

# Chapter 4: Whistleblowers

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## Chapter Overview

For too long, efforts to silence those who speak uncomfortable truths have succeeded. More than one-third of federal workers recently said they were less likely to make whistleblowing disclosures because they fear retaliation that threatens their careers, livelihood and even their safety. The administration should show their support for those who speak out when they witness wrongdoing, reaffirming the value of whistleblower disclosures, strengthening government programs to protect employees who make such disclosures, and protecting whistleblowers. It can accomplish these objectives through better educating government employees of their rights, better vetting presidential appointees to ensure a commitment to whistleblowing, and improved efforts to ensure compliance by ensuring policies and practices are consistent with the law and adequately hold retaliators accountable.

**Principle 9: Whistleblowers play a critical role in constitutional checks and balances and exposing executive branch abuses; therefore, they must have meaningful channels to make disclosures and solid protections from retaliation.**

### The Problem

Currently, whistleblowers are chilled from speaking truth to power across the federal government. Long before President Trump attacked both confidential and public whistleblowers (such as the Ukraine whistleblower and the Health and Human Services' Dr. Rick Bright), whistleblowers faced demotions and harassment. Agency officials are [increasingly retaliating against whistleblowers with impunity](#), according to inspectors general, and a *Government Executive* [survey](#) indicates that the president's rhetoric during impeachment made more than one-third federal workers less likely to make whistleblowing disclosures.

While Congress has advanced whistleblower protections in the public and private sectors significantly over the past decade, the laws that protect whistleblowers from retaliation remain inadequate. Protections for national security whistleblowers, in both the intelligence community and the military, are particularly weak because of executive branch opposition to providing them meaningful protections.

The president must reverse this dangerous trend that keeps whistleblowers from exposing dangerous wrongdoing that can put us at risk. Whistleblowers must be valued for their role in quickly identifying issues for further investigation and potential corrective action. The administration must reenergize bipartisan support for truth-tellers and revitalize our whistleblowing programs, ensuring functional channels for reporting disclosures and encouraging their use by increasing protections from retaliation.

## Recommendations for Action on Day One

1. **Appoint a Special Assistant to the president to review and suggest reforms to the federal whistleblowing system.**

The president must appoint a Special Assistant to serve inside the Domestic Policy Council to address structural and cultural issues that plague whistleblowing systems across the federal government. This Special Assistant, who ideally has a deep understanding of our complex federal whistleblowing system, should review the structure of the federal government's internal whistleblowing systems and form recommendations to enhance these systems and repair cultural issues. Additionally, the Special Assistant should work to improve interagency coordination regarding whistleblower matters.

2. **Declare support for whistleblowers.**

The administration must take immediate steps to change the executive branch's anti-whistleblower culture by communicating to all federal employees that they will be protected against retaliation and that they are expected to speak up when they witness wrongdoing. Federal employees must be made aware that one of the 14 General Principles from the Standards of Ethical Conduct for Executive Branch employees provides: "employees *shall* disclose waste, fraud, abuse, and corruption to appropriate authorities." (emphasis added).

3. **Nominate qualified individuals to lead the Merit Systems Protection Board who are dedicated to upholding the federal merit system.**

The Merit System Protection Board (MSPB), a quasi-judicial administrative board that adjudicates federal workers' claims (e.g., whistleblowing retaliation cases), has not had a quorum for over three years. As a result, there was a backlog of over 2,500 cases in January of 2019. Its acting chief executive told Federal News Network in January 2020: "That 2,500 number does represent 2,500 cases where individuals are choosing to get in line to wait for a board to come. It's a large number, by far the largest backlog there's ever been at MSPB."<sup>10</sup> Appointing qualified individuals is imperative to dig out from under this backlog, alleviating a hardship thousands of federal workers currently face.

## Recommendations for Short-term Action (First 100 Days)

1. **Plan a bipartisan Rose Garden ceremony honoring federal government whistleblowers.**

Every year Senator Charles Grassley asks the president to honor federal whistleblowers on National Whistleblower Day through a Rose Garden ceremony.<sup>11</sup> No previous president has answered his request. Given Sen. Grassley's role as the Republican Co-Chairman of the Senate Whistleblower Protection Caucus, committing to plan such a ceremony would demonstrate support for whistleblowing as a government ideal. This is

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<sup>10</sup> <https://federalnewsnetwork.com/workforce/2020/01/lack-of-quorum-hits-3-year-mark-at-mspb-with-no-clear-end-in-sight/>

<sup>11</sup> <https://www.grassley.senate.gov/news/news-releases/grassley-urges-president-change-culture-bureaucracy-honoring-whistleblowers-rose>

a first step to restoring the unity behind federal whistleblowers and contributing to a changed culture that supports them.

**2. Ensure agency non-disclosure agreements comply with whistleblower laws.**

Many agencies require their workforce to sign non-disclosure agreements that do not comply with the anti-gag provisions found in federal whistleblower laws. These laws prohibit the government from placing restrictions on employees' free speech without making it clear those restrictions do not remove their rights to disclose wrongdoing. According to an April 2014 report by Senator Grassley, only one of fifteen agencies was able to document implementation of the anti-gag provisions (eight agencies only partially implemented the provisions, while two were unable to demonstrate even partial compliance). This trend continues in the current administration. These non-disclosure policies and agreements falsely chill whistleblowers from exercising their right and duty to report wrongdoing. Requiring general counsels to review all of their agency's policies and agreements for compliance would render federal workers more welcome to blow the whistle.

**3. Ensure agencies hold whistleblower retaliators to account.**

The administration should make clear that whistleblower retaliation will not be tolerated. Recently departed Department of Defense (DoD) Inspector General Glenn Fine shared a concerning observation with the House Committee on Oversight and Reform: "Recently, we've seen a disturbing trend of the [DoD] disagreeing with the results of our investigation or not taking disciplinary action in whistleblower reprisal cases without adequate or persuasive explanations. Failure to take action sends a message to agency managers that reprisal will be tolerated and also to potential whistleblowers [that they] will not be protected." Agency heads must discipline whistleblower retaliators for violating whistleblowers' legal protections. The administration should either ensure that agencies do not tolerate retaliation (once substantiated by an inspector general or a similar agency) or require agencies to provide specific explanations as to why they disagree with Inspectors General's findings.

**4. Train political appointees on their subordinates' whistleblowing rights.**

While Inspectors General and other entities train federal workers on their whistleblowing rights and responsibilities, political appointees are trained less frequently. Political appointees are likely to interact with whistleblowers, usually from a position of power. They should be trained on the whistleblowing processes and protections to ensure they do not infringe others' rights.

**5. The Presidential Personnel Office should ensure that all candidates for presidential appointment honor, understand, and value whistleblower protections.**

When the Presidential Personnel Office evaluates candidates for presidential appointment, they should include a survey question asking whether or not that candidate will protect whistleblowers inside their workforce from retaliation. Only candidates who commit to whistleblower protection should be considered for appointment.

**6. Review the whistleblowing system for inspector general personnel.**

The Council of the Inspectors General on Integrity and Efficiency's Integrity Committee receives whistleblowing disclosures made against inspectors general or their senior staff, but rarely conducts fulsome investigations into whistleblowers' concerns. The administration should review the processes by which the Committee investigates whistleblowing disclosures against Inspectors General, as well as their historical track record, in consultation with civil society. Additionally, Intelligence Community whistleblowers who are also inspector general personnel should be afforded the same protected channels as other Intelligence Community personnel under President Obama's Presidential Policy Directive-19; the Integrity Committee should not be their only outlet for relief.

**7. Expand Intelligence Community whistleblowers' right to counsel and attorney-client privilege.**

Not all whistleblowers who participate in inspector general investigations, as either original sources or corroborating witnesses, are afforded counsel at all stages of their saga. Even when they are, their attorneys are occasionally barred from receiving the full record. The administration should declare that all complainants and witnesses in inspector general investigations are allowed to have counsel participate at all stages of investigations. Furthermore, all agencies should process a complainant's preferred counsel for access to any classified information relevant to the complaint, and the Director of National Intelligence in his or her capacity as Security Executive Agent should issue a directive establishing a uniform process for such counsel access. Additionally, an agency that conducts prepublication review of any attorney-client communications should treat such communications as privileged and not disseminate them beyond the office conducting the review, unless specifically directed by the general counsel of the agency on a document-by-document basis. The Security Executive Agent and the attorney general should issue public guidance for how to conduct prepublication review on privileged communications.

**8. Appoint qualified individuals to run the government's whistleblowing agencies.**

Beyond the Merit System Protection Board (discussed above), the government requires qualified individuals to run the varying agencies, boards, and components that enforce whistleblower protections. As a start, the Secretary of Labor should promptly appoint a new Administrative Review Board that shares the administration's commitment to whistleblower protection. Workers outside the federal government rely on this Board to enforce their whistleblowing rights under the law, and the Administrative Review Board's decisions can be adopted by federal courts. An Administrative Review Board hostile to whistleblowers undermines the spirit of our whistleblower laws.

**9. Assess Internal Revenue Service compliance with 2019 Taxpayer First Act whistleblower provisions.**

The Internal Revenue Service's whistleblower program does not adequately work with whistleblowers and keep them apprised of updates in their cases, despite mandatory notification requirements<sup>12</sup> in the 2019 Taxpayer First Act. The administration should assess Internal Revenue Service compliance with these requirements.

## Recommendations for Legislative Action

### 1. **Support cornerstone improvements to the Whistleblower Protection Act of 1989.**

The administration should support legislation which establishes, among other reforms, jury trials for federal whistleblowers, designation of retaliatory investigations as prohibited personnel practices, and realistic standards to obtain temporary relief in cases that drag on for years.

### 2. **Intelligence Community whistleblower reform.**

The administration should support legislation that establishes independent due process for Intelligence Community whistleblowers to enforce their whistleblowing protections, as well as a lack of prior restraint in making congressional disclosures, among other necessary reforms. The reforms contained in the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence's Fiscal Year 2021 Intelligence Authorization Acts should be a starting point, but further reform is necessary to ensure a strong, internal process that limits unauthorized disclosures of classified information.

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<sup>12</sup> <https://www.irs.gov/compliance/whistleblower-reforms-under-the-taxpayer-first-act>