

The Roles of NGOs and Whistleblowers in the Oversight Process

Lydia Dennett,¹ Elizabeth Hempowicz,² Justin Rood³

Some of the best resources and insight available to congressional oversight staff can be found off of Capitol Hill and away from government buildings. Non-governmental organizations (NGOs)—particularly government watchdog groups—often have extraordinary access to people and information in their area of expertise. That can include access to whistleblowers or potential whistleblowers. When called upon, they can provide significant help to a congressional investigation.

From government spending and agency affairs to civil liberties and tax policy, NGOs often enjoy better access to knowledgeable officials and experts in their focus area than do many congressional offices. A veteran oversight staffer does not hesitate to call on these groups, even when they may not align with the ideology of his or her boss or chairman.

In addition to facilitating access to people, documents, and other sources of useful information, these groups can provide briefings to oversight staff on their topics of expertise (featuring analyses which are sometimes less ambivalent and more direct than what may be offered by governmental experts). They can also provide witnesses to testify at oversight hearings, and discuss both oversight findings and also possible policy solutions.

The Project On Government Oversight (POGO) is one such group. Founded in 1981, POGO originally worked to expose outrageously overpriced military spending on items such as a \$7,600 coffee maker and a \$435 hammer. In 1990, after many successes reforming military spending, POGO decided to expand its mandate and investigate waste, fraud, and abuse throughout the federal government. Since then, POGO investigations have delved into issues involving the nation's national security, contracting oversight, natural resources, nuclear energy, the financial sector, public health, lobbying, and more.

POGO's investigators and journalists take leads and information from insiders and verify the information through investigations using the Freedom of Information Act, interviews, and other fact-finding strategies. The organization then disseminates its findings to the media, Congress, and the public through alerts, statements, studies, and journalistic reports.

On countless occasions, POGO has assisted congressional staffers in pursuing their oversight efforts through organized briefings, testifying in open hearings, training investigators, and providing access to documents and information relevant to congressional inquiries.

A. Whistleblowers and POGO

Known as an organization that champions the rights and protections of whistleblowers, POGO works directly with both individual whistleblowers (as they work with Congress) and with congressional offices across the political spectrum.

1 Investigator, Project on Government Oversight (POGO).

2 Policy Counsel, POGO.

3 Director of Congressional Oversight Initiative, POGO.

In 1986, POGO championed Republican Senator from Iowa Chuck Grassley's False Claims Act, the most effective tool to fight fraud against the government, and one that protects the whistleblowers who come forward. In 1987, POGO helped defend Air Force whistleblower A. Ernest Fitzgerald in his First Amendment fight against a government-wide gag order. In 1989, POGO and the Government Accountability Project published *Courage Without Martyrdom: A Survival Guide for Whistleblowers*.

After more than a decade of advocacy, in 2012 POGO helped usher in a new wave of protections for whistleblowers with the Whistleblower Protection Enhancement Act (WPEA). The legislation closed many loopholes and upgraded protections for federal workers who blow the whistle on waste, fraud, abuse, and illegality. Among many other common-sense reforms, the WPEA provided compensatory damages for whistleblowers who prevailed in their Whistleblower Protection Act cases after an administrative hearing, and made it easier for the Office of Special Counsel (OSC) to discipline those responsible for illegal retaliation.

Unfortunately, loopholes remained in the final WPEA text. POGO was instrumental in urging President Barak Obama to take executive action to close them. In response, the president issued a landmark directive, Presidential Policy Directive 19, extending varying whistleblower protections to many of the federal employees and contractors in the intelligence and national security community for the first time.

POGO also helped inform legislation that would improve whistleblower protections at specific agencies. The Department of Veterans Affairs (VA) is one such agency. After the 2014 VA scandal broke (see our case study later in this piece), it became clear that the VA had a culture that was decidedly anti-whistleblower and that culture played a significant role in how widely and deeply the department's problems extended. POGO began working with congressional offices to develop legislation to reverse the culture of retaliation at the VA. Our staff was invited multiple times to testify before Congress on this problem and the legislative proposals to fix it—but the real work was done behind the scenes, hammering out language with congressional offices and with The Office of Special Counsel (OSC), an independent federal investigative and prosecutorial agency dedicated to protecting federal employees from reprisal for blowing the whistle. OSC had vast experience on the issue, having worked for years on VA cases, investigating claims of retaliation and securing favorable actions for many of the VA whistleblowers who came forward.

POGO has also worked to close loopholes in current whistleblower protections within the FBI, the intelligence community (IC), and the military.

B. The State of Whistleblower Protection Laws Today

Whistleblowers are a tremendous asset to the American public, but Congress has passed piecemeal protections for them. The result is a patchwork of wildly uneven protections depending on factors such as which agency the whistleblower works for, his or her employment status, and the kind of wrongdoing he or she is exposing. Some whistleblowers receive not only protection but financial incentives to blow the whistle; others receive no protection at all. The disparity can only be understood by looking at some of the differing laws.

The False Claims Act (FCA) is in many ways the gold standard of whistleblower incentives and protections. The FCA prohibits a person or entity from fraudulently or dishonestly obtaining or using government funds. It also allows individuals or entities to bring a civil claim, in the name of the government, against contractors defrauding American taxpayers. If the claim is successful, the individual or entity can receive up to 30 percent of the recovery. The law incentivizes whistleblowing through the financial awards and strong protections against retaliation. Any employee who is discharged, demoted, harassed, or otherwise discriminated against because of an FCA disclosure is entitled to reinstatement, double back pay, and compensation for litigation costs and reasonable attorney's fees. However, the entitlement is limited to claims involving fraud perpetrated by a person or entity receiving federal funds.

There also are extremely narrow protections for employees of entities with public contracts under 41 U.S.C. § 4705. This law is fairly flimsy, lacking fundamental policies for an effective whistleblower statute. It only protects disclosures of "substantial" violations of law relating to the contract—it does not protect disclosures of gross mismanagement, gross waste, substantial

danger to health and safety, or violations of law, rule, or regulations. This law also does not specifically protect disclosures made internally to one's supervisor or to another employee with the authority to investigate or resolve the matter. Because whistleblowers report internally first, it is incredibly important to clear the path to report to a supervisor.

This is true whether the case involves contractors or federal employees.

One important agency where federal employees are not protected when they make disclosures to their direct supervisors is the FBI. Unlike any other federal law enforcement agency, the FBI only allows employees to report wrongdoing to a small number of senior officials. Even after this problem was highlighted in a Government Accountability Office report, the Department of Justice said it did not plan to expand the number of people FBI whistleblowers can report wrongdoing to because that might increase the number of complaints. Bipartisan legislation that would fix this and other problems with FBI whistleblower protections has been introduced.

Another key area of whistleblower law focuses on members of the military and contractors who make up a growing percentage of the workforce at the Department of Defense (DOD). Recent improvements to the Military Whistleblower Protection Act include extending the time limit to report misconduct from a short 60 days to one year, which is more in line with what other federal workers and contractors are given and allows potential whistleblowers sufficient time to find counsel. It also requires that the service secretary take action within 30 days of receiving a complaint, and that a whistleblower may file a reprisal complaint with the DOD inspector general. The military must support whistleblowers through the difficult investigatory process, rather than leaving them to navigate that process on their own, as was the case previously. Another important provision of the law is that whistleblowers and victims of retaliation for having reported sexual assault are now guaranteed an administrative due-process hearing.

However, military whistleblowers still face one of the hardest fights in proving they were retaliated against for blowing the whistle. This is because the burden of proof is on the whistleblower to prove retaliation, rather than on the agency to prove its absence—the opposite of the current standard in every other whistleblower statute.

Since 2008, DOD contractors have had whistleblower rights enforceable through district court jury trials. When enacted, these protections extended to contractors at the Defense Intelligence Agency and the National Security Agency (NSA). In 2009, best-practice rights were enacted for all government contract employees paid with stimulus funds, including other IC agencies like the CIA.

The whistleblower shield was so successful in deterring taxpayer waste and contractor abuse that the Council of the Inspectors General on Integrity and Efficiency proposed permanent expansion for all government contractors. In 2012, Sen. Claire McCaskill, D-Mo., introduced a whistleblower protection amendment for all government contractors, and it won bipartisan Senate approval in the fiscal year 2013 National Defense Authorization Act.

However, during the closing conference committee negotiations, whistleblower rights were extended only to contractors outside of the intelligence community. Pre-existing rights for IC contractors were removed, despite a proven track record that the law was working as intended and did not produce any adverse impacts on national security during its five-year lifespan. Every year since, Senator McCaskill has introduced a bill to reinstate whistleblower protections for intelligence community contractors, but as of this writing she has been unsuccessful in getting it passed.

DOD contractors also lack some basic protections found elsewhere, including in private-sector whistleblower laws. DOD contractors' disclosures are not protected from abuse of authority, for instance. The inspector general (IG) is not required to recommend relief if the whistleblower meets the burdens of proof, a legal standard found in every whistleblower law since 1989. And there is no provision for a genuine remedy of compensatory damages to "make whole" DOD contractor whistleblowers who have been found to have endured reprisal for protected disclosures.

Despite these uneven protections, many federal employees are able to seek redress outside of their internal whistleblower review channels by going to OSC or the Merit Systems Protection Board (MSPB). The Merit Systems Protection Board is an independent, quasi-judicial executive branch agency that serves as the guardian of federal merit systems. MSPB

hears federal employee appeals of alleged prohibited personnel practices, or retaliation, including those resulting from the employee's whistleblowing.

Whistleblower protections in many places are stronger than ever, but for others the laws have not changed, and for still others the laws have only gotten worse.

C. Case Study: POGO and the VA Corruption Scandal

The VA case mentioned earlier initially came to light when a brave VA doctor revealed long wait times at a veteran hospital in Arizona, and a scheme by VA managers to hide data on those wait times and the deaths they may have caused. Immediately POGO suspected there would be more VA whistleblowers with similar stories to tell. POGO volunteered to provide support to any VA staff who wanted to come forward with information about the agency's wrongdoing.

The response was overwhelming—nearly 800 current and former VA employees and veterans contacted POGO in the first three months. POGO reviewed each of the submissions, which together indicated that concerns about the VA went beyond long or falsified wait times for medical appointments, to include many other issues affecting the quality of health care services at VA hospitals. There were allegations of errors and delays in the delivery of medications to patients, on-call physicians failing or refusing to report to the hospital during medical emergencies, and several cases of blatant patient neglect.

The submissions also indicated a culture of fear at the VA: agency employees across the country worried they would face repercussions if they dared to raise concerns about their workplace. POGO found this culture was pervasive throughout the VA system, and over the next two years worked with countless whistleblowers, members of Congress, congressional committee staff, and agencies like OSC to try to expose and eliminate this toxic climate.

POGO also took an in-depth look at problems within the VA bureaucracy that sometimes prevented veterans from getting the benefits they needed and deserved. For example, in 2005 Steven P. Massong went to a VA hospital in Loma Linda, California, for a straightforward vascular procedure on his left leg. He ended up with much of his right foot and scrotum removed due to a complication during surgery. In the years that followed, Massong's fruitless attempt to receive related VA disability benefits shows how claims can get tied up in a seemingly endless bureaucratic cycle. His story spotlighted how federal law limits malpractice suits against the VA, insulating the agency from an important source of accountability.

The call to VA whistleblowers reached not only VA employees but veterans themselves. Several vets contacted POGO to say that they were concerned about their quality of care but were scared to say anything to VA management or even hospital patient advocates for fear that their access to care would be cut off. The culture of fear and retaliation affected them as well.

For all the people who agreed to speak to POGO on the record, there were many more who told their story only on the condition of anonymity. When VA insiders contacted POGO anonymously, it was impossible to look into their claims. However, their comments contributed to a disturbing picture.

For example, an anonymous commenter from Florida wrote: "The working environment is [so] full of fear and intimidation that very few employees will advocate for the Veteran. I have and so I am treated very badly."

Their fears were well-founded. VA employees who came forward later reported retaliation from their managers: being placed on administrative leave, being fired, and even having their personal medical records accessed and used against them. Because so many VA employees are veterans themselves this was a particularly cruel form of retaliation.

Just two weeks after POGO put out the call to VA whistleblowers, POGO received an unexpected response from the VA Office of Inspector General (OIG). An administrative subpoena arrived at the front door of POGO's offices from the OIG demanding: "All records that POGO has received from current or former employees of the Department of Veterans

Affairs, and other individuals or entities relating in any way to wait-times, access to care, and/or patient scheduling issues at the Phoenix, Arizona VA Healthcare System and any other VA medical facility.”

POGO had previously offered to work with the OIG to share general trends and information without revealing whistleblower names and contact information. The subpoena appeared to suggest the OIG was more interested in the identities of VA whistleblowers than in the problems they were trying to help fix.

At the time, the VA did not have a permanent, Senate-confirmed IG leading its work. The post was held by an appointed “acting” official. POGO’s work on IG offices has shown that when an agency does not have a permanent IG, accountability is reduced and abuses can proceed unchecked. Acting IGs are generally less effective than permanent IGs because their temporary status impedes their ability to provide leadership and set long-term priorities. And unlike permanent IGs, acting IGs do not go through a vetting process, raising concerns about their independence and effectiveness. Two years later, in April of 2016, the Senate finally confirmed a new permanent IG for the VA.

POGO declined to comply with the VA OIG subpoena, citing the First Amendment freedom of speech, freedom of press and freedom of association rights. But it was not until over a year later, in the summer of 2015, that the VA OIG—under the leadership of a new acting IG but still without a permanent head—withdrawed the subpoena. The office’s change in tune was due in large part to the support of members of Congress, a few of whom specifically and pointedly requested that the VA OIG withdraw the subpoena.

POGO worked closely with the House Committee on Veterans Affairs, which sought to assist veterans who came forward with specific care complaints. POGO also worked with members and their offices on their efforts to reform the VA legislatively. POGO investigators testified before Senator Mark Kirk, R-Ill., chairman of the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, several times in support of his legislation to hold retaliatory VA managers accountable.

POGO also worked closely with OSC. After the initial media reports on VA problems in 2014 their office saw a huge spike in disclosures from VA whistleblowers. In 2014 and 2015 alone, the OSC achieved favorable actions for 116 VA whistleblowers. But even two years later there are still many VA cases pending at OSC, some involving the underlying disclosures and claims of retaliation. The percentage of VA cases at OSC remains among the highest of any government agency.

POGO continues to work with VA whistleblowers, the OSC, and members of Congress to expose ongoing problems at VA facilities and improve patient care for veterans. Slowly the agency is cleaning up its act and addressing those problems. But were it not for whistleblowers who bravely came forward to share their stories, none of us would be aware of the extent of the problems at the VA.