

Congress of the United States

Washington, DC 20515

February 1, 2017

Mr. Donald F. McGahn, II
Counsel to the President
The White House
Washington, DC 20006

Dear Mr. McGahn:

Whistleblowers can be one of the incoming Administration's most powerful allies to identify waste, fraud, abuse and mismanagement in the federal government and "drain the swamp" in Washington, D.C. Over the years, there have been a variety of efforts to encourage government insiders to blow the whistle. For example, in 1989 Congress enacted the Whistleblower Protection Act, and since 1990, all federal government officers and employees have also been subject to an Executive Order issued by President George H.W. Bush which stated: "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."¹ These are issues that are extremely important to those of us committed to making government work more effectively through the oversight process.

Through oversight, Congress can assist in identifying areas ripe for change as President Trump takes the reins of government. Indeed, Congress has a constitutional obligation to do so. As a result, Congress has always safeguarded direct communications with federal employees. The right of federal employees to communicate directly with Congress arises from the First Amendment and has been further established in statute since the Lloyd-LaFollette Act of 1912,² which stated:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.³

To further enhance enforcement of the provision, during the Clinton Administration, Republicans in Congress passed a similar restriction for Fiscal Year 1998 government-wide appropriations which has remained in every annual appropriations bill since.⁴ This so-called

¹ Executive Order 12674, Oct. 17, 1990.

² Postal Service Appropriations Act, 1912, Pub. L. No. 336 § 6, 37 Stat. 539, 555 (1912).

³ That provision has been found at 5 U.S.C. § 7211 since the Civil Service Reform Act of 1978, Pub. L. No. 95-454 Title VII § 703(a)(3), 92 Stat. 1111, 1217 (1978).

⁴ Treasury & Gen. Gov't Appropriations Act, 1998, Pub. L. No. 105-61 § 640, 111 Stat. 1272, 1318 (1997); *see, e.g.,* Consol. Appropriations Act, 2016, Pub. L. No. 114-113 Div. E § 713, 129 Stat. 2241, 2475 (2015). The rider states:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or

“Lloyd-LaFollette anti-gag rider” has been an important provision in protecting federal employee communications with Congress. For instance, as the result of an opinion we requested with House Judiciary Committee Chairman Bob Goodlatte, the Government Accountability Office last year found that two officials at the Department of Housing and Urban Development had violated the provision, and that “HUD’s appropriation was not available to pay the salaries of [the two officials] while they prevented or attempted to prevent” an interview sought by the three committees.⁵

Another appropriations restriction, sometimes known as the “Grassley anti-gag rider,” was introduced by Senator Grassley in the 1980s to ensure no money was used to enforce any nondisclosure policy, form, or agreement that does not include a specific provision regarding whistleblower protections and employees’ rights to communicate with Congress and inspectors general.⁶ Due to Senator Grassley’s efforts, in 2012 the requirement was codified in the Whistleblower Protection Enhancement Act, and failing to abide by it was made a prohibited personnel practice.⁷ Both of our offices have provided continued oversight of this provision, and in April 2014, Senator Grassley’s staff issued a report on the provision’s implementation.⁸

These provisions are significant because they ensure that attention can be brought to problems in the Executive Branch that need to be fixed. In contrast to the approximately 4,000 political appointees made by an incoming administration, the rest of the Executive Branch is composed of 2.6 million career civil servants.⁹ Under previous administrations, this vast and unwieldy bureaucracy has eluded attempts at reform. Thus, protecting whistleblowers who courageously speak out is not a partisan issue—it is critical to the functioning of our government.

Recent accounts have suggested various memoranda or other guidance distributed within certain agencies may be perceived, albeit possibly incorrectly, as “gag orders” aimed at silencing

employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

- (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, stats, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

⁵ GOV’T ACCOUNTABILITY OFFICE, B-325124.2, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT—APPLICATION OF SECTION 713 OF THE FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2012 (RECONSIDERATION) 2 (Apr. 5, 2016).

⁶ See, e.g., Consol. Appropriations Act, 2016, Pub. L. No. 114-113 Div. E § 744, 129 Stat. 2241, 2485 (2015).

⁷ Whistleblower Prot. Enhancement Act of 2012, Pub. L. 112-199 § 115(a)(1).

⁸ Memorandum from Republican Staff, S. Judiciary Comm., to Spec. Counsel Carolyn Lerner, et al., *Report on the Implementation of Section 115(a) of the Whistleblower Protection Enhancement Act of 2012 (WPEA)*, Apr. 4, 2014, <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/WPEA%2C%2004-02-14%2C%20Report%20of%20WPEA%2C%20anti-gag%20Implementation.pdf>.

⁹ See Office of Personnel Mgmt., *Data, Analysis & Documentation: Federal Employment Reports—Historical Federal Workforce Tables*, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962> (last visited Feb. 1, 2017).

whistleblowers. There has, however, been significant confusion surrounding those communications. While some memoranda have been made publicly available in their entirety, they differ significantly in origin, format, and instructions.¹⁰ The purported impetus for various memoranda has run the gamut from “poorly worded effort[s] by career officials”¹¹ to allegedly being “at the direction of the new Administration.”¹² Memoranda have used such language as “[n]o correspondence to public officials (e.g., Members of Congress, Governors),”¹³ although the agency in question noted that the memo specifically states it is referencing “new or pending regulations or guidance documents.”¹⁴ While we have an expectation that agencies will respond swiftly and completely to letters and inquiries from Congress, we do understand the Executive Branch has procedures for clearing communication of official agency positions to Congress.

Much of the recent reporting has focused on guidance regarding public-facing digital tools such as agency social media or blogs. While the Whistleblower Protection Act protects disclosures to the press of waste, fraud, and abuse, individuals do not have an unfettered right to use official agency digital platforms. These are a relatively new feature of government communications, and have been noted to have “made the [communications] changes particularly visible.”¹⁵ Just as individuals must grapple with the fact that it is difficult to retract information shared online, social media also provides added hurdles to “remov[ing] references to policy priorities and initiatives of the previous Administration.”¹⁶

With regard to the recent guidance, *The New York Times* noted longtime federal employees “said such orders were not much different from those delivered by the Obama Administration as it shifted policies from the departing White House of George W. Bush.”¹⁷ Similarly, Reuters’ review of Department of Agriculture memoranda dated January 23, 2017 and January 22, 2009 found the one germane area of difference in the more recent memorandum related to the agency’s media inquiries and social media presence; otherwise, comparison of the memos “shows many of the steps reflect either the same or similar measures taken by the previous administration.”¹⁸ Although in 2009 the statutory anti-gag order provision had not yet

¹⁰ See, i.e., Sunlight Foundation, *Reports of Federal Government Agencies Directed Not to Communicate with the American Public*, <https://sunlightfoundation.com/list-of-federal-government-agencies-told-not-to-communicate-with-the-public> (last visited Feb. 1, 2017).

¹¹ Jeffrey Mervis, *Firestorm over supposed gag order on USDA scientists was self-inflicted wound, agency says*, SCIENCE, Jan. 25, 2017, available at <http://www.sciencemag.org/news/2017/01/firestorm-over-supposed-gag-order-agricultural-scientists-was-self-inflicted-wound>.

¹² Memorandum from Acting Sec., Dep’t of Health & Human Services, *Immediate Action on Regulatory Review*, Jan. 20, 2017, available at <https://sunlightfoundation.com/list-of-federal-government-agencies-told-not-to-communicate-with-the-public>.

¹³ Sunlight Foundation, *Reports of Federal Government Agencies Directed Not to Communicate with the American Public*, <https://sunlightfoundation.com/list-of-federal-government-agencies-told-not-to-communicate-with-the-public> (last visited Feb. 1, 2017).

¹⁴ Andrew Restuccia, Alex Guillen, and Nancy Cook, *Information lockdown hits Trump’s federal agencies*, POLITICO, Jan. 24, 2017.

¹⁵ Juliet Eilperin and Brady Dennis, *Federal agencies told to restrict their communications*, WASH. POST, Jan. 24, 2017.

¹⁶ See P.J. Huffstutter, *USDA disavows gag-order emailed to scientific research unit*, REUTERS, Jan. 24, 2017, <http://www.reuters.com/article/us-usa-trump-usda-idUSKBN1582OB>.

¹⁷ Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. TIMES, Jan. 25, 2017.

¹⁸ P.J. Huffstutter, *USDA disavows gag-order emailed to scientific research unit*, REUTERS, Jan. 24, 2017, <http://www.reuters.com/article/us-usa-trump-usda-idUSKBN1582OB>.

been enacted, the appropriations rider was in application. However, we are unable to find public record of objections to incoming Obama Administration orders.

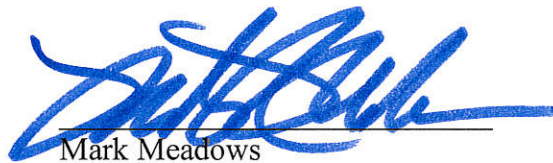
The White House is in a position to alleviate any potential confusion for federal employees regarding whether these recent memoranda implicate whistleblower protection laws. As the new Administration seeks to better understand what problems exist in this area, this is an appropriate time to remind employees about the value of protected disclosures to Congress and inspectors general in accordance with whistleblower protection laws. Further, doing so would be consistent with the purposes behind the nondisclosure agreement anti-gag order provisions. Such guidance may also benefit incoming employees who are unfamiliar with these longstanding protections.

Protecting whistleblowers is crucial to your success and the oversight process. We stand ready to assist the Administration in its efforts to root out waste, fraud, abuse, and mismanagement in the federal government, and to protect the best tool for doing so—whistleblowers.



Jason Chaffetz
Chairman
House Committee on Oversight
and Government Reform

Sincerely,



Mark Meadows
Chairman
House Subcommittee on
Government Operations



Charles E. Grassley
Chairman
Senate Committee on the Judiciary

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
House Committee on Oversight and Government Reform

The Honorable Gerald E. Connolly, Ranking Minority Member
House Subcommittee on Government Operations

The Honorable Dianne Feinstein, Ranking Minority Member
Senate Committee on the Judiciary