Tenure of Civil Rights Head Vanita Gupta* (January 19, 2017). https://www.cato.org/sites/cato.org/files/pubs/pdf/legal_policy_bulletin_1.pdf; Letter from General Accounting Office General Counsel Anthony H. Gamboa to President George W. Bush informing the president of a Vacancies Reform Act violation, March 18, 2002. <http://www.gao.gov/assets/80/75124.pdf>

³² Congressional Research Service, *The Vacancies Act: A Legal Overview* [see note 26]; 5 U.S.C. § 3349(b) (2020). <https://www.law.cornell.edu/uscode/text/5/3349>

³³ For example, *Patrick v. Whitaker*, 426 F. Supp. 3d 182, 186 (Eastern District of NC, December 12, 2019). <https://casetext.com/case/patrick-v-whitaker-1/> (“The Court is inclined to agree with plaintiff that the President’s designation of Mr. Whitaker as a principal officer pursuant to the [Vacancies Act] ‘raises grave constitutional concerns...’ However, because the Court concludes that plaintiff lacks standing, it dismisses his claims.” (quoting *SW Gen., Inc.*, 137 S. Ct. at 946))

In the last several years, we saw numerous examples of Vacancies Act violations undercutting the legality of government actions.

For example, last year a judge ruled that William Perry Pendley's time as the top official at the Bureau of Land Management was legally invalid because the process by which the Interior secretary delegated authority to him was not consistent with the Vacancies Act. In the ruling, the judge also noted that the decision could lead to courts invalidating agency actions beyond those at issue in the immediate case.³⁴ There are now multiple lawsuits seeking to invalidate additional Bureau of Land Management actions under Pendley.³⁵

In 2017, the Supreme Court vacated an order from the National Labor Relations Board because the acting general counsel of the National Labor Relations Board was serving in the role in violation of the Vacancies Act.³⁶

In 2020, the U.S. District Court for the District of Maryland granted petitioners a preliminary injunction against the implementation of six immigration-related rules issued by the Department of Homeland Security because then-acting Secretary Chad Wolf's appointment violated the agency's statutory line of succession.³⁷ (Wolf's appointment was governed by both the Vacancies Act and the agency's line of succession, so while this is distinct from a Vacancies Act violation, the principles and the practical effects are the same.)

Also in 2020, the U.S. District Court for the District of Columbia invalidated two directives amending the asylum process. The United States Citizenship and Immigration Services had issued those directives under the leadership of Ken Cuccinelli, whose appointment violated the Vacancies Act.³⁸ (Cuccinelli's appointment was notable for many reasons, but primarily because he was appointed to a position that previously didn't exist and therefore he never served as the "first assistant" to the role he ultimately filled, a requirement under the Vacancies Act.³⁹)

³⁴ Bullock v. US Bureau of Land Mgmt., No. 4:20-cv-00062-BMM at 33 (District of MT, September 25, 2020).

https://www.eenews.net/assets/2020/09/25/document_gw_16.pdf

³⁵ Complaint for declaratory and injunctive relief at 2, Center for Biological Diversity v. U.S. Bureau of Land Mgmt., No. 1:21-cv-00174 (District of DC, January 19, 2021). <https://westernlaw.org/wp-content/uploads/2021/01/2019.01.19-Pendley-FVRA-Complaint.pdf>; Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt., No. 1:20-cv-02484-MSK (District of CO, October 27, 2020).

https://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/pdfs/Uncompahgre-Field-Office-RMP-Amended-Complaint.pdf

³⁶ Nat'l Labor Relations Bd. v. SW Gen., Inc. 137 S. Ct. 929, 944 (2017). <https://casetext.com/case/natl-labor-relations-bd-v-sw-gen-inc/> (Vacating order that had concluded that SW General improperly failed to pay certain bonuses to long-term employees because the president's temporary appointment of the general counsel violated the Vacancies Act.)

³⁷ Casa de Md. v. Wolf, No. 8:20-cv-02118-PX at 45, 68 (District of MD, September 11, 2020). <https://casetext.com/case/casa-de-md-v-wolf/>

³⁸ L.M.-M. v. Cuccinelli, No. 19-2676 (RDM) at 5 (District of DC, March 1, 2020).

https://democracyforward.org/wp-content/uploads/2019/09/20200301_LMM-v-cuccinelli.pdf

³⁹ L.M.-M. v. Cuccinelli, No. 19-2676 (RDM) at 38 [see note 38].

Given the sheer number of vacancies under the Trump administration,⁴⁰ even if just a fraction had been filled by temporary appointments that violated the law, the ramifications could be staggering as the courts continue to hear challenges to actions taken by those temporary officials.

Abuse of the Vacancies Act also exposes the executive branch to corruption by evading the advice and consent process, which is one of the Constitution's foundational checks and balances. Alexander Hamilton, one of the leading proponents for a powerful executive, called Senate confirmation an essential barrier against "the appointment of unfit characters" to senior government service.⁴¹ A near-unanimous Supreme Court decision more than two centuries later called it one of the "significant structural safeguards of the constitutional scheme."⁴² But the flexibility in the current Vacancies Act framework allows the president to skip the advice and consent step entirely and instead appoint people based on their loyalty to the president rather than their qualifications and ability to do the job.⁴³

It is past time to address the loopholes that leave the Vacancies Act open to such unbridled abuse. As more than a dozen good government organizations spanning the political spectrum wrote in support of the Accountability for Acting Officials Act, the bill "would further the original intent of the [Vacancies Act] by encouraging timely nomination of qualified individuals from the White House and ensuring that a plan is in place to appoint permanent leadership."⁴⁴

The bill would place reasonable limits on the president's flexibility to appoint temporary leadership to most government offices, shorten the timeframe in which one could serve as an acting official, and would mandate that acting officials testify at least once every 60 days before the congressional committees of jurisdiction, unless both the chair and ranking member of the committee waive that requirement.⁴⁵ It would also clarify the timeline for reporting executive branch vacancies and who will be temporarily filling those positions.⁴⁶

These reforms would modestly recalibrate the balance of power between Congress and the executive branch without improperly limiting the president from carrying out their responsibilities. Though lawyers in the executive branch may reflexively tell you that any changes to the Vacancies Act would encroach on the president's appointment power, keep in mind that the Constitution limits that power. Even Alexander Hamilton, one of the top proponents of a strong executive, made it clear that the language of the Constitution intentionally denies the president the unfettered ability to appoint executive branch officers.⁴⁷

⁴⁰ Nancy Cook, "Trump's staffing struggle: After 3 years, unfilled jobs across the administration," *Politico*, January 20, 2020. <https://www.politico.com/news/2020/01/20/trumps-staffing-struggle-unfilled-jobs-100991>

⁴¹ Alexander Hamilton, "The Appointing Power of the Executive," *Federalist Papers*, No. 76 (1788). <https://guides.loc.gov/federalist-papers/full-text#TheFederalistPapers-76>

⁴² *Edmond v. U.S.*, 520 U.S. 651 (1996). <https://supreme.justia.com/cases/federal/us/520/651/case.pdf>

⁴³ Rebecca Jones, "The Dangers of Chronic Federal Vacancies" [see note 29].

⁴⁴ Letter from POGO et al. to Representative Katie Porter endorsing the Accountability for Acting Officials Act, May 1, 2020. <https://www.pogo.org/letter/2020/05/organizations-support-new-bill-to-address-persistent-federal-vacancies/>

⁴⁵ The bill would place further limits on this flexibility when it comes to appointing individuals to fill inspector general positions, because they require additional independence from agency leadership.

⁴⁶ A version of this bill introduced last year also contained this clarification. See Accountability for Acting Officials Act, H.R. 6689, 116th Cong., § 2 (2020). <https://www.congress.gov/bill/116th-congress/house-bill/6689/text>

⁴⁷ Alexander Hamilton, "The Appointing Power of the Executive" [see note 41].

I strongly urge this committee to advance the Accountability for Acting Officials Act and begin the critical process of reasserting Congress's proper role as a check on this aspect of executive authority.

In the same spirit, I would also urge the committee to pass additional legislation that is before this committee, the Federal Advisory Committee Transparency Act and the Periodically Listing Updates to Management Act (the PLUM Act). Both bills would increase transparency around who is serving our government in advisory capacities and in more senior leadership roles. This increased transparency would make it easier for Congress to conduct necessary oversight and would reduce the unnecessary secrecy that fuels distrust in government.

Conclusion

The loopholes and weaknesses in the laws that are meant to expose government corruption and insulate our government from corruption can be exploited by any president from either party. This committee has a great history of advancing legislation, with strong bipartisan support, to address weaknesses in whistleblower protection laws and issues faced by the inspector general community. I encourage every member of this committee to approach the issues raised in this hearing and the corresponding legislation in a similar, bipartisan way. My colleagues and I at POGO stand ready to assist however we can.