



GOVERNMENT  
ACCOUNTABILITY  
PROJECT

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The Honorable Christopher C. Miller  
Acting Secretary  
Department of Defense  
1000 Defense Pentagon  
Washington, D.C. 20301

December 21, 2020

Dear Acting Secretary Miller,

Government Accountability Project, a nonprofit organization that represents whistleblowers and develops whistleblower policy, joined by American Oversight, Protect Democracy, and Public Citizen, writes to request that you inform the Department of Defense workforce of the whistleblower rights they enjoy under federal law. During this transition period, it is critical to remind employees to report wrongdoing they witness in the workplace, and that their rights supersede any non-disclosure policies or restrictions.

Past practice combined with repeat reporting about the Department of Defense's efforts to block and chill communications between career civil servants and incoming President-elect transition teams<sup>1</sup> prompts us to caution your agency against violating federal whistleblower protection laws and provisions which require that any directives barring employee communications include explicit language noting that their whistleblowing rights supersede the gag on their speech.<sup>2</sup> Indeed, President Trump's recent Executive Order directing agencies to reclassify employees who are in policy-related positions into "Schedule F" workers, which would effectively strip employees of their civil service protections—including their whistleblower protection rights—sends a message to those workers who are in the most likely positions of discovering high-level, serious misconduct that reporting wrongdoing will leave them most vulnerable to future reprisal without a remedy.<sup>3</sup>

Combined, these efforts have the likely effect of deterring employees from reporting serious wrongdoing they witness in the workplace. Whistleblower rights exist to encourage employees, who are in the best position to identify problems, to serve the public by reporting violations of laws, rules, and regulations, gross mismanagement, gross waste of funds, abuses of authority, and substantial and specific dangers to public health and safety. During a global pandemic and a volatile transition between administrations, civil servants, military personnel, federal contractors and grantees are the first line of defense to prevent, mitigate or address abuses that violate the public trust.

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<sup>1</sup> Mike Allen, Jonathan Swan, "Scoop: Pentagon halts Biden transition briefings." Axios. December 19, 2020.

<https://www.axios.com/pentagon-biden-transition-briefings-123a9658-4af1-4632-a6e6-770117784d60.html>; Lisa Friedman, "Trump appointees are participating in some transition meetings, chilling the flow of some information." New York Times. December 9, 2020. <https://www.nytimes.com/live/2020/12/09/us/joe-biden-donald-trump/trump-appointees-are-participating-in-some-transition-meetings-chilling-the-flow-of-some-information>

<sup>2</sup> Irvin McCullough and Addison Rodriguez, "The Trump administration loves gag orders. But they're often illegal." Washington Post. October 13, 2020. <https://www.washingtonpost.com/outlook/2020/10/13/trump-gag-orders-illegal>

<sup>3</sup> Erich Wagner, "'Stunning' Executive Order Would Politicize Civil Service," Government Executive. October 22, 2020. <https://www.govexec.com/management/2020/10/stunning-executive-order-would-politicize-civil-service/169479/>

The Defense Department should compensate for any previous unlawful communication or chilling effect by informing employees of the whistleblower rights they enjoy under federal law. Your workforce should know that:

- Under the Whistleblower Protection Act of 1989 (WPA), most civilian federal employees may lawfully disclose, free from retaliation, information an employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or censorship of research, analysis or technical information that would result in such forms of misconduct.<sup>4</sup>
- Civilian DOD employees can disclose information related to any of the foregoing forms of misconduct to a variety of audiences—the Office of Special Counsel (OSC), the Inspector General, the Congress, the press, or even the President-elect’s transition team—so long as the disclosed information is not barred from release by statute or Executive Order.<sup>5</sup>
- Federal contractors and grantees enjoy similar rights to make disclosures under 10 U.S.C. § 2409.<sup>6</sup>
- Under the Military Whistleblower Protection Act, service members also have the right to make disclosures free from reprisal to a member of Congress, an Inspector General, a member of a Defense Department audit, investigation, or law enforcement organization, or a person in their chain of command.<sup>7</sup>
- Appropriations acts prohibit Congress from funding agencies that “implement or enforce” any “non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain” provisions reaffirming that employee whistleblower rights are controlling, despite any nondisclosure restrictions, the inclusion of which is mandated by the Whistleblower Protection Enhancement Act.<sup>8</sup>
- Employees have the right to seek legal counsel for guidance about their confidentiality obligations and whistleblower rights.<sup>9</sup>

Employees who exercise their whistleblower rights perform an essential public service, as National Guardsman Major Adam DeMarco did when he blew the whistle to Congress on the “unprovoked escalation and excessive use of force” when law enforcement cleared racial justice protesters near the White House ahead of President Trump’s photo shoot at St. John’s Church.<sup>10</sup> Federal employees may soon be witness to, and choose to disclose,

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<sup>4</sup> 5 U.S.C. § 2302(b)(8)(A)

<sup>5</sup> 5 U.S.C. § 2302(b)(8). If such information is barred from release by statute or Executive Order (i.e., classified information), or if the federal employees are members of the United States Armed Forces or Intelligence Community, lawful mechanisms exist to facilitate its disclosure within the federal government. 5 U.S.C. § 1213(a)(2); 5 U.S.C. 2302(b)(8)(B-C); 10 U.S.C. § 1034; 50 U.S.C. §§ 3234, 3341(j)

<sup>6</sup> 10 U.S.C. § 2409 protects Department of Defense contractors and grantees who disclose information they reasonably believe violates a law, rule, or regulation, gross mismanagement of a federal contract or grant, a gross waste of federal funds, an abuse of authority, or a substantial and specific danger to public health or safety. Employees of contractors and grantees may make disclosures to Congress, an Inspector General, the Government Accountability Office (GAO), the Department of Justice (DOJ) or other law enforcement agency, a federal employee responsible for contract oversight at the relevant agency, or a management official of the contractor with responsibility to investigate or address misconduct.

<sup>7</sup> 10 U.S.C. § 1034.

<sup>8</sup> 5 U.S.C. § 2302; 5 USC §2302(b)(13); §§713 and 743, Consolidated Appropriations Act, 2020; Irvin McCullough and Tom Devine, “Congress could cut pay of Trump aides who try to enforce nondisclosure agreements,” Washington Post. February 25, 2019. <https://www.washingtonpost.com/outlook/2019/02/25/congress-could-cut-pay-trump-aides-who-try-enforce-ndas/>

<sup>9</sup> See, e.g., *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000) (“The right to hire and consult an attorney is protected by the First Amendment’s guarantee of freedom of speech, association and petition.”)

<sup>10</sup> Catie Edmondson, “National Guard Officer Says Police Used ‘Excessive’ Force at White House Clash,” New York Times. July 27, 2020. <https://www.nytimes.com/2020/07/27/us/politics/national-guard-excessive-force-lafayette-square.html>

evidence of a whole host of abuses, including but not limited to federal records destruction, politicized censorship of science or intelligence data, fraud related to COVID-19 relief or defense spending, gross misuse of funds, or misinformation used by political appointees and elected officials used to justify military actions or to prompt retaliatory investigations against politically disfavored individuals. Your workforce should not be prohibited or chilled from, or retaliated against for, legally reporting evidence of such wrongdoing. Rather, they should be encouraged to do so.

Evident in the oath to “support and defend the Constitution of the United States,” federal employees at the Department of Defense are entrusted to preserve the integrity of our civil institutions and the foundations of our democracy. The need to empower a civil service to work for the American people is most important during a transition of power, ensuring the continuity of government is stable, uninterrupted, and free from interference for our nation’s safety and security. The work of the federal employees must continue unfettered.

Please inform your workers of their whistleblower rights and protections and ensure they understand their rights are not superseded by any restriction placed on their speech.

Very truly yours,

Louis Clark  
Executive Director and Chief Executive Officer  
Government Accountability Project

Austin Evers  
Executive Director  
American Oversight

John Langford  
Counsel  
Protect Democracy

Robert Weissman  
President  
Public Citizen

CC: The Honorable David L. Norquist, Deputy Secretary