

February 7, 2020

Chairman James Lankford
Ranking Member Christopher Coons

Senate Select Committee on Ethics
220 Hart Senate Office Building
Washington, D.C. 20510

Re: The Misconduct of Senator Rand Paul During the Impeachment Trial of the President

Dear Chairman Lankford and Ranking Member Coons:

Senator Rand Paul defied the rules of the Senate and engaged in improper conduct that is unethical and unbecoming of a Senator. Last week, Senator Paul submitted a question in the impeachment trial of President Donald John Trump that illegally and dangerously named a government whistleblower. Senator Paul compounded his criminal conduct by then publicizing his question after it was rejected by Chief Justice John Roberts. Senator Paul then doubled down on his inappropriate conduct by publicly displaying a card with the alleged whistleblower's name on it on the Senate Floor in front of public cameras. I submit this complaint requesting a full review by the Senate Select Committee on Ethics.

The Constitution mandates that the Chief Justice preside over a Senate impeachment trial of a President.¹ The Constitution also authorizes the Senate to determine the rules for its proceedings and to punish its members for disorderly behavior and failure to follow those rules.² In harmony with those provisions of the Constitution, the Senate has established rules for impeachment trials. Those rules specify that the Chief Justice, as Presiding Officer, "shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate provides."³

As part of the orderly procedures of the impeachment trial of President Trump, members were invited to submit questions for the House Managers and the President's legal team. Senator Paul submitted a question mentioning by name a mid-level government official. Some limited-circulation media outlets have alleged that this mid-level government official is the intelligence-

¹ U.S. Const. art. I, § 3, cl. 6.

² U.S. Const. art. I, § 5, cl. 2.

³ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials at V, revised pursuant to S. Res. 479, 99-2, Aug. 16, 1986.

community whistleblower who wrote of an urgent concern about the President’s conduct with respect to Ukraine. Senator Paul knew of those allegations when he composed his question.⁴

On January 30, 2020, Chief Justice Roberts exercised his power under the Constitution and the Senate’s rules to decline to read Senator Paul’s question on the Senate floor. Upon receiving Senator Paul’s question, the Chief Justice stated: “The Presiding Officer declines to read the question as submitted.” After the Chief Justice’s ruling, Senator Paul did not revise his question, nor did he ask that a formal vote be taken upon the question in accordance with the Senate rules.⁵ Instead, he immediately left the Senate chamber, read his question aloud at an impromptu press conference, and proceeded to tweet the question verbatim to his 2.6 million Twitter followers. In so doing, Senator Paul directly defied the Presiding Officer and violated the rules established by the Senate for the conduct of impeachment trials. And although Senator Paul’s Twitter page boasts “I fight for the Constitution,” Senator Paul’s conduct was antithetical to the Constitution, to federal law, and to the official Senate impeachment proceeding, which was conducted subject to the Senate’s applicable rules and practices.

Senator Paul did not back down from this conduct. Instead, on February 4, 2020, Senator Paul renewed his campaign of attack on the whistleblower by reading his name aloud on the Senate floor and printing a poster with his name on it, displayed towards C-Span cameras (which blanked it out).⁶ The whistleblower’s name was thus both heard and seen by countless persons, on top of Senator Paul’s prior publicizing of his name.

Senator Paul’s actions constituted a retaliatory outing of a government witness—which is criminal conduct. Federal criminal law prohibits the obstruction of justice, and provides that “[w]hoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.”⁷ Courts have regularly found that outing a whistleblower in online media—exactly what Senator Paul did here—can constitute such criminal retaliatory action.⁸

The obstruction of justice statute is intended to protect the safety of whistleblowers. Senator Paul’s conduct provides a sadly apt example of why such a statute is necessary. By naming an otherwise anonymous person through the public press and the public forum of

⁴ Senator Paul’s knowledge of these allegations is well-established, and he has urged the outing of the whistleblower for months. For instance, on November 13, 2019, in a radio interview with D.C.-based WMAL, Senator Paul identified by name the same government official alleged to be the whistleblower.

⁵ Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials at VII, revised pursuant to S. Res. 479, 99-2, Aug. 16, 1986 (providing that the Presiding Officer’s rulings “shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon . . .”).

⁶ Kyle Cheney & Burgess Everett, *Rand Paul reads alleged whistleblower’s name and Republicans ‘fine’ with it*, Politico (Feb. 4, 2020), <https://www.politico.com/news/2020/02/04/rand-paul-reads-alleged-whistleblowers-name-senate-floor-110684>.

⁷ 18 U.S.C. § 1513(e).

⁸ See, e.g., *United States v. Ward*, No. 17-171, 2019 WL 6255198 (D. Conn. Nov. 22, 2019) (Facebook post naming whistleblower violated 18 U.S.C. § 1513(e)); *United States v. Edwards*, No. 17-170, 2018 WL 456320 (S.D. Ohio Jan. 17, 2018), aff’d, 783 F. App’x 540 (6th Cir. 2019) (same).

Twitter, Senator Paul created the real possibility that this person will confront threats of violence.⁹ Whether or not the named individual was in fact the whistleblower, as Senator Paul claimed, is irrelevant to this concern. A senator charged with the safety and security of the nation should not be purposefully placing a citizen in harm's way for no public purpose.

This dangerous conduct is not protected by the special constitutional protections provided to members of the Senate. The "Speech and Debate Clause" protects members from being "questioned in any other Place . . . for any Speech or Debate in either House."¹⁰ Court decisions have clarified that such protections extend only to legislative activity, as the purpose of the clause is to protect the free and full expression of congresspeople during such activity.¹¹ There is no way to construe Senator Paul's public outing of the whistleblower as conducive to legislative debate. The naming of a private citizen, in public and not on the Senate floor, is not legislative activity.

Indeed, Senator Paul's retaliatory conduct degrades Congress's role as a co-equal branch of government constitutionally empowered to protect whistleblowers from reprisal by the Executive Branch. The Senate and the House passed the Intelligence Community Whistleblower Protection of 1998, finding that:

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.

Senator Paul's defiance of the Presiding Officer demonstrated contempt for the rule of law and Chief Justice Roberts in his role as presiding officer, flouted the Constitution's design for presidential impeachments, and may have chilled the future reporting of Executive Branch misdeeds.

Senator Paul's conduct was especially corrosive because it occurred during one of the most solemn of the constitutional tasks bestowed upon the upper chamber, a time when the Senate was sitting as a court of presidential impeachment for only the third time in this nation's history. But even if this had been an ordinary trial in a conventional court, the behavior would have been contemptuous. In any court in the land, to disrespect, in spirit and substance, a judge's ruling by launching a defiant tweet in the hallway that retaliated against a government witness would likely have resulted in criminal prosecution, or at the very least, sanctions for the offender, whether a juror, lawyer, or litigant. A senator during an impeachment trial should be held to no lower a standard than an ordinary citizen.

⁹ Zachary Cohen & Paul LeBlanc, *Threats against Ukraine whistleblower's legal team lead to law enforcement probe*, cnn.com (Oct. 29, 2019), <https://www.cnn.com/2019/10/29/politics/ukraine-whistleblower-threats-law-enforcement-investigation/index.html>.

¹⁰ U.S. Const. art. I, § 6, cl. 2.

¹¹ See, e.g., *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 508 (1975) (clause only protects actions "essential to legislating" (internal quotation marks and citations omitted)).

In the past, the Senate Select Committee on Ethics has admonished members who fail to meet the higher standards expected of a U.S. Senator.¹² Senator Paul’s conduct reflects poorly on the Senate. His behavior violates the bipartisan consensus that whistleblowers deserve protection, which is explicated in numerous laws and regulations¹³ including those that specifically prohibit outing a whistleblower as illegal retaliation.¹⁴ “Whistleblowers bring accountability to government” were the wise words of the Chairman of the bipartisan Senate Whistleblower Protection Caucus.¹⁵

And if accountability in government means anything, a senator who defies a Presiding Officer’s ruling—here the Chief Justice of the Supreme Court—and flouts Senate rules should be held accountable. Senator Paul surely understood the possible ethical ramifications of his disclosure. In fact, a fellow senator observed: “Certainly under our ethics rules, there will be potential consequences.”¹⁶ There should be appropriate consequences for Senator Paul.

I ask that the Senate Select Committee on Ethics undertake an appropriate investigation to address this unethical and improper conduct.

Sincerely,

/s/ Tom Mueller

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¹² See, e.g., Letter from Senate Select Committee on Intelligence to Sen. Tom Coburn at 3 (May 25, 2012).

¹³ See, e.g., 5 U.S.C. § 2302 (protection from retaliation for federal employee whistleblowers); 5 U.S.C. § 7211 (protection for government whistleblowers reporting to congress); 5 U.S.C. App. 3 § 7 (prohibition against reprisal for reporting to inspector general); 15 U.S.C. § 78u–6(h) (protection from retaliation for Securities Act whistleblowers); 31 U.S.C. § 3730(h) (protection from retaliation for False Claims Act whistleblowers).

¹⁴ See *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (collecting cases); see also Tom Devine & Mark Hertsgaard, *Trump and the Whistleblower He Hates*, *The Nation* (Feb. 4, 2020), <https://www.thenation.com/article/politics/whistleblower-protection-trump-ukraine/>.

¹⁵ Press Release (July 24, 2019), <http://www.grassley.senate.gov/news/news-releases/grassley-wyden-announce-new-members-senate-whistleblower-protection-caucus>.

¹⁶ Brandi Buchman et al., *Chief Justice Puts Kibosh on GOP Effort to ID Whistleblower*, *Courthouse News Service* (Jan. 30, 2019), <https://www.courthousenews.com/senators-fan-trump-trial-flames-on-day-2-of-qa/>