

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



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October 31, 2024

The Honorable Jason Smith  
Chairman, Committee on Ways & Means  
U.S. House of Representatives

The Honorable Jim Jordan  
Chairman, Committee on the Judiciary  
U.S. House of Representatives

The Honorable James Comer  
Chairman, Committee on Oversight  
and Accountability  
U.S. House of Representatives

Dear Chairmen:

I write regarding the Internal Revenue Service's ("IRS's") ongoing retaliation against Supervisory Special Agent ("SSA") Gary Shapley.

An IRS "term tenure" policy requires that IRS managers either promote within a period of time or face demotion. Thus, in order to punish SSA Shapley with demotion next May, the IRS need take no official action than simply not select him for advancement. This possibility was still over two years away at the beginning of January 2023 when the IRS passed over SSA Shapley for a promotion for which he was clearly the most qualified, less than two weeks after the IRS surreptitiously agreed to remove SSA Shapley and his team from the Hunter Biden investigation at the request of U.S. Attorney ("USA") for the District of Delaware David Weiss. Thereafter, Empower Oversight filed a whistleblower retaliation complaint with the U.S. Office of Special Counsel's ("OSC") in May 2023.

SSA Shapley awaited the outcome of OSC's investigation for over a year before determining the need to resume applying for advancement opportunities. But in 2024 he has been passed over for two promotions for which he applied, one of which the IRS deliberately avoided including in a vacancy announcement. And this week, in a clearly retaliatory move less than an hour after an email from IRS Criminal Investigation ("IRS-CI") Chief Guy Ficco to SSA Shapley and Special Agent ("SA") Ziegler was released in the press, the IRS gave SSA Shapley 15 days to make just such a decision of being demoted or resigning.<sup>1</sup>

Meanwhile, we learned yesterday that OSC is only barely taking investigative steps it should have taken long ago. These circumstances merit the attention of your committees.

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<sup>1</sup> Attachment A.

## *SSA Shapley's Performance History*

When SSA Shapley first contemplated blowing the whistle outside of IRS Criminal Investigations (“IRS-CI”), he was excelling in his career, most of which had been in IRS-CI’s Washington, D.C. Field Office (“WDCFO”). In 2013 SA Shapley was selected to represent the IRS in the Department of Justice (“DOJ”) Tax Division’s Swiss bank program, which he did for five years. After being promoted to IR-04 SSA in April 2018, he personally assisted the IRS-CI Director by standing up the Joint Chiefs of Global Tax Enforcement (“J5”) in June 2018, which he remained involved in for the next several years. In January 2020 SSA Shapley was selected to supervise IRS-CI’s International Tax and Financial Crimes (“ITFC”) Group, a team of around 10 of the top IRS-CI special agents from around the country selected to lead the most significant and high-profile international tax investigations in the IRS.

On March 15, 2018, IRS-CI implemented its first 1811 Term Tenure Policy, which established a maximum mandatory tenure of five years for SSAs, with the possibility of a renewal of term for up to two additional years.<sup>2</sup> According to the new policy, SSAs were expected during that five (or seven) years to “[c]ompete for and be selected for a different position indicating progression within the organization prior to the end of the respective tenure term of current position.”

In 2021 SSA Shapley submitted a statement of interest and was selected to serve as an Acting IR-01 Assistant Special Agent in Charge (“ASAC”) in IRS-CI’s New York Field Office, which he served in for five months.<sup>3</sup> That year he was competitively selected from a USA Jobs application for a “not to exceed” (“NTE”) IR-01 ASAC position in IRS-CI’s Chicago Field Office—a promotion which should have met the Term Tenure Policy’s requirement for establishing a new tenure of December 2026.<sup>4</sup>

SSA Shapley served as the Chicago ASAC from December 2021 until November 2022, during which he also maintained his J5 program responsibilities. On September 12, 2022, SSA Shapley’s Special Agent in Charge (“SAC”) first-line supervisor gave him an Outstanding summary evaluation rating for his first year as an IR-01 ASAC. The SAC wrote:

Gary – you started as the detailed ASAC for Branch C in December 2021. Among the 3 branches, you quickly set yourself apart as a leader among your peers. Your strong desire to seek excellence no matter the situation has provided a positive impact to our entire field office. I have enjoyed working closely with you again and look forward to watching you continue to grow as a leader!<sup>5</sup>

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<sup>2</sup> Attachment B.

<sup>3</sup> On August 3, 2021, IRS-CI issued a new 1811 Leadership Tenure Policy which eliminated the two-year term renewal option for future prospective leaders. Attachment C. However, the new policy grandfathered in those who had already been in leadership roles under the prior March 15, 2018 policy. (“To provide for an orderly transition to this updated policy, all permanent, incumbent 1811 leaders serving under an existing term will have their final term date automatically granted without the requirement to re-apply for the assignment.”) At this time, SSA Shapley was provided with a term tenure date of April 29, 2025.

<sup>4</sup> Under the August 3, 2021 policy, “A field office leader’s term starts after both a change in position and agency-approved POD relocation greater than 50 miles or leadership progression/promotion[.]” *Id.* at 2 (emphasis added).

<sup>5</sup> Attachment D.

On October 21, 2022 SSA Shapley's Director of Field Operations ("DFO") second-line supervisor approved the Outstanding performance appraisal.<sup>6</sup> That same day, a different IRS-CI SAC and DFO outside of SSA Shapley's supervisory chain provided his Leadership Succession Rating, which rated him "Ready for Senior Management" in every one of the IRS's leadership core qualifications and competencies.<sup>7</sup>

SSA Shapley received a significant performance bonus in November 2022, and the IRS offered him the permanent Chicago IR-01 ASAC position that month. Because the position would have required moving permanently to the Chicago area, SSA Shapley declined the permanent position. However, when he was reassigned to the WDCFO, SSA Shapley's service as Chicago ASAC should have at least removed a year from his SSA tenure clock. More reasonably, having competitively applied for (and successfully excelled in) "a position indicating progression" in December 2021, SSA Shapley's tenure term should have remained until December 2026.

On November 3, 2022 SSA Shapley applied for the position of J5 Lead in WDCFO. As the only IRS-CI official involved in the J5 since its creation, SSA Shapley was by far the most qualified for the J5 Lead position.

### ***DOJ and IRS Retaliation for Protected Whistleblower Disclosures***

Everything changed after U.S. Attorney ("USA") David Weiss learned in the fall of 2022 that SSA Shapley had been making whistleblower disclosures regarding the Hunter Biden investigation.

USA Weiss first learned in the October 7, 2022 meeting of SSA Shapley's concerns about the handling of the Hunter Biden investigation. In that meeting, SSA Shapley disclosed that he believed it was a mistake to fail to charge Hunter Biden for his 2014 and 2015 tax years because of the large amount of unreported income Hunter Biden received from Ukrainian energy company Burisma.<sup>8</sup> Thereafter, the Delaware U.S. Attorney's Office ("USAO") made an unprecedented request for all of SSA Shapley's internal correspondence on the case to his supervisors.<sup>9</sup>

According to testimony to your committees, in November 2022 USA Weiss contacted both IRS-CI WDCFO SAC Darrell Waldon and IRS-CI Deputy Chief Guy Ficco about obtaining copies of SSA Shapley's communications with his chain of command about the Hunter Biden case.<sup>10</sup> The IRS produced Significant Case Reports to the Delaware USAO in early December 2022. On December 12, 2022, SSA Shapley emailed SAC Waldon and DFO Batdorf:

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<sup>6</sup> *Id.*

<sup>7</sup> Attachment E.

<sup>8</sup> U.S. House Committee on Ways and Means, Interview of Gary A. Shapley, Jr., May 26, 2023 ("Shapley Transcript"), Exhibit 10, [https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript\\_Redacted.pdf](https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript_Redacted.pdf) at 178-79.

<sup>9</sup> See [https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T108-Shapley-3\\_Attachment-27.pdf](https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T108-Shapley-3_Attachment-27.pdf).

<sup>10</sup> U.S. House Committee on Ways and Means, Interview of Michael Batdorf, Sept. 12, 2023 ("Batdorf Transcript"), at 80, 87, [https://gop-waysandmeans.house.gov/wp-content/uploads/2024/03/HWM255550\\_Final\\_Redacted\\_Batdorf-with-Exhibits.pdf](https://gop-waysandmeans.house.gov/wp-content/uploads/2024/03/HWM255550_Final_Redacted_Batdorf-with-Exhibits.pdf); U.S. House Committee on Ways and Means, Interview of Darrell Waldon, Sept. 8, 2023 ("Waldon Transcript"), at 99-100, <https://gop->

[B]ecause of the USAO and DOJ Tax’s continued visceral reactions to any dissenting opinions or ideas . . . I continually reported these issues up to IRS-CI leadership beginning in the summer of 2020. Now, because they realize I documented their conduct they separate me out, cease all communication and are now attempting to salvage their own conduct by attacking mine.<sup>11</sup>

DFO Batdorf responded on December 13, 2022, copying SAC Waldon:

I understand through your emails that you believe the prosecuting team may have not conducted themselves in an ethical or proper manner to include prosecutorial misconduct. I am not the reviewing official, deciding official or expert on such matters. However, there are routes you could take if you truly believe there are violations of ethical conduct or prosecutorial misconduct.<sup>12</sup>

After having the opportunity to review SSA Shapley’s protected disclosures to his IRS-CI chain of command regarding the conduct of USA Weiss’s own office,<sup>13</sup> USA Weiss had a December 22, 2022 phone call with DFO Batdorf and SAC Waldon.<sup>14</sup> In it, he allegedly requested that SSA Shapley and his team be removed from the Hunter Biden investigation.<sup>15</sup> Although DFO Batdorf claims he decided with SAC Waldon at that time to remove SSA Shapley and his team from the Biden case, they did not inform SSA Shapley until May 15, 2023—well after he had blown the whistle to Congress.<sup>16</sup>

On January 4, 2023, approximately a week and a half after USA Weiss’s call with IRS-CI, the IRS inexplicably informed SSA Shapley that he had not been selected for the J5 Lead position. Instead, IRS-CI appointed an IRS employee with no IR-01 experience whose work had primarily been on cyber-related non-tax cases, rather than the international tax investigations SSA Shapley had specialized in since 2013. In the months to follow, the new J5 Lead would

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[waysandmeans.house.gov/wp-content/uploads/2024/03/HWM251550\\_Final\\_Redacted\\_Waldon-with-Exhibits.pdf](https://waysandmeans.house.gov/wp-content/uploads/2024/03/HWM251550_Final_Redacted_Waldon-with-Exhibits.pdf).

<sup>11</sup> Shapley Transcript, Exhibit 9 ([https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript\\_Redacted.pdf](https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript_Redacted.pdf) at 172-173).

<sup>12</sup> *Id.*

<sup>13</sup> Batdorf Transcript at 90-91. For example, SSA Shapley’s May 2021 Significant Case Report read: “This investigation has been hampered and slowed by claims of potential election meddling. Through interviews and review of evidence obtained, it appears there may be campaign finance criminal violations. [Delaware] AUSA [Lesley] Wolf stated on the last prosecution team meeting that she did not want any of the agents to look into the allegation. She cited a need to focus on the 2014 tax year, that we could not yet prove an allegation beyond a reasonable doubt, and that she does not want to include their Public Integrity Unit because they would take authority away from her. We do not agree with her obstruction on this matter.” [https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T95-Shapley-3\\_Attachment-14\\_WMRedacted.pdf](https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/T95-Shapley-3_Attachment-14_WMRedacted.pdf).

<sup>14</sup> Batdorf Transcript at 38-39, 86-97.

<sup>15</sup> *Id.* at 80-81, 87, 92-93.

<sup>16</sup> *Id.* at 94-98. DFO Batdorf’s testimony completely contradicts that of SAC Waldon, who first claimed he was not involved in the decision to remove SSA Shapley from the case (Waldon Transcript at 122-23), then claimed he made a recommendation in February 2023 to remove SSA Shapley (*id.* at 134-35, 139-40). Despite DFO Batdorf’s contention that Batdorf and Waldon agreed in a December 22, 2022 call that they would remove SSA Shapley from the Hunter Biden case, SAC Waldon claimed to be unable to recall any phone call with USA Weiss between October 2022 and February 2023 (*id.* at 99-100), and in fact completely omitted any mention of USA Weiss requesting SSA Shapley’s removal from the case.

request SSA Shapley’s help dozens of times to perform the duties of the position the J5 Lead selectee was unqualified to fill.

On January 6, 2023, SSS Shapley had a phone call with DFO Batdorf in which Shapley informed Batdorf he had retained whistleblower counsel who had contacted Congress and the Treasury Inspector General for Tax Administration (“TIGTA”).

The following week, on January 12, 2023, SSA Shapley contacted the Executive Director of IRS-CI’s Cyber and Forensic Services about that office’s Deputy Director vacancy, submitting a formal statement of interest on January 17, 2023. The vacancy announcement indicated the applicant be a “current *or prior* IR-01,” which SSA Shapley had been from April 2021 until November 2022. Yet on January 25, 2023, IRS-CI Office of Strategy Executive Director Shea Jones claimed to SSA Shapley he was ineligible for the position because he “must have *permanently held* a competitively selected IR-1811-01 position”—a requirement nowhere in the vacancy announcement.

On May 15, 2023, SAC Kareem Carter informed SSA Shapley that his team was being removed from the Hunter Biden case—a decision that, as your transcribed witness interviews uncovered, was apparently made in December 2022. Whether requested by USA Weiss or not, for the IRS to acquiesce to this retaliation was a continuation of the dereliction of duty IRS-CI management demonstrated throughout the Hunter Biden investigation. As we wrote in a letter to Congress on May 15, 2023: “Removing the experienced investigators who have worked this case for years and are now the subject-matter experts is exactly the sort of issue our client intended to blow the whistle on to begin with.”<sup>17</sup>

### *OSC Investigation*

On May 17, 2023, Empower Oversight filed a whistleblower retaliation complaint with OSC regarding the IRS’s retaliatory non-selection of SSA Shapley for the J5 Lead position.<sup>18</sup> In the 17 months since, we have regularly informed them of the various other forms of retaliation by the IRS, including but not limited to:

- Failing to respond to SSA Shapley’s emails;
- Excluding SSA Shapley from meetings he was previously a part of as ITFC SSA and/or on the J5 team;
- Shutting down investigations managers had previously told SSA Shapley were the “future of IRS-CI”;
- Circumventing SSA Shapley to communicate directly with ITFC team members on matters that normally go through the chain of command;
- Cancelling scheduled travel and reassigning international interviews planned by SSA Shapley’s ITFC team to local attaches with no knowledge of the underlying case;

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<sup>17</sup> Letter from Tristan Leavitt and Mark D. Lytle to the Honorable Ron Wyden, et al. (May 15, 2023), <https://empowr.us/wp-content/uploads/2024/10/2023-05-15-Letter-to-Congress-re-IRS-DOJ-retaliation-1.pdf>.

<sup>18</sup> *Id.*, Attachment 1 (letter from Tristan Leavitt to U.S. Office of Special Counsel, May 17, 2023).



- Defeating the stay OSC requested on filling the J5 Lead position by filling a duplicative new SSA position in International Operations as well as a Senior Analyst position on the J5; and
- “Mistakenly” lowering SSA Shapley’s year-end performance rating at the second-line supervisor level.

Most recently, the IRS passed over SSA Shapley for two promotions in 2024, either of which would have clearly obviated the tenure policy issue. On April 29, 2024, SSA Shapley submitted a statement of interest for the Assistant Director of International Operations vacancy, either as a detail or as a permanent appointment. Once again, the IRS claimed SSA Shapley was ineligible to apply because he had never been a “permanent” IR-01.

On June 17, 2024, IRS-CI posted a general purpose announcement for 25 listed ASAC openings across the country. The list of 25 did not include the ASAC position that currently supervises SSA Shapley in IRS-CI’s Washington, D.C. Field Office (“WDCFO”), and SSA Shapley therefore did not submit an application for the general purpose announcement. IRS-CI appeared to deliberately refrain from listing the WDCFO ASAC opening, failing to add WDCFO to the general purpose ASAC announcement or put out a temporary promotion listing as it did for other ASAC vacancies that became available after the June 17 general purpose announcement. As soon as he learned that his ASAC planned to take another position, SSA Shapley submitted an August 2, 2024 application for the WDCFO position through the general purpose announcement.

Yet SSA Shapley was never interviewed. Instead, when conducting interviews on August 6, 2024 of those who applied for any of the 25 other ASAC openings in the general purpose announcement, WDCFO SAC Kareem Carter *asked applicants who had never applied to WDCFO* if they would be willing to come to Washington, D.C. to take the ASAC position SSA Shapley had just applied for.

We informed OSC staff of these developments on August 9, 2024. SAC Carter subsequently announced on August 15 that a new WDCFO ASAC had been selected and would begin on October 7, 2024. In the meantime, on September 9, 2024, OSC staff informed us the IRS had agreed to an informal 45-day stay of permanently filling the position while OSC investigated the selection. Yet this did not stop the IRS from demanding that SSA Shapley commit within two weeks to a decision on which OSC’s investigation would have a direct impact.

In our August 9, 2024 call with OSC staff, we also noted that it had been over a year since our initial May 17, 2023 filing. We also pointed out that if OSC kept delaying investigative steps every time the IRS took a new retaliatory action against SSA Shapley, their investigation might never end. Thus, we specifically requested that OSC make a determination on our allegations of the retaliatory non-selection of SSA Shapley for the J5 Lead position and the pre-selection of a less qualified individual.

OSC staff eventually informed us on October 11, 2024 that they “hope to provide [us] with feedback . . . by early November,” apparently intending to wait until after the presidential election. After I posted the IRS’s latest letter on X yesterday, we learned that at least one IRS

employee only received noticed for the first time *yesterday afternoon* that OSC staff had identified him as a witness they would like to interview regarding the J5 Lead non-selection.

This delay in contacting witnesses about a prohibited personnel practice allegation we submitted to OSC 17 months ago is inexplicable. It merits the committees obtaining from OSC a briefing on the investigation and why it has taken them so long to contact basic fact witnesses.

### *Conclusion*

From the moment USA Weiss received access to SSA Shapley's protected whistleblower disclosures and contacted IRS leadership, the IRS has treated SSA Shapley differently. Their illegal reprisal increased after SSA Shapley made clear he intended to blow the whistle to Congress and others. And it continues to this day, when the IRS knows it can retaliate against SSA Shapley simply by waiting out the clock for him to be forced into the position of resigning or being demoted.

The IRS's latest move comes just weeks after we were informed by TIGTA that it could not complete its own investigation into alleged wrongdoing by the IRS and DOJ (including the removal of SSA Shapley and SA Ziegler from the Hunter Biden case) because DOJ refused to provide certain information to TIGTA while the Hunter Biden case remained open. Meanwhile, DOJ Inspector General Michael Horowitz testified before the Subcommittee on the Weaponization of Government approximately one month ago that his office has also held off on all investigative activity related to SSA Shapley and SA Ziegler's allegations while the Hunter Biden case remained open.<sup>19</sup>

These developments all highlight the weaknesses of current government accountability mechanisms. The DOJ Office of Inspector General ("OIG") conducted its review of Operation Fast and Furious, including allegations involving the U.S. Attorney for the District of Arizona and several of his subordinates, at the same time as DOJ prosecuted those associated with the murder of Border Patrol Agent Brian Terry. However, if DOJ can prevent OIGs from investigating alleged attorney misconduct while a case remains open, DOJ can remain virtually unaccountable for years while prosecutions, appeals, and other legal proceedings go on interminably.

Meanwhile, if OSC takes so long to render a decision on retaliation allegations that the personnel action in question can no longer be reversed, other potential whistleblowers throughout government will see no incentive to risk reprisal by making protected disclosures—defeating the entire reason for OSC's existence. Even before serving at OSC as the Principal Deputy Special Counsel from 2017 to 2018, I have long been an advocate for their role in remedying—and ideally helping to prevent—whistleblower retaliation. OSC is a very small agency relative to their outsized mission, and (largely because of their disclosure referral authority under 5 U.S.C. § 1213) justifiably points out to congressional appropriators that every dollar invested in their budget results in a return to the U.S. Treasury many times over.

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<sup>19</sup> *Hearing on the Weaponization of the Federal Government: Hearing Before the H. Subcomm. on the Weaponization of the Fed. Govt.*, 118th Cong. (Sept. 25, 2024).

However, when it comes to whistleblower retaliation cases, justice delayed is justice denied—whatever the cause. This should not be.

Sincerely,  
[/Tristan Leavitt/](#)  
President  
Empower Oversight

ATTACHMENTS