

The Never-Ending War on Federal Whistleblowers

By Lynne Bernabei and Alan R. Kabat

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Federal employees are often the only people in the position to identify illegal conduct, waste of funds, gross mismanagement or other misconduct at federal agencies. Even though laws have theoretically protected whistleblowers for four decades since the enactment of the 1978 Civil Service Reform Act, Congress and the executive branch have waged a never-ending war in an attempt to punish whistleblowers instead of addressing the underlying misconduct. Congress should avoid enacting legislation that could resurrect the spoils system. After all, it was the spoils system that led to the creation of a merit-based civil service in 1883. Basic due process protections for civil service employees may seem burdensome, but a politicized federal workforce would be a disaster.

Initially, it was the executive branch that eviscerated protections for whistleblowers, because no administration likes to see its faults pointed out. The government successfully argued to the Merit Systems Protection Board—which is presidentially appointed—that an agency was free to fire a whistleblower, as long as the agency could claim that it made the decision for some unrelated reason, even though the supervisor was openly hostile to the whistleblower's disclosures of government misconduct.

Congress responded with the 1989 Whistleblower Protection Act, which singled out for criticism the Office of Special Counsel, the MSPB, and the courts, for erecting “barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing.”

Despite enhanced legislative protections, the executive branch continued to successfully argue to the MSPB and the U.S. Court of Appeals for the Federal Circuit that whistleblowers were not protected if they made disclosures to the wrongdoer, or if the agency already knew about the misconduct. In response, Congress passed the 2012 Whistleblower Protection Enhancement Act, which overruled prior MSPB and Federal Circuit court rulings, and emphasized that “any [protected] disclosure” of illegal activities, gross waste of public funds, or gross mismanagement would be protected.

In recent years, agency inspectors general—who in theory are supposed to protect whistleblowers and investigate government misconduct—have been shifting their attention to investigating whistleblowers, at the behest of supervisors who are upset with their disclosures. We are seeing IGs go after whistleblowers, sometimes resulting in criminal investigations by the Justice Department, or even referrals to professional licensing boards.

Most recently, Congress (this time under Republican control) has joined the executive branch's war on federal employees by proposing legislation that would severely curtail the due process and other civil service rights of federal employees. These bills in the House Committee on Oversight and Government Reform would directly harm whistleblowers by making it much easier for agencies to demote or terminate them, and much harder for whistleblowers to challenge adverse personnel actions.

Congress already eviscerated civil service protections for members of the Senior Executive Service in the Veterans Affairs Department, by making it much easier for the agency to demote or fire them, and by limiting judicial review to a single administrative judge of the MSPB, with less than one month allowed for appeals. Even if an SES member claims that the agency fired her because she reported misconduct, the board and the Federal Circuit no longer have any role in protecting SES members at VA. Thus, VA can get rid of SES members who the agency does not like, including those who are whistleblowers.

So far, VA has demoted or terminated four SES members. One of them, employed at the Phoenix VA hospital, lost before an administrative judge and is now appealing to the Federal Circuit, arguing that the lack of judicial review is unconstitutional. In the past two weeks, administrative judges of the MSPB overturned adverse actions (two demotions and one removal) against three other SES members. The demotions were reversed on the basis that VA failed to discipline other SES members who were involved with the alleged performance misconduct, and improperly targeted only those two SES members. The basis for overturning the removal of the third SES member has not yet been disclosed.

Now Congress wants to extend this SES removal process across the entire government, through the Senior Executive Service Accountability Act ([H.R. 4358](#), approved by the House Committee on Government Oversight and Reform). That would make it much easier for agencies to get rid of SES members who are disfavored for the wrong reasons, and make it much harder for SES members to challenge their removal, unless they can get an administrative judge to agree that the agency discipline was improper. Essentially, SES positions will become at-will employment, subject to political whims.

Meanwhile, the executive branch, through the Office of Personnel Management, is trying to set quotas for the agencies to ensure that SES members are regularly rotated to other positions (including at other agencies), which will make it easier to get rid of SES members.

The Committee on Government Oversight and Reform also approved, on a party-line vote, [H.R. 3023](#), which would extend the probationary period for all federal employees from one to two years. Even more problematically, the probationary period would not even start until the new hire has completed all "required training," which could take months or years. This would allow agencies to take adverse actions against probationary and pre-probationary employees, who have reduced civil service protections—another way to ensure that there is no whistleblower protection for new hires for years. Congress has already done this for the Defense Department through the fiscal 2016 National Defense Authorization Act, and is now trying to institute this evisceration of protections across the entire federal government.

The House committee also has approved the Official Personnel File Enhancement Act ([H.R. 4360](#)), which would prevent employees from getting a "clean record" by resigning or retiring while an investigation is underway. Instead, any finding by an investigator would be added to their permanent

personnel record, which will be an indelible black mark, affecting security clearances and the ability to be hired by other agencies. Again, because whistleblowers are the subjects of most retaliatory investigations, this legislation would provide another way to go after them.

Sen. Charles Grassley, R-Iowa, has waged a spirited but lonely battle against both his congressional colleagues and the executive branch in his decades-long effort to protect whistleblowers. He recently proposed the FBI Whistleblower Protection Enhancement Act ([S. 2390](#)). That bill would provide for outside review of FBI whistleblower claims by administrative law judges instead of a review limited to within the agency.

Grassley also introduced the Administrative Leave Act of 2016 ([S. 2450](#)), in response to the acts of many agencies that have put employees under investigation on paid leave for weeks, months, or even years. This legislation would prevent agencies from keeping employees on indefinite leave, would require agencies to consider allowing telework instead of leave, and would allow employees to challenge being placed on leave as a prohibited personnel practice. The Senate Homeland Security and Governmental Affairs Committee [recently approved](#) the bill. But the House Oversight and Government Reform Committee introduced competing legislation, the Administrative Leave Reform Act ([H.R. 4359](#)), which would limit paid leave for alleged misconduct or poor performance to 14 days in a year, but would provide no protection to employees. In other words, under the House legislation, the government could presumably convert the employee to unpaid leave after 14 days, and for as long as the investigation is underway.

In the history of retaliation against whistleblowers, it doesn't matter which political party is in power at any particular time. Except when they are supported by a few brave supervisors and members of Congress, whistleblowers are still risking their careers if they try to report and fix problems at their agencies, acting to protect the public's interest in honest and effective government.

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