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Whistleblowers and Congressional Oversight: Best Practices

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I. Legal History

The first whistleblower law protecting federal employee disclosures focused directly on the Congressional Oversight process. The current federal law regarding federal employee contact with Members of Congress is contained in the Lloyd-LaFollette Act of 1912. The statute states as follows:

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.

5 U.S.C. § 7211.

The history and scope of the Lloyd-LaFollette Act was described by the U.S. Supreme Court in *Bush v. Lucas*, 462 U.S. 367 (1983). Quoting directly from the decision:

Congressional attention to the problem of politically-motivated removals was again prompted by the issuance of Executive Orders by Presidents Roosevelt and Taft that forbade federal employees to communicate directly with Congress without the permission of their supervisors. . . . These “gag orders,” enforced by dismissal, were cited by several legislators as the reason for enacting the Lloyd-LaFollette Act in 1912, 37 Stat. 539, 555, § 6.^{FN20} That statute . . . explicitly guaranteed that the right of civil servants “to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.” . . . As the House Report explained, this legislation was intended “to protect employees against oppression and in the right of free speech and the right to consult their representatives.”^{FN23} In enacting the Lloyd-LaFollette Act, Congress weighed the competing policy considerations and concluded that efficient management of government operations did not preclude the extension of free speech rights to government employees.^{FN24}

^{FN20}. See 48 Cong.Rec. 4513 (1912) (remarks of Rep. Gregg) (“[I]t is for the purpose of wiping out the existence of this despicable ‘gag rule’ that this provision is inserted. The rule is unjust, unfair, and against the provisions of the Constitution of the United States, which provides for

the right of appeal and the right of free speech to all its citizens.”) A number of the bill's proponents asserted that the gag rule violated the First Amendment rights of civil servants. See, e.g., *id.*, at 4653 (remarks of Rep. Calder) (1912); *id.*, at 4738 (remarks of Rep. Blackmon); *id.*, at 5201 (remarks of Rep. Prouty); *id.*, at 5223 (remarks of Rep. O'Shaunessy); *id.*, at 5634 (remarks of Rep. Lloyd); *id.*, at 5637-5638 (remarks of Rep. Wilson); *id.*, at 10671 (remarks of Sen. Ashurst); *id.*, at 10673 (remarks of Sen. Reed); *id.*, at 10793 (remarks of Sen. Smith); *id.*, at 10799 (remarks of Sen. LaFollette).

FN23. H.R.Rep. No. 388, 62d Cong., 2d Sess. 7 (1912).

FN24. Members of the House, which originated § 6, suggested that it would improve the efficiency and morale of the civil service. “It will do away with the discontent and suspicion which now exists among the employees and will restore that confidence which is necessary to get the best results from the employees.” 48 Cong.Rec. 4654 (1912) (remarks of Rep. Calder); see *id.*, at 5635 (remarks of Rep. Lloyd).

The Senate Committee initially took a different position, urging in its report that the relevant language, see *id.*, at 10732 (House version) be omitted entirely:

“As to the last clause in section 6, it is the view of the committee that all citizens have a constitutional right as such to present their grievances to Congress or Members thereof. But governmental employees occupy a position relative to the Government different from that of ordinary citizens. Upon questions of interest to them as citizens, governmental employees have a right to petition Congress direct. A different rule should prevail with regard to their presentation of grievances connected with their relation to the Government as employees. In that respect good discipline and the efficiency of the service requires that they present their grievances through the proper administrative channels.” S.Rep. No. 955, 62d Cong.2d Sess. 21 (1912).

As Sen. Bourne explained, “it was believed by the committee that to recognize the right of the individual employee to go over the head of his superior and go to Members of Congress on matters appertaining to his own particular grievances, or for his own selfish interest, would be detrimental to the service itself; that it would absolutely destroy the discipline necessary for good service.” 48 Cong.Rec. 10676 (1912).

This view did not prevail. After extended discussion in floor debate concerning the right to organize and the right to present grievances to Congress, *id.*, at 10671-10677, 10728-10733, 10792-10804, the committee offered and the Senate approved a compromise amendment to

the House version, guaranteeing both rights at least in part, which was subsequently enacted into law. *Id.*, at 10804; 37 Stat. 555.

II. Best Practices in Working with Employee Whistleblowers

The following are ten basic suggestions for working successfully with whistleblowers as part of the Congressional oversight process:

1. *Understand the risks* faced by your whistleblower-witness and take steps to prevent retaliation from the beginning of any relationship.
2. *Look at the Evidence - Not the Spin.* Try to identify a document(s) or other informational source that corroborates the whistleblower allegation.
3. *Be very skeptical of information provided by the government.* Agency representatives will often make “off the record” remarks about an employee designed to “warn” a Committee or Member away from being involved with that employee. This advice is not “friendly.”
4. *Strictly honor confidentiality.*
5. *Aggressively defend your witness(es).* Agencies will “back off” if Congress demonstrates its support for the witness. Also, whistleblowers need (and should have) independent advocates, separate from Committee staff. Effective whistleblower-advocates should be viewed as partners in the oversight process, balancing the need to protect the employee with the oversight goals.
6. *Establish a bi-partisan reputation* (not just when it helps your side). Oversight should not be part of any partisan agenda. Its goal is the effective operation of government and the protection of citizens. If one side wants to convert an oversight issue into a partisan issue, that does not mean that the other side should go along with that practice, regardless of the temptation or short-term political benefit.
7. *Don't underestimate your impact.* Effective oversight can achieve widespread national impact. Laws have little meaning if they are not enforced. Proposed legislation is radically advanced in the context of oversight.
8. *Don't shy away from supporting witnesses who have ongoing whistleblower litigation.* It is not uncommon for a whistleblower-witness to be a party in an ongoing lawsuit against an agency. This is not a weakness. The litigation can provide enormous amounts of documentary evidence. Agencies (and some Congressional staff) will use the existence of litigation as a justification to avoid a certain witness. This is a big mistake.

9. *Work with the news media* in bringing valid whistleblower claims to the attention of the public. There is no need to wait for a hearing.

10. *Don't let the hearing process/Committee process interfere with the oversight process.* A single Member can effectively support a whistleblower and effectively bring concerns to the attention of the public or the appropriate regulatory office.

III. Resources

Federal Whistleblower Laws and Regulations. The book compiles all federal statutes and regulations protecting whistleblowers. It is now available free of charge on the internet at: http://www.whistleblowers.org/Federal_Whistleblower_Laws_and_Regs_with_bookmarks.pdf.

Concepts and Procedures in Whistleblower Law (Greenwood Press, 2000). Contains a detailed legal analysis of federal and state laws protecting whistleblowers.

Whistleblower Law: A Guide to Legal Protections for Corporate Employees (Praeger, 2004). This book focuses on the corporate whistleblower protections set forth in the Sarbanes-Oxley Act.

The National Whistleblower Legal Defense and Education Fund's "Report Fraud" and Attorney Referral Services. This program permits whistleblowers to **confidentially** report fraud or seek assistance from a knowledgeable attorney. The service is free of charge and available at: <http://whistleblowers.org/Cofidential%20Report%20Form.php> or http://www.whistleblowers.org/html/ars_intake.html

The National Whistleblower Center. The Center's web site contains detailed information for whistleblowers and links to all of the major services offered by the Center at www.whistleblowers.org.

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