

Whistleblower Protection Reform

CONSIDERATIONS FOR ETHICS AND LOBBYING

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BRYCE HARLOW WORKSHOP ON ETHICS AND LOBBYING

Whistleblower protections are not always identified as a central tenant of lobbying and government ethics reform. More attention is generally directed to reporting compliance, campaign finance, and other issues. However, whistleblowers are integral to rooting out governmental waste, fraud, abuse, and misconduct. In the executive branch of the federal government, whistleblowers are often the first line of defense to identify problems and enforce compliance, and protections allow them to come forward without fear of reprisal. Relating to lobbying, whistleblower disclosures may bring to light improper conduct between lobbyists and government employees, such as improper gifts or contact, or other misconduct or violation of ethics. This report discusses historical problems of enforcement of lobbying law, the ways in which whistleblower protections address those problems, and further reforms needed to bolster whistleblower protections to enhance compliance and enforcement, particularly by expanding whistleblower protections to legislative branch staff.

MODERN LOBBYING REFORM AND POOR ENFORCEMENT

Despite efforts over the past 20 years to reform and strengthen lobbying laws, lack of compliance and poor enforcement cripple their effectiveness (Thurber, 2006). The first modern lobbying reform was the Lobbying Disclosure Act of 1995 (LDA). The LDA broadly defined “lobbyists,” streamlined the registration and reporting process, and broadened the covered employees to include some executive branch employees (Straus, 2015). The LDA was followed in 2007 by the Honest Leadership and Open Government Act of 2007 (HLOGA) which, among other things, bolstered reporting requirements in several ways and banned gifts from lobbyists to Members of Congress and their staff (Straus, 2015).

Though these reforms did increase transparency, they do not appear to have improved enforcement of lobbying laws. In 2016, the Department of Justice Office of the Inspector General issued a report that found that the Justice Department was not adequately enforcing the Foreign Agents Registration Act (FARA), which requires registration and periodic disclosures by agents lobbying on behalf of foreign governments (Department of Justice Office of the Inspector General, 2016). Additionally, the LDA has been poorly enforced. In 2014, the Office of Congressional Ethics (OCE) referred a case to the Department of Justice for an entity that failed to register under the LDA; this was the first formal action of its kind (Straus, 2015). A 2011 report from the Task Force on Federal Lobbying Law described enforcement of the LDA as “modest, to say the least” (Task Force on Federal Lobbying Laws, 2011). The lobbyists themselves agree. In a 2012 report, the American League of Lobbyists recommended, among other things, that LDA administration, enforcement, and evaluation be improved (American League of Lobbyists, 2012). Both the Task Force and American League of Lobbyists reports mention inadequate oversight by the Government Accountability Office (GAO). GAO is tasked with auditing the LDA registrants, but this audit only evaluates information that is reported; it does not seek to identify information *not* reported. In other words, only information offered by the lobbyists will be scrutinized, and information withheld is not pursued (Gordon, 2017).

Congressional efforts to ward off another Abramoff-like scandal by reforming rules and regulations are futile without proper enforcement of these laws. One of the many ways in which enforcement might be bolstered is to enhance protections for whistleblowers throughout the government, in order to encourage employees and contractors who observe wrongdoing to report waste, fraud, abuse, and misconduct.

WHISTLEBLOWERS AND THEIR PROTECTIONS

A 2010 survey of executive branch employees by the Merit Systems Protection Board (MSPB) found that 11% of survey respondents had observed wrongdoing in their agency in the past year (U.S. Merit Systems Protection Board, 2011). Among those who had observed wrongdoing, 10.1% observed the use of an official position for personal benefit; 4.8% observed an unfair advantage in the selection of a contractor, consultant, or vendor; 5.1% observed waste caused by ineligible people receiving funds, goods, or services; 0.2% observed acceptance of bribes or kickbacks; and 17.6% observed other serious violations of law or regulation (U.S. Merit Systems Protection Board, 2011). While these categories do not explicitly relate to lobbying, they are ancillary to the various laws, regulations, and ethics surrounding lobbying. Further, these types of wrongdoing relate more broadly to types of lobbying not covered under the LDA, like lobbying for contracts.

The survey also finds that 35% of employees who observed wrongdoing did not report at all, and less than 10% reported to a higher-level agency official, the agency Inspector General, the Office of Special Counsel, the Government Accountability Office, or law enforcement officials (U.S. Merit Systems Protection Board, 2011). Additionally, 36.2% of employees who did report wrongdoing suffered reprisal or threat of reprisal (U.S. Merit Systems Protection Board, 2011). So, while employees observed instances of wrongdoing, many did not report, and those that did were often subject to adverse action, or threat of adverse action. Reforms in whistleblower protections laws attempt to enable employees to report without threat of reprisal.

BRIEF HISTORY OF PROTECTIONS

Whistleblower protections for certain federal employees have been in place since 1978, with major reforms in 1989 and 2012. The first comprehensive legislation to address whistleblower protections was the Civil Service Reform Act of 1978 (CSRA), which established merit system principles, including protection for certain employees who make a “lawful disclosure of information which the employees reasonably believe evidences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

The Civil Service Reform Act was soon followed by the Whistleblower Protection Act of 1989 (WPA). The stated purpose of WPA was to “strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government.” WPA formalized and clarified the roles of the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) in handling and adjudicating whistleblower cases, and provided more specific guidance to the protections outlined in CSRA. The WPA did much to enhance the protections of federal whistleblowers, however, there remained some major problems with the legislation particularly relating to which employees were covered under the law, and under what circumstances they made a disclosure. The Whistleblower Protection Enhancement Act of 2012 addressed these and other problems.

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT: GOAL OF REFORM

Congress long recognized the need to address the problems with whistleblower protections, and introduced versions of the Whistleblower Protection Enhancement Act (WPEA) in every Congress since 2001 (Peffer, et al., 2015). However, it wasn't until 2012 that both chambers agreed on the legislation and sent the bill to the President to become law. The stated purpose

of WPEA is “to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.” These goals were guided by a couple glaring problems with enforcement and coverage of whistleblower laws.

One of the main issues that necessitated reform was the poor track record of whistleblower retaliation cases in court. Between 1989 and 2010, 142 whistleblower retaliation cases relating the ethical disclosures were decided in appellate courts – these are cases in which the whistleblower sued an employer for wrongfully retaliating after a covered employee made a protected disclosure (Peffer, et al., 2015). Of those 142 cases, only 31 cases, or 21.8%, were decided favorably for the whistleblower (Peffer, et al., 2015). So, although the intent of the WPA was to protect whistleblowers, the courts’ reading of the law showed otherwise.

Another highly impactful case for whistleblower laws was the 2006 Supreme Court decision on *Garcetti v. Ceballos*. This decision held that public employees are not protected by the first amendment for free speech when they are speaking within the scope of their official duties (Kleinbrodt, 2013). The implication of this decision was that employees who made whistleblower disclosures within the scope of their official duties may no longer be protected under current whistleblower laws. The WPEA sought to address these and other issues.

ELEMENTS OF REFORM

The WPEA clarified the decades old WPA, and enhanced the protections for whistleblowers. In a statement following passage of the bill, co-sponsor Senator Susan Collins (R-Maine) stated,

“Our new law makes crystal clear that federal employees should not be subject to prior restraint from, or punishment for, disclosing wrongdoing. The whistleblowers' law will help give federal workers the peace of mind that if they speak out, they will be protected. Whistleblower protections will also help ensure that Congress has access to the information necessary to conduct proper oversight. It is important to note a major change made by the Akaka-Collins law is that, for the first time, the U.S. Office of the Special Counsel will have the tools needed to enforce the law" (U.S. Senate Documents, 2012).

The elements of WPEA fall in four basic categories, as evaluated by the Government Accountability Project. According to the analysis, the WPEA:

- **Expanded free speech rights**, which included coverage of individuals who were not the first to blow the whistle, overriding the decision of *Garcetti v. Ceballos* to expand free speech of federal workers speaking during their official duties, canceling the requirement of “reasonable belief” to have irrefragable proof, and addressing censorship, gag orders, and classified disclosures;
- **Expanded coverage and due process rights**, which included access for Title 5 workers to federal district court jury trials, reinstating all-Circuit review, ensuring trial and appeal rights for whistleblowers, extended whistleblower rights to baggage handlers, the FBI, and intelligence community employees, and barring the President from discretionary exemptions of whistleblower rights;
- **Expanded remedies**, which included permitting reimbursement for expert witness fees; and
- **Enhanced resources**, which included permitting the Office of Special Counsel (OSC) to file amicus briefs for employees appealing Merit System Protection Board (MSPB) decisions, lowering the burden of proof in retaliation cases, ending OSC liability for

attorney's fees, establishing reporting requirements for MSPB, and creating a whistleblower ombudsman program (Government Accountability Project).

IMPACT OF REFORM

Although the WPEA was passed in 2012, it is still a relatively new law and evaluating its impact proves to be a challenge at this point in time. The MSPB has not made public survey results that could be compared to the 2010 data described above, which would prove useful to evaluate employee experience in observing and reporting wrongdoing in their agency. Further research into favorable whistleblower case decisions by appellate courts also has not been completed.

Trends of the Federal Employee Viewpoint Survey (FEVS) show that employees' agreeance to the statement "arbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated" increased only slightly from 2012 to 2016 – from 51.2% to 53.1% (Office of Personnel Management). Employees' agreeance with the statement "prohibited personnel practices are not tolerated" also increased only slightly in the same time frame – from 65.9% to 66.7% (Office of Personnel Management). These data indicate a slight increase in employee perception of ethical and legal compliance with personnel practices, which include whistleblower protections. However, these results only show a slight uptick, and do not indicate the impact overall of the WPEA. Further evaluation is needed.

DISCUSSION OF FURTHER REFORMS FOR WHISTLEBLOWERS AND ETHICS

Although much progress in whistleblower protection has been made since the Civil Service Reform, and the Whistleblower Protection Enhancement Act addressed many persistent issues in whistleblower law, there are still areas for improvement. Most significantly, by expanding the employees covered under the law.

An additional reform, The Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, was passed in the lame duck period of the 114th Congress, and expands protection for FBI whistleblowers. This is a notable advancement for employees in national security, who have been left out of previous whistleblower protections. Protections should be extended to other national security employees, including contractors.

Another important aspect of current whistleblower protection law is that they only apply to employees of the executive branch of the federal government. Employees of the judicial and legislative branch of the federal government are not covered. In leveraging whistleblower disclosures to enhance enforcement of lobbying laws and ethical considerations, expanding protections to legislative branch staff is particularly imperative.

One strong proponent of legislative staff whistleblower protections is the Office of Compliance (OOC), an independent, nonpartisan legislative branch agency charged with enforcing thirteen workplace laws as mandated by the Congressional Accountability Act (Office of Compliance, About). The OOC has recommended in each biennial report since 1998 that Congress expand whistleblower protections to legislative staff (Office of Compliance, Section 102(b) Biennial Reports) – the 2016 report stating “The Office has received a number of inquiries from congressional employees concerned about the lack of whistleblower protections. The absence of specific statutory protection such as that provided under 5 U.S.C. § 2302(b)(8) chills the disclosure of such information” (Office of Compliance, 2016). Paula Sumberg, the Deputy Executive Director of the OOC, said in an interview that OOC cannot aid legislative employees who report they have been retaliated against for making a disclosure, and the OOC “routinely” sends staff to the Office of Congressional Ethics (OCE) or other offices to seek

assistance; but the employees have no legal protections against retaliation for disclosures regarding something that doesn't involve a workplace right explicitly covered by the Congressional Accountability Act (Sumberg, 2017). This includes disclosures regarding ethics, financial reform, or election fraud (Sumberg, 2017).

OCE is tasked with investigating ethics violations in the House of Representatives and has completed dozens of investigations of Congressmen and staff since its inception in 2008 (Office of Congressional Ethics). OCE investigations rely on voluntary testimony from staff. However, with no whistleblower protections for legislative staff, employees could be retaliated against with adverse personnel action for providing information to OCE. Staff Director and Senior Counsel of OCE, Omar Ashmawy said that he was unaware of any retaliation on employees who provided information for OCE investigations, but the OCE would generally be unaware of that kind of personnel action (Ashmawy, 2017). Ashmawy is a proponent of expanding whistleblower protections to legislative staff, saying the protections would help OCE do its job, but also that the principle is important: "It is somewhat obvious that if you want long term organizational ethical culture, those people that come forward revealing that something wrong has happened, those individuals have to be protected" (Ashmawy, 2017).

Further compounding the need for whistleblower protections is the fact that legislative branch employees are at-will employees. Unlike executive branch employees who are afforded clear employment security, legislative branch employees need no justification for firing – a point Sumberg stressed, stating that rarely do firings for blowing the whistle come up that specifically, "there's usually some other pretext and people aren't treated so blatantly, but

sometimes they do (come up). There's a lot of ways that whistleblower protection would help, and that's been our recommendation" (Sumberg, 2017).

The Congressional Whistleblower Protection Act of 2016, a bill cosponsored by Senators Grassley (R-Iowa), McCaskill (D-Missouri), and Wyden (D-Oregon) introduced in the 114th Congress, would amend the Congressional Accountability Act to extend whistleblower protection to legislative branch staff – which includes staff from the House, Senate, GAO, Congressional Budget Office, Architect of the Capitol, the Library of Congress and others. This bill is like others sponsored by Grassley and introduced in 110th, 111th, and 112th Congresses.¹ No similar bill has yet been introduced in the 115th Congress.

CONCLUSION

Whistleblowers are integral to rooting out waste, fraud, abuse, and misconduct in the federal government. With lobbying laws and ethics' record of poor enforcement, ensuring protections for employees who disclose wrongdoing may be an effective way to bolster enforcement. Congress has passed a number of laws since 1978 to enhance and clarify whistleblower protections. The Whistleblower Protection Enhancement Act of 2012 was a long-needed reform that addressed problems with restricted free speech, reduced due process rights, limited remedies, and insufficient resources. The impact of the WPEA cannot yet be sufficiently evaluated, as data are not available. However, it is clear the reforms are still needed to expand the employees covered under whistleblower protections, including employees of the legislative branch.

¹ See congress.gov for legislation history.

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