We, the Board of Directors of 80-20 Educational Foundation, recommend an “innocent victim restoration” process to be installed in the "National Insider Threat Program" while DHS is institutionalizing some of its processes (e.g. Privacy Act exemptions) for our national security.

Many federal agencies enjoy a degree of immunity. However it is only fair and just for the government to repair the damages done to the wrongfully accused/investigated victims. Since now DHS is about to institutionalize some of the practices, it is a good time to install an "innocent victim restoration" process. A methodology should be structured to protect the innocent citizens from the human frailties of the system.

This "innocent victim restoration" should minimally include the following components:

1) A formal letter of apology to the innocent victim.
2) A letter of explanation to his/her employer to clear his/her name & reputation.
3) Correction of any inaccurate information in the victim's security file.
4) Reinstate the victim in a job position equivalent to the one held before the investigation.
5) Financial compensation to the victim, or the victim’s beneficiaries: (A) Based on the tangible monetary loss (business income, salary, bonus, legal fees, etc). (B) For mental suffering, anguish, etc.
6) Determine the responsibility and criminality of the person/agency who made groundless allegations.

Attached below are references supporting the above based on case law and legal precedents:

MEMORANDUM OF POINTS AND AUTHORITIES in support of 80-20 Initiative’s comment to the Department of Homeland Security (DHS) regarding the need for “innocent victim restoration” for Sherry Chen (and other victims similarly situated).

Constitutional underpinnings: **First, Fourth, and Fifth Amendments** to the **U.S. Constitution**, for violations of victims’ constitutional rights, reasonable expectation of privacy, free speech and association, right to be free of unreasonable searches and seizures, and due process rights.

Case law and statutory law in support of **rehabilitation** (for violation of common law and statutory rights):

(1) Violations by the Government (or agents thereof), are **compensable** under ***Bivens v. VI Unknown Federal Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)**. The *Bivens* decision supports an award of compensatory and actual damages, punitive damages, equitable relief, reasonable attorneys fees, pre-judgment interest, post-interest and costs, and an award in an amount to be determined in court, if necessary. So this would encompass the demand for financial compensation for the victims based on the tangible loss in income and benefits (salary, bonus, *etc.*) as well as for mental suffering, anguish, *etc.*

(2) The **Administrative Procedure Act** ("APA") "establishes a cause of action for those suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." ***Koretoff v. Vilsack,* 614 F.3d 532, 536 (D.C. Cir 2010) (quoting U.S.C. section 702).** The APA permits such aggrieved persons to bring suit against the United States and its officers for "**relief other than money damages**" pursuant to 5 U.S.C. section 702, such as **injunctive relief**. So this would encompass the demand for the letter of apology to the victim, the letter of explanation to the victim's employer to clear his/her name and reputation, and reinstatement of the victim into a job/position equivalent to the one he or she lost.

(3) While judicial review (of Executive Branch action) is taken cautiously by the federal courts, so as not to impinge on the Separation of Powers doctrine, in ***Webster v. Doe*, 486 U.S. 592 (1988),** the Court stated emphatically that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear". *Webster* at 603. See also ***Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2132 (2012)**, which held that "[A] necessary predicate to the application of *Webster*'s heightened standard [is] a statute that purports to "deny any judicial forum for a colorable constitutional claim.'" See also ***McBryde v. Comm. To Review Circuit Conduct & Disability Orders of the Judicial Conference of U.S.*, 264 F.3d 52, 59 (D.C. Cir. 2001)**, which held that "preclusion of review for both as applied and facial constitutional challenges only if the evidence of congressional intent to preclude is 'clear and convincing'…"

(4) In sum, the presumption that judicial review of constitutional claims is available in federal district courts is a strong one, *see Webster*, 486 U.S. at 603. Where, as in these victims' cases, "core individual constitutional rights are implicated by Government action, Congress should not be able to cut off a citizen's right to judicial review of that Government action simply because it intended for the conduct to remain secret by operation of the design of its statutory scheme. While Congress has great latitude to create statutory schemes, it may not hang a cloak of secrecy over the Constitution." See **Memorandum Opinion** issued by U.S. District Judge Richard J. Leon in ***Klayman et al. v. Obama et al.,* December 16, 2013 [Dkt. #13(No. 13-0851), #10(No. 13-0881), at page 34.**

In addition, we support the following recommendation submitted separately by the Federation of American Scientists and Dr. Jeremy Wu of Committee 100:

> The proposed rule be modified to affirm that information which is otherwise exempted will nevertheless be provided to an employee, at least in summary or paraphrase, whenever adverse action is taken against the employee on the basis of that information.
>
> The rationale for this recommendation is that no one should be penalized on the basis of secret evidence that is unverified and that may be incorrect.

Aside from actual insider threats, innocent individuals can be the object of derogatory reports based on error, misunderstanding, or personal animus. Employees facing demotion or dismissal should be allowed to challenge allegations against them as a matter of due process.

The proposed rule itself notes that "the accuracy of information obtained or introduced occasionally may be unclear." If such information is used to justify an adverse personnel action, an opportunity to rebut it must be provided. Even if particular details must be withheld to protect confidential sources, the substance of the allegation should be made available to the affected employee.

Thank you for considering our comments.

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