

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 6

April 2021

No. 4

THE WAR ON WHISTLEBLOWERS

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In the last few decades, Congress has passed a variety of statutes to improve legal protections for federal employee-whistleblowers, with the dual goals of promoting disclosure of wrongdoing and prohibiting retaliation against whistleblowers. However, these statutes and goals were undermined during the Trump administration. This Article argues that President Trump's administration conducted multi-faceted attacks against federal employee-whistleblowers in order to deter disclosure of the administration's wrongdoing. Since these efforts began, there has been a decrease in whistleblower disclosures of wrongdoing in the federal government. In order to stop this trend, immediate action is needed, including amending federal laws to reduce the possibility of retaliation by administration officials against whistleblowers, increasing funding and staffing at the federal agencies tasked with protecting whistleblowers and adjudicating their retaliation claims, and promoting greater outreach by congressional committees to federal employees within agencies over which such committees have oversight authority. If these steps are not taken, there is a significant risk that the culture of promoting whistleblowing that has been cultivated within the federal government will collapse, leaving the American public in the dark about future misconduct within the Executive branch of the government.

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INTRODUCTION

President Trump’s administration produced a surfeit of high-profile whistleblowers. Ranging from the whistleblower who jumpstarted the House of Representative’s investigation into the Ukraine scandal to the whistleblower who brought allegations of Russian bounties on American troops to light, these individuals illustrate the increasing importance of whistleblowing in the public sector as well as the lack of adequate protections for whistleblowers. As to the former, it is quite possible that without the individual who reported the call with the Ukrainian president, there would have been no impeachment of President Trump. And as to the latter, traditional protections for whistleblowers, which focus on preventing the agency in which the whistleblower works from retaliating against that whistleblower, are inadequate to protect whistleblowers in the federal government. Indeed, the steps President Trump and his administration took to quell whistleblowers have undermined the whistleblower protection system. Unless protections for whistleblowers are strengthened, and the

culture of antagonism to whistleblowers changes, it is likely that the number of public sector whistleblowers will drop, which may have catastrophic effects on the viability of our democracy.

This Article will proceed in three parts. Part I will outline the development of whistleblower protections for federal government employees and the current state of these protections. Part II will expose how the Trump administration undermined these protections in myriad ways, including outright ignoring the prohibitions on retaliation against whistleblowers, increasing resources devoted to investigating and prosecuting employees who disclose wrongdoing to the press, threatening and encouraging others to threaten whistleblowers on social media, and under-funding and -staffing the federal agencies responsible for assisting whistleblowers and adjudicating their retaliation claims. Part III proposes solutions to mitigate the damage in order to restore the whistleblowing promotion and protection culture within the federal government.

I. OVERVIEW OF THE FEDERAL EMPLOYEE-WHISTLEBLOWER SYSTEM

Legal protections for whistleblowers began more than a century ago with concerns about protecting the government. As early as the Civil War, an early form of whistleblower encouragement was enacted to battle against fraud by government contractors.¹ Fast-forward a century, and the federal government developed the blueprint for current whistleblower protections throughout the country. The contours of protections for federal employees, the importance of whistleblowers within the federal government, and the trends in whistleblower disclosure and retaliation are discussed below.

A. Development of Whistleblower Protections for Government Employees

Modern protections for government whistleblowers began with the Civil Service Reform Act of 1978 (CSRA). As stated in the Act:

Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

- (A) a violation of any law, rule, or regulation, or
- (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.²

¹ See NANCY M. MODESITT, JANIE F. SCHULMAN & DANIEL P. WESTMAN, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* ch. 1, at 4–5 (3d ed. 2015) (describing the evolution of whistleblower protections in the United States).

² Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 2301(b)(9), 92 Stat. 1111, 1114 (1978).

The Civil Service Reform Act also created the Office of Special Counsel (OSC), which is an independent entity that promotes whistleblowing within the federal government and protects whistleblowers against reprisal.³ In addition to the authority given to the Special Counsel to investigate retaliation allegations,⁴ the Special Counsel is also tasked with bringing disciplinary proceedings against those who engaged in such retaliation.⁵

That same year that Congress passed the Civil Service Reform Act, Congress also created a secondary system to promote whistleblowing within the federal government by enacting the Inspector General Act. The Inspectors General were tasked with conducting audits of their agencies, investigating fraud and abuse, and reporting on these to Congress and the head of their agencies.⁶

Putting together the provisions of the Civil Service Reform Act and the Inspector General Act, federal employees who wanted to report wrongdoing in the government could take a variety of approaches: (1) they could report wrongdoing within their governmental unit; (2) they could report wrongdoing to OSC; and/or (3) they could report wrongdoing to their agency's Inspector General. Regardless of the approach taken, the CSRA was supposed to protect them from retaliation. However, limitations in the initial statute, as well as subsequent court decisions interpreting the statute, made it difficult for some whistleblowers to receive the promised protection against retaliation.⁷

Recognizing this, Congress has acted twice since the enactment of the Civil Service Reform Act to significantly enhance protections for whistleblowers. First, the Whistleblower Protection Act of 1989 substantially modified the provisions of the CSRA to better protect whistleblowers.⁸ It created an independent right of action for federal employee whistleblowers who had suffered from retaliation, rather than forcing them to rely upon OSC to pursue their claims.⁹ It also lowered the causation standard, allowing whistleblower claims to succeed so long as the whistleblower could establish

³ For a detailed history of the OSC and its role in supporting federal employee-whistleblowers, see Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015 (1991).

⁴ 5 U.S.C. § 1214.

⁵ *Id.* § 1215. Interestingly, this provision shows that Congress was clearly concerned about political appointees retaliating against federal workers. *Id.* Section (b) provides for the Special Counsel to submit reports of such retaliation to the President. *Id.* Apparently, Congress did not envision the current scenario where the President would be the one spearheading the retaliation charge. See discussion *infra* Section II.A.

⁶ Civil Service Reform Act §§ 2, 4.

⁷ See MODESITT ET AL., *supra* note 1, at ch. 8, § A, at 3–13 (discussing the development of the CSRA).

⁸ *Id.* § 8-4.

⁹ Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.). For the individual right of action provision, see 5 U.S.C. § 1221.

that their protected disclosure of information was a contributing factor in action taken against them.¹⁰ In order to further protect whistleblowers against retaliation, Congress also prohibited OSC from disclosing the identity of whistleblowers except in extremely limited circumstances.¹¹

While these changes were beneficial to whistleblowers, the Federal Circuit Court of Appeals limited the scope of these protections through its interpretations of the statutory scheme.¹² As a result, several decades later, the Whistleblower Protection Enhancement Act of 2012 (WPEA) was passed to reverse many of these interpretations of the law. For example, the WPEA reversed decisions that had eliminated protections for whistleblowers who made disclosures as part of their job duties.¹³ It also broadened the scope of protected activities to include any disclosure made in connection with an OSC investigation, not just those made by the primary whistleblower.¹⁴

As might be evident from this brief overview, the trend in this area of the law has been to increase legal protections for federal employee-whistleblowers against retaliation. This increased protection recognizes the importance of whistleblowing within the federal government, which is discussed below.

B. Importance of Whistleblowing in the Federal Government and Disturbing Trends in Whistleblowing Data

Whistleblowing is a critically important method of uncovering wrongdoing within any organization. Indeed, one study indicated that whistleblowing is the primary method for organizations to detect fraud.¹⁵ As the head of OSC, Special Counsel Kerner emphasized the importance of whistleblowers in the federal government, saying: “[w]histleblowers are our front-line in rooting out fraud and wrongdoing at all levels of government.”¹⁶ Within the federal government, whistleblowers have uncovered gross waste

¹⁰ 5 U.S.C. § 1214 (containing the “contributing factor” standard).

¹¹ *MODESITT ET AL.*, *supra* note 1, § 8-4.

¹² *Id.* § 8-7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See W. Michael Hoffman & Mark S. Schwartz, *The Morality of Whistleblowing: A Commentary on Richard T. De George*, 127 J. BUS. ETHICS 771, 771–73 (2015) (discussing existing research on the topic); Muel Kaptein, *From Inaction to External Whistleblowing: The Influence of the Ethical Culture of Organizations on Employee Responses to Observed Wrongdoing*, 98 J. BUS. ETHICS 513, 513–16 (2011) (discussing the importance of whistleblowers in detecting organizational wrongdoing).

¹⁶ *Special Counsel Henry J. Kerner Statement on National Whistleblower Appreciation Day*, U.S. OFF. SPECIAL COUNS. (July 30, 2019), <https://osc.gov/News/Pages/19-13-Special-Counsel-Whistleblower-Appreciation-Day.aspx> [<https://perma.cc/GL45-SGL4>].

that has cost millions of dollars,¹⁷ violations of safety standards that are designed to protect the public,¹⁸ and potentially unlawful or corrupt behavior at the highest levels of government.¹⁹

Despite the obvious importance of whistleblowers in the federal government, it is impossible to determine the precise number of whistleblowers in the federal government. This is because there is no entity that centrally records allegations by whistleblowers. While many federal employees do have an option to report wrongdoing to the OSC, the entity tasked with protecting whistleblowers, there is no requirement that they do so. Thus, some employees will report wrongdoing to OSC, while others will work within their own agency to report wrongdoing, such as by contacting the Inspector General for their agency.

The figures on whistleblowing that are obtainable are numbers of employees who report wrongdoing outside of their agency by bringing it to the attention of OSC through a whistleblower disclosure report. Beyond that, one must extrapolate from the number of retaliation claims filed, where an employee alleges that they reported wrongdoing and suffered adverse consequences as a result.

Since fiscal year (FY) 2006, the number of whistleblower disclosures made to OSC increased significantly over time until FY 2015. In FY 2006, there were only 435 whistleblower disclosures made to OSC.²⁰ As of FY 2008, the number had only modestly increased, by approximately one hundred disclosures.²¹ However, between FY 2008 and FY 2012, the total number of disclosures rose steeply, reaching 1,148 in FY 2012.²² The peak number of whistleblower disclosures to OSC was reached in FY 2015, in which OSC received 1,965 disclosures.²³ Since then, the number has

¹⁷ *VA Wasted \$223 Million on Transport Services, Failed to Pay Veterans' Medical Bills Resulting in Denied Care*, U.S. OFF. SPECIAL COUNS. (Dec. 13, 2019), <https://osc.gov/News/Pages/20-07-VA-Wasted-223-Million.aspx> [<https://perma.cc/J669-US8G>].

¹⁸ *OSC Obtains \$90K in Damages for Whistleblower Retaliated Against After Disclosing Unqualified Flight Safety Inspectors*, U.S. OFF. SPECIAL COUNS. (Feb. 24, 2020), <https://osc.gov/News/Pages/20-11-Damages-for-Whistleblower-Flight-Safety-Inspectors.aspx> [<https://perma.cc/BYQ7-PSLC>].

¹⁹ See *infra* Sections II.A–C (detailing the retaliation against whistleblowers who have disclosed wrongdoing in the Trump administration).

²⁰ 2011 U.S. OFF. SPECIAL COUNS. ANN. REP. 27. For the purposes of this Article, all numbers of disclosures refer to disclosures made in a particular fiscal year, not the total number of disclosures that OSC handled in a fiscal year. The total number of disclosures handled in a fiscal year is higher than the total number of disclosures made to the agency because some matters are carried over from one fiscal year to the next.

²¹ *Id.*

²² 2013 U.S. OFF. SPECIAL COUNS. ANN. REP. 36.

²³ 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 27.

fluctuated, but mainly declined, with 1,559 whistleblower disclosures in FY 2018 and 1,373 in FY 2019.²⁴

Whistleblower disclosures only reveal a partial picture of actual whistleblowing that occurs within federal agencies. As noted above, some employees elect not to make a disclosure to OSC, and instead work within their agency to disclose wrongdoing. These situations are not captured by the whistleblower disclosure data. However, a portion of these situations do come to OSC's attention—specifically, when a whistleblower files a claim with OSC that they have been retaliated against for having blown the whistle. As to these retaliation claims, it appears that the number is higher than the number of whistleblowing disclosures and has increased in recent years.²⁵ In FY 2006, up to 1,805 PPP complaints²⁶ were made to OSC. That number steadily rose and by FY 2012, the Office of Special Counsel received 2,969 complaints,²⁷ an increase of approximately 1,100 since FY 2006.²⁸ By FY 2018, that number had increased significantly again, growing to its highest level ever, at 4,168.²⁹

²⁴ *Id.*

²⁵ OSC tracks the number of retaliation complaints as part of the broader group of “prohibited personnel practices” (PPPs) that include some matters that do not involve retaliation. OSC does not disaggregate the data on PPPs; thus, the best approximation we have on the trends in retaliation complaints is based on this number of PPP complaints filed. Throughout the passage below, the term “PPP complaint” references these PPP complaints.

²⁶ 2011 U.S. OFF. SPECIAL COUNS. ANN. REP. 17; *see also id.* at 12 (referring to “whistleblower retaliation” claims—along with claims for retaliation for exercising an appeal right, due process violations, other legal violations, and marital discrimination—as “prohibited personnel practice complaints”).

²⁷ 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 16. Annual reports from the Merit System Protection Board (MSPB) also provide some information about the number of whistleblower retaliation claims brought by federal employees. *See* 2019–2021 U.S. MERIT SYS. PROT. BD. ANN. PERFORMANCE REP. & ANN. PERFORMANCE PLAN 51 (detailing petitions for review relating to whistleblower appeals for FY 2019). The number of initial whistleblower appeals in 2019, filed under 5 U.S.C. § 2302(b)(8) and (9), was 691. *Id.* There were also eight-seven refiled whistleblower appeals and eleven cases remanded which, if included, would put the grand total of whistleblower cases filed with the MSPB last year at 789. *Id.* However, these cases represent only a portion of the total number of cases that involve claims of retaliation because of the different ways in which retaliation claims can be filed. The above numbers represent claims filed as an individual right of action—all of which are whistleblowing claims. A claim involving whistleblowing could also be filed as an appeal of a dismissal for performance reasons, which would not necessarily be captured in the MSPB's data as a whistleblowing claim. Furthermore, an undeterminable number of these MSPB claims will involve matters previously brought to OSC's attention. Thus, the number of MSPB claims is both over- and under-inclusive of the number of whistleblowers in the federal government and seems less accurate than the OSC figures.

²⁸ *See* 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 16 (summarizing the number of complaints from FY 2012 to FY 2019).

²⁹ *Id.*

Two central points emerge from this information on rates of whistleblowing. First, regardless of the metric used (whistleblower disclosures or retaliation claims filed), whistleblowing behavior had been increasing in the federal government up until around 2015.³⁰ The growth in the number of whistleblowers could be the result of a number of factors. First, it could reflect an increase in the confidence of whistleblowers that they would not face retaliation, or that if they did, retaliation would be mitigated when they filed a claim with OSC. Support for this hypothesis is found in the transformation of OSC between the George W. Bush administration and the Obama administration. The Special Counsel appointed by Bush was widely viewed as ineffective and not supportive of whistleblowers.³¹ Indeed, he ultimately plead guilty to criminal contempt of Congress when he removed information from OSC computers that would have revealed his refusal to protect federal employees under his office's mandate.³² This changed dramatically under the Obama administration,³³ where the Special Counsel was so well-regarded that even a number of Republicans advocated for her retention after President Obama left office.³⁴ Supporting this hypothesis, whistleblower disclosure numbers were fairly stagnant between FY 2006 and FY 2008,³⁵ with an increase of about fifty each year. Special Counsel Scott Bloch announced his resignation one month into FY 2009,³⁶ and in FY 2009, the number of

³⁰ See *id.* (showing increasing number of retaliation claims until FY 2015); 2012 U.S. OFF. SPECIAL COUNS. ANN. REP. 14 (showing increasing number of retaliation claims from FY 2007 to FY 2012, with the exception of a slight decrease between FY 2009 and FY 2010); *id.* at 31 (showing increasing number of whistleblower disclosures from FY 2007 to FY 2012, with numbers of disclosures more than doubling in that interval, with the exception of a slight decrease in disclosures from FY 2010 to FY 2011).

³¹ See Joe Davidson, *Workers Applaud Special Counsel's Return to Private Sector*, WASH. POST (Oct. 22, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102572.html> [<https://perma.cc/7CVH-3CKF>] (noting comments by workers' organizations and federal employees that the office failed to support whistleblowers).

³² Spencer S. Hsu, *Head of Bush Administration's Whistle-Blower Protection Office Faces Prison*, WASH. POST (Feb. 4, 2011), <https://www.washingtonpost.com/wp-dyn/content/article/2011/02/03/AR2011020306810.html> [<https://perma.cc/3WWW-AYLH>].

³³ See Joe Davidson, *Under Carolyn Lerner, Special Counsel Office is Doing Its Job Now, Observers Say*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/politics/under-carolyn-lerner-special-counsel-office-is-doing-its-job-now-observers-say/2012/06/28/gJQApX229V_story.html [<https://perma.cc/77WB-5MLA>] (discussing workers' positive reactions to and whistleblower advocates' praise for OSC's new head).

³⁴ See Joe Davidson, *Special Counsel Lerner Leaves Office as Trump Rejects Highly Praised Whistleblower Advocate*, WASH. POST (June 7, 2017, 7:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2017/06/07/lerner-leaves-office-of-special-counsel-as-trumps-rejects-highly-praised-whistleblower-advocate/> [<https://perma.cc/CA9Y-NDJT>] (noting support for the retention of Carolyn Lerner among Republicans).

³⁵ 2011 U.S. OFF. SPECIAL COUNS. ANN. REP. 27.

³⁶ See Davidson, *supra* note 31 (discussing Bloch's announcement of his resignation).

whistleblower disclosures jumped by nearly 200 reports.³⁷ Taken together, the timing of Special Counsel Bloch's resignation and the sharp increase in whistleblower disclosures could be read to support this hypothesis.

Another potential reason for the increase in the number of whistleblowers could be an increase in the behavior subject to whistleblowing. There is also support for this position in the data. During FY 2014, there was a large spike in whistleblower disclosures, with approximately 400 more disclosures than were made in the previous year.³⁸ There was another large increase in FY 2015 of approximately 400 disclosures.³⁹ OSC does not report the agency where the disclosing employee worked, but it appears likely that at least some of these disclosures were related to a major scandal at the Department of Veterans Affairs. In early 2014, significant problems had been exposed in the provision of medical services to veterans.⁴⁰ And while OSC does not disclose the agency for whom employees making whistleblower disclosures worked, there is evidence that some employees at the Department of Veterans Affairs (VA) did report wrongdoing and were retaliated against.⁴¹ Between FY 2013 and FY 2014, the number of PPP complaints made by employees at the Department of Veterans Affairs increased by approximately 500.⁴² Between FY 2014 and FY 2015, the number of these complaints increased again by approximately 600.⁴³ The number of these PPP complaints then leveled off in FY 2016, and

³⁷ 2011 U.S. OFF. SPECIAL COUNS. ANN. REP. 27.

³⁸ See 2018 U.S. OFF. SPECIAL COUNS. ANN. REP. 31 (detailing the rise in disclosures from 1,129 in FY 2013 to 1,554 in FY 2014).

³⁹ *Id.*

⁴⁰ See Michael Pearson, *The VA's Troubled History*, CNN (May 30, 2014), <https://www.cnn.com/2014/05/23/politics/va-scandals-timeline/index.html> [<https://perma.cc/8BXQ-NQ8B>] (noting the January 2014 scandal over delays in treating veterans and falsification of medical records to cover up the delays).

⁴¹ See, e.g., 2013 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints, with VA totaling 985); 2014 U.S. OFF. SPECIAL COUNS. ANN. REP. 16 (identifying source of complaints, with VA totaling 1,504); 2015 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints, with VA totaling 2,165); 2016 U.S. OFF. SPECIAL COUNS. ANN. REP. 14 (identifying source of complaints, with VA totaling 1,887); 2017 U.S. OFF. SPECIAL COUNS. ANN. REP. 14 (identifying source of complaints, with VA totaling 1,824); 2018 U.S. OFF. SPECIAL COUNS. ANN. REP. 13 (identifying source of complaints, with VA totaling 2,125); 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints with VA totaling 1,843).

⁴² 2013 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints, with VA totaling 985); 2014 U.S. OFF. SPECIAL COUNS. ANN. REP. 16 (identifying source of complaints, with VA totaling 1,504).

⁴³ 2014 U.S. OFF. SPECIAL COUNS. ANN. REP. 16 (identifying source of complaints, with VA totaling 1,504); 2015 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints, with VA totaling 2165).

has remained essentially flat since that time.⁴⁴ As late as 2019, OSC noted that it “continue[d] to receive far more cases from VA employees than any other agency.”⁴⁵ Thus, at least a portion of the increase the number of whistleblower disclosures may be attributable to the reporting of a higher than normal amount of gross misconduct, fraud, abuse of authority, or unlawful behavior in the federal government.

However, these explanations do not explain the decrease in whistleblower disclosures since FY 2015, nor the lack of corresponding decrease in retaliation claims since then. Whistleblower disclosures had been increasing at OSC, with some variations each year, since FY 2006 up until FY 2015. Between FY 2015 and FY 2018, disclosures dropped 20%.⁴⁶ But even though whistleblower disclosures peaked in FY 2015, PPP complaints to OSC did not. PPP complaints have continued to rise over time, with a 2.8% *increase* between FY 2015 and FY 2018.⁴⁷ While whistleblowers were making fewer disclosures to OSC, more PPP complaints were being filed.

This divergence between number of disclosures and PPP complaints is disturbing. As noted above, OSC offers a rationale for the increase in complaints filed with OSC: the ongoing issues at the VA. However, this does not explain why PPP complaints have failed to follow the same trend as whistleblower disclosures. PPP complaints filed by employees at the Department of Veterans Affairs peaked in FY 2015 and have stayed nearly constant at the FY 2016 levels. While this number has been flat, whistleblower disclosure numbers have been dropping. Thus, the issues at the Department of Veterans Affairs do not appear to be the source of the divergence between whistleblower disclosures and complaints filed with OSC.

There are a few plausible explanations for the divergence between whistleblower disclosures and PPP complaints. The first possibility is that the PPP complaints include non-whistleblower related claims, and that these numbers obscure the trends in retaliation filings. This hypothesis is impossible to analyze without disaggregated data. Second, it is possible that retaliation numbers lag behind the disclosure numbers because retaliation occurs after the disclosure, after which the employee has to consider the circumstances and go through the process of filing a complaint with OSC.

⁴⁴ 2016 U.S. OFF. SPECIAL COUNS. ANN. REP. 14 (identifying source of complaints, with VA totaling 1,887); 2017 U.S. OFF. SPECIAL COUNS. ANN. REP. 14 (identifying source of complaints, with VA totaling 1,824); 2018 U.S. OFF. SPECIAL COUNS. ANN. REP. 13 (identifying source of complaints, with VA totaling 2,125); 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (identifying source of complaints with VA totaling 1,843).

⁴⁵ 2019 U.S. OFF. SPECIAL COUNS. ANN. REP. 14.

⁴⁶ *Id.* at 27. While there is data for FY 2019, OSC noted that the data would have been different if not for the government shutdown. *See id.* at 16. Thus, the best information is from FY 2018.

⁴⁷ *See* 2018 U.S. OFF. SPECIAL COUNS. ANN. REP. 15 (documenting the rise in claims). There was a dip in claims in FY 2017, but the number rose again in FY 2018.

There is some support for this proposition in the data. While disclosures peaked in FY 2015, PPP complaints continued to increase in FY 2016 before dropping in FY 2017. This later peak in FY 2016 could be the result of the delay between disclosure and retaliation filing. On the other hand, disclosures dipped slightly between FY 2012 and FY 2013, yet PPP complaints *increased* between FY 2013 and FY 2014. Thus, a lagging retaliation claim is not a satisfactory explanation for why disclosure filings dropped between FY 2015 and FY 2018 while PPP complaints increased.

There are other plausible reasons that retaliation cases have not decreased at the same rate as whistleblower disclosures. It is possible that retaliation has been increasing in the government, or that whistleblowers perceive more retaliation. In other words, even though there are fewer whistleblower disclosures, a higher percentage of those making disclosures suffered from or believed they suffered from retaliation.⁴⁸ Or, based on this same divergence in data, the amount of retaliation is the same, as shown by the fairly flat numbers of PPP complaints being filed, but fewer employees are willing to go to OSC to make a whistleblower disclosure. The reasons for this could be due to an increased fear of retaliation in general or a decrease in trust in OSC. Regardless of whether there is more retaliation (or the perception of it) or less trust in OSC, the overall drop in whistleblower disclosures coupled with the flat numbers of PPP complaints is disturbing. Why is this divergence occurring now? Part II, below, describes the anti-whistleblower tactics undertaken by the Trump administration, which appear to be at least a part of the reason for the drop in number of whistleblower disclosures.

II. LOSING WHISTLEBLOWER PROTECTIONS INDIRECTLY: THE WAR ON WHISTLEBLOWERS

The history of whistleblowing protections for federal employees has been a movement toward greater statutory protections. However, the actions of the Trump administration have significantly undermined these statutory protections. Social science research has demonstrated that whistleblowing behavior decreases where organizational culture is not supportive of whistleblowing.⁴⁹ Even though whistleblowers have the same rights on paper

⁴⁸ A related idea is that the rate of retaliation is not increasing, but employees perceive more retaliation and thus file more claims. Determining whether there has been an actual versus perceived increase in retaliation would require substantive review of all of the retaliation claims filed with OSC. This is far beyond the scope of this work. Furthermore, even a perception of increased retaliation has negative repercussions for whistleblowing, as discussed in Part II, so it may not matter the extent to which either or both explanations are correct.

⁴⁹ See PETER ROBERTS, A. J. BROWN & JANE OLSEN, *WHISTLING WHILE THEY WORK: A GOOD-PRACTICE GUIDE FOR MANAGING INTERNAL REPORTING OF WRONGDOING IN PUBLIC*

as they had under previous presidents, in reality, President Trump and his administration created a culture where whistleblowing was fraught with peril. The anti-whistleblowing culture was created by removing whistleblowers from their positions, threatening them on social media, targeting them with criminal investigations by the Department of Justice, and undermining the institutions designed to protect whistleblowers. These efforts did not go unnoticed: as early as 2017, a nonprofit was created to assist whistleblowers in the federal government.⁵⁰ The organization was sufficiently concerned about government attempts to identify whistleblowers contacting the organization that it required whistleblowers attempting to contact it to use a special browser to limit the government's ability to track users.⁵¹

Each of the approaches used by the Trump administration to undermine whistleblower protections is examined below.

A. Public Firings/Removals of Whistleblowers

One way in which the Trump administration attempted to reduce whistleblowing was to openly retaliate against those who disclose or report wrongdoing within the administration and are not legally protected by federal whistleblower statutes. The most well-known of these individuals is probably Lieutenant Colonel Vindman, whose testimony before Congress supported the allegations of the Ukraine whistleblower.⁵² After President Trump was acquitted by the Senate, he ordered LTC Vindman to be removed from his position in the White House. In explaining LTC Vindman's transfer out of the White House, the President remarked that LTC Vindman, "did a lot of bad things."⁵³ Other comments by the President included suggesting that the military investigate LTC Vindman and calling him "insubordinate."⁵⁴ Ultimately, LTC Vindman retired from active duty, stating that political

SECTOR ORGANISATIONS 18–19 (2011) (discussing how whistleblowing can be undermined by a lack of support within an organization for reporting wrongdoing).

⁵⁰ Carol Morello, *Former Whistleblower Starts Legal Aid Group to Guide Would-Be Tipsters*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/world/national-security/former-whistleblower-starts-company-to-give-advice-to-would-be-tipsters/2017/09/17/711049e4-e55d-40c5-b71a-50032851a7f4_story.html [https://perma.cc/XG3L-G2ZF].

⁵¹ *Id.*

⁵² Alana Abramson, *Trump's Attack on Vindman May Violate Whistleblower Protection Laws. But Challenging It Could Be Risky.*, TIME (Feb. 12, 2020, 6:03 PM), <https://time.com/5783160/trumps-attack-on-vindman-may-violate-whistleblower-protection-laws-but-challenging-it-could-be-risky/> [https://perma.cc/RGC3-CFWK].

⁵³ *Id.*

⁵⁴ *Id.*

retaliation would limit his future in the military.⁵⁵ In his own words: “I made the difficult decision to retire because a campaign of bullying, intimidation and retaliation by President Trump and his allies forever limited the progression of my military career.”⁵⁶

Several other individuals within the Trump administration who testified in the impeachment inquiry in a way that was unfavorable to President Trump also were removed from their positions in a public manner. Gordon Sondland was removed from his position as the Ambassador to the European Union after he testified to facts supporting the whistleblower’s account of events.⁵⁷

Another example of the removal of a federal employee that appears to have been directed by President Trump and that relates to the impeachment inquiry is the removal of Michael Atkinson, the Inspector General for the intelligence community. Atkinson was removed because of his actions in determining that the whistleblower’s complaint met the criteria for reporting it to Congress, which he ultimately did.⁵⁸ Nor was Atkinson the only Inspector General that President Trump removed. President Trump engaged in a wholesale firing of Inspectors General in 2019–2020. Trump removed Steve Linick, the Inspector General for the State Department, reportedly due to several investigations that he was conducting of Secretary of State Michael Pompeo’s behavior. Initial reports indicated that Inspector General Linick was targeted because he was investigating Secretary Pompeo for unlawfully using federal employees to perform personal errands.⁵⁹ However,

⁵⁵ Katherine Faulders, Luis Martinez & Libby Cathey, *Trump Impeachment Key Witness Alexander Vindman Retiring from Military Citing ‘Campaign of Bullying’*, ABC NEWS (July 8, 2020, 3:06 PM), <https://abcnews.go.com/Politics/trump-impeachment-key-witness-alexander-vindman-retiring-military/story?id=71672510> [https://perma.cc/Z8WQ-9GEQ].

⁵⁶ Alexander S. Vindman, Opinion, *Coming Forward Ended My Career. I Still Believe Doing What’s Right Matters.*, WASH. POST (Aug. 1, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/08/01/alexander-vindman-retiring-oped/> [https://perma.cc/9WMT-2E7U].

⁵⁷ See Peter Baker, Maggie Haberman, Danny Hakim & Michael S. Schmidt, *Trump Fires Impeachment Witnesses Gordon Sondland and Alexander Vindman in Post-Acquittal Purge*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/02/07/us/politics/alexander-vindman-gordon-sondland-fired.html?searchResultPosition=1> [https://perma.cc/Y8WP-CXBL] (“President Trump wasted little time on Friday opening a campaign of retribution against those he blames for his impeachment, firing two of the most prominent witnesses in the House inquiry against him barely 48 hours after being acquitted by the Senate.”).

⁵⁸ Charlie Savage, *Inspector General Fired by Trump Urges Whistle-Blowers ‘to Bravely Speak Up’*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/michael-atkinson-inspector-general-fired.html?auth=login-email&login=email&searchResultPosition=1> [https://perma.cc/G76Q-FYZH].

⁵⁹ Mike DeBonis & John Hudson, *Fired Inspector General Was Examining Whether Pompeo Had a Staffer Walk His Dog, Handle Dry Cleaning, Official Says*, WASH. POST (May 17, 2020, 11:00 PM), https://www.washingtonpost.com/national-security/state-department-inspector-general-steve-linick-mike-pompeo/2020/05/17/daf5170a-98a7-11ea-b60c-3be060a4f8e1_story.html [https://perma.cc/A4ML-3YQ8].

information quickly came to light that Inspector General Linick was also investigating Secretary Pompeo for allegedly pushing the sale of arms to Saudi Arabia without approval from Congress.⁶⁰

In his purge of Inspectors General, President Trump also targeted Inspector General Cristi Grimm at the Department of Health and Human Services. The notice to remove Grimm came only a few weeks after her office issued a report that highlighted problems with the response to the novel coronavirus at hospitals in the United States and contained information that contradicted President Trump's characterizations about the circumstances of the pandemic.⁶¹ Glenn Fine, the Inspector General for the Department of Defense, was removed by Trump almost immediately after Congress gave that Inspector General's office additional oversight authority in connection with huge spending bills passed to mitigate the effects of the pandemic.⁶² President Trump removed acting Inspector General Mitch Behm from his position at the Department of Transportation. Behm was purportedly removed from his position because of his investigation into allegations that the Department of Transportation, headed by Secretary Elaine Chao, improperly provided preferential treatment to projects in Kentucky, where Secretary Chao's husband Mitch McConnell is a senator.⁶³

The removal of employees who either spoke out publicly in a way that suggested that President Trump engaged in wrongdoing or who were investigating allegations of wrongdoing in the President's administration extended beyond the impeachment inquiry and beyond Inspectors General. Indeed, it began early on in the Trump administration. In 2017, Joel Clement, a senior policy advisor at the Department of Interior, was removed from his position. Clement argued that the removal was in retaliation for his disclosure of how climate change would affect native Alaskan communities.⁶⁴ Clement was reassigned to a position involving auditing, an area in which he had no

⁶⁰ Andrew Desiderio, *Fired Watchdog Was Investigating Arms Sales to Saudi Arabia*, POLITICO (May 18, 2020, 5:16 PM), <https://www.politico.com/news/2020/05/18/linick-administration-arms-sales-saudi-arabia-265024> [https://perma.cc/Q3NZ-BSK2].

⁶¹ Ledyard King, *The Trump Administration Has Recently Moved to Oust 4 Government Watchdogs. Here They Are.*, USA TODAY (May 18, 2020, 9:38 AM), <https://www.usatoday.com/story/news/politics/2020/05/16/pompeos-firing-state-ig-linick-latest-removal-trump-admin/5206160002/> [https://perma.cc/5LZ4-KPSV].

⁶² *Id.*

⁶³ Ian Duncan & Michael Laris, *Democrats Open Investigation into Trump's Replacement of Acting Transportation Department Inspector General*, WASH. POST (May 19, 2020, 6:06 PM), https://www.washingtonpost.com/local/trafficandcommuting/democrats-open-investigation-into-replacement-of-acting-transportation-department-inspector-general/2020/05/19/e8e62b52-99f5-11ea-89fd-28fb313d1886_story.html [https://perma.cc/3PAY-C2VC].

⁶⁴ Darryl Fears, *Interior Department Whistleblower Resigns; Bipartisan Former Appointees Object to Zinke's Statements*, WASH. POST (Oct. 6, 2017, 1:00 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/10/04/whistleblower-resigns-keeping-my-voice-more-important-than-keeping-my-job/> [https://perma.cc/3N7Z-JDLU].

experience. A subsequent investigation by the Inspector General found that records of the removal were not kept as required by law and were so lacking that it was impossible to determine whether Clement's removal was retaliatory.⁶⁵ Clement was not the only employee at the Department of Interior to allege retaliation for having engaged in whistleblowing. The number of PPP complaints in the Department of Interior filed with OSC more than doubled in the first year of the Trump administration, from twenty-nine complaints in FY 2016 to seventy-two complaints in FY 2017.⁶⁶

More recently, similar retaliation allegations were made by Dr. Rick Bright. Dr. Bright was a top governmental employee who was working on the COVID-19 response at the Department of Health and Human Services.⁶⁷ Dr. Bright had been the Director of BARDA, the Biomedical Advanced Research Development Authority, as well as the Deputy Assistant Secretary for Preparedness and Response. These entities worked on the US response to disease outbreaks. When President Trump touted the use of unproven treatments for COVID-19, Dr. Bright released information to the press about the lack of efficacy of these treatments. The reason he gave for going to the press was that he had attempted to work within the administration to change the perspective on the efficacy of these treatments, but as the death toll from COVID-19 rose, he felt that the public needed to know that the treatments were not effective.⁶⁸ Almost immediately after the reporter's work was published, Dr. Bright was removed from his position and transferred to NIH.⁶⁹

The implications of demotion or removal are most dire for employees who are not a part of the civil service. While Dr. Bright was not fired, he had the capacity to legally challenge his removal, which he did. The set of legal protections for civil servants includes two components: first, the right to directly challenge retaliatory conduct that is caused by employee whistleblowing; and second, the right to challenge significant disciplinary actions and removals on the grounds that the government lacked cause for its decisions.⁷⁰

⁶⁵ Neela Banerjee, *Investigators: We Can't Tell if Interior Dept. Reassignments Were Legal Due to Lack of Records*, INSIDE CLIMATE NEWS (Apr. 12, 2018), <https://insideclimatenews.org/news/11042018/zinke-interior-department-staff-reassignments-inspector-general-report-whistleblower-joel-clement-doi-scientist> [<https://perma.cc/6HNV-48WN>].

⁶⁶ Hannah Northey, *Federal Workforce: Interior Whistleblower Complaints Rise—But Why?*, GREENWIRE (May 22, 2018), <https://www.eenews.net/greenwire/stories/1060082375/search?keyword=Interior+Whistleblower+Complaints+Rise%2C+But+Why%3F+> [<https://perma.cc/5LB4-AGWZ>].

⁶⁷ U.S. OFF. OF SPECIAL COUNS., COMPLAINT OF PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY: RICK BRIGHT, addendum at 6 (2020), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/6bfde4d6-4c3d-4671-8eeb-6b3d39e47c03/note/26f73d7a-d060-4c25-af4c-a58a167ee2c7.#page=1> [<https://perma.cc/VSZ5-MXPL>].

⁶⁸ *Id.*, addendum at 3.

⁶⁹ *Id.*

⁷⁰ For a detailed description of these protections, see *infra* Section I.B.

On the other hand, some of those who were removed from their positions by Trump—particularly political appointees—are unlikely to have any recourse for their removal. For example, LTC Vindman’s removal may be subject to challenge under the Military Whistleblowers Protection Act,⁷¹ but it would be difficult to force Vindman’s reinstatement because of the sensitive/confidential nature of the position. Gordon Sondland, the former Ambassador to the European Union, was completely unprotected by any laws for providing testimony to Congress that was supportive of the whistleblower in the impeachment inquiry. Nor were the Inspectors General who President Trump removed provided any protection against retaliation. The only protection against removing an Inspector General is that the President has to provide thirty days’ notice to Congress.⁷² And while some congressional leaders have argued that the information provided by the President in these removals has been inadequate,⁷³ the D.C. Circuit Court of Appeals determined in 2011 that a statement that the President had lost “the fullest confidence” in an Inspector General was sufficient under the statute.⁷⁴ Thus, as a practical matter, the President can fire any Inspector General at any time for any or no reason.

These examples of employees who were removed for either blowing the whistle or supporting investigations into wrongdoing are important because the retaliation occurred very publicly and received significant attention in the press.⁷⁵ These public removals supported the approach of the

⁷¹ Abramson, *supra* note 52.

⁷² See 5 U.S.C. app. § 3(b) (“If an Inspector General is removed from office . . . the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”)

⁷³ See, e.g., Letter from Nancy Pelosi, Speaker, U.S. House of Representatives, to Donald Trump, President of the United States (May 18, 2020), <https://www.speaker.gov/newsroom/51820> [<https://perma.cc/T6E3-G7UG>] (“You are required to notify Congress of your removal of an Inspector General. It is essential that you also inform Congress of the cause for the removal and your lack of confidence.”)

⁷⁴ *Walpin v. Corp. for Nat’l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011).

⁷⁵ See Yasmeen Abutaleb & Laurie McGinley, *Ousted Vaccine Official Alleges He Was Demoted for Prioritizing ‘Science and Safety’*, WASH. POST (May 5, 2020, 6:55 PM), <https://www.washingtonpost.com/health/2020/05/05/rick-bright-hydroxychloroquine-whistle-blower-complaint/> [<https://perma.cc/2FS9-HPWH>] (reporting that a top public health official was reassigned to a “less prestigious role” for raising health concerns about a coronavirus treatment “repeatedly pushed” by President Trump); Nathan Rott, *Climate Scientist Says He Was Demoted For Speaking Out On Climate Change*, NPR (July 19, 2017, 11:13 PM), <https://www.npr.org/sections/thetwo-way/2017/07/19/538216232/climate-scientist-says-he-was-demoted-for-speaking-out-on-climate-change> [<https://perma.cc/5FJD-YY59>] (reporting that a top policy advisor at the U.S. Department of the Interior was reassigned to a “lesser position for speaking out about the dangers of climate change.”); Peter Baker, *Trump Moves to Replace Watchdog Who Identified Critical Medical Shortages*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/01/us/politics/trump-health-department-watchdog.html>

Trump administration to make it evident that those who openly report wrongdoing in the Trump administration would be immediately punished. And because there were no immediate consequences for those who retaliated, the message became clear to potential whistleblowers that they would suffer prompt retaliation. One of the goals was clearly to silence whistleblowers. Some of those who have been removed tried to push back against this implicit message of silencing whistleblowers. Michael Atkinson pleaded with federal employees to continue to disclose wrongdoing, asking them, “Please do not allow recent events to silence your voices.”⁷⁶

B. Criminal Investigations of Whistleblowers

A second manner in which the Trump administration attempted to reduce whistleblowing was to increase the number of criminal investigations by the Department of Justice into disclosures to the media by federal employees. The trend toward investigation and prosecution of employees leaking information to the press did not actually begin under President Trump. Instead, the move began under President Bush, where, “during the CIA’s covert worldwide ‘war on terror,’ intelligence agencies and the Justice Department began aggressive investigations of classified information ‘leaks’ to the news media.”⁷⁷ The trend continued under President Obama, who set a record for the most prosecutions (ten) of any administration of contractors and employees who leaked information to the media.⁷⁸

President Trump took this same approach and has pushed even more resources into investigating and prosecuting employee/contractor leaks. Then-Attorney General Jeff Sessions reported in August 2017 that a new focus on investigating leaks within the federal government would begin.⁷⁹

[<https://perma.cc/ZPB8-JPEX>] (reporting that a top official at the U.S. Department of Health and Human Services was replaced for “anger[ing]” President Trump with a report “highlighting supply shortages and testing delays at hospitals during the coronavirus pandemic.”); Eric Schmitt, Charlie Savage & Noah Weiland, *Longtime Pentagon Watchdog Stepping Down From Post*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/pentagon-inspector-general-glenn-fine.html> [<https://perma.cc/4HVW-WVKC>] (reporting that the head of a watchdog panel overseeing coronavirus pandemic relief spending was “ousted by President Trump”, likely because of his “reputation for aggressiveness”).

⁷⁶ Savage, *supra* note 58.

⁷⁷ Leonard Downie Jr., *The Trump Administration and the Media*, COMM. TO PROTECT JOURNALISTS (Apr. 16, 2020), <https://cpj.org/reports/2020/04/trump-media-attacks-credibility-leaks/> [<https://perma.cc/KPT6-ETR3>].

⁷⁸ *Id.*

⁷⁹ Press Release, U.S. Dep’t of Just., Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security (Aug. 4, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials> [<https://perma.cc/A2ZY-6T88>].

DOJ tripled the number of leak investigations and directed the National Security Division and U.S. Attorneys to prioritize these cases. Although Attorney General Sessions' briefing was only months into the Trump administration, four prosecutions of leakers had already been announced.⁸⁰ Since then, there have been additional prosecutions and convictions. Natalie Edwards, an official in the Treasury Department, was charged with illegally showing a journalist reports about President Trump's wire transfers.⁸¹ She later pleaded guilty to one count of conspiracy in connection with the matter.⁸² Nor is the Edwards' situation an outlier. In just under three years, the Trump administration indicted eight employees or contractors for leaking information.⁸³ At that rate, the Trump administration was on track to indict more than twice as many employees/contractors as the Obama administration.

The effect of the increased focus on investigating and prosecuting leaks was to chill whistleblowers.⁸⁴ Liz Hempowicz, the director of public policy at the Project on Government Oversight, commented that "[t]hose prosecutions [under the Espionage Act] in my perspective were meant to make an example of these individuals . . . making it less worth it for an individual to come forward [to report wrongdoing]."⁸⁵ Gabe Rottman, technology and press freedom project director at the Reporters Committee for Freedom of the Press, voiced similar concerns, stating that the trend toward more prosecutions is "trying to dissuade sources from coming forward and providing information to journalists."⁸⁶

C. Use of Media to Retaliate against Whistleblowers

In addition to removing employees who speak up about wrongdoing in his administration and investigating/prosecuting those who leak information to the press, President Trump used tactics to discourage whistleblowers that were

⁸⁰ *Id.*

⁸¹ Emily Flitter, *Treasury Official Charged with Leaking Bank Reports to Journalist*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/business/treasury-leak-mana-fort.html?searchResultPosition=1> [<https://perma.cc/KQC4-EW9L>].

⁸² Corinne Ramey, *Ex-Treasury Official Pleads Guilty to Leaks on Trump Campaign Officials*, WALL ST. J. (Jan. 13, 2020, 6:03 PM), <https://www.wsj.com/articles/ex-treasury-official-pleads-guilty-to-leaks-on-trump-campaign-officials-11578956603> [<https://perma.cc/EZ8W-7YGY>].

⁸³ Downie, *supra* note 77.

⁸⁴ Historically, with such limited investigations and prosecutions of leakers, there was arguably no chilling effect caused by the relatively few investigations and prosecutions. See Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1415 (2015) (discussing the lack of deterrence of whistleblowers by criminal investigations and prosecutions).

⁸⁵ Brittany Gibson, *All the President's Whistleblowers*, AM. PROSPECT (Oct. 18, 2019), <https://prospect.org/justice/all-the-presidents-whistleblowers/> [<https://perma.cc/77NG-6Z84>].

⁸⁶ Downie, *supra* note 77.

dramatically different than in previous administrations: he used social media and the press to directly impugn whistleblowers. Examples of his attacks on whistleblowers, primarily on Twitter, abound. Trump called the whistleblower who divulged the facts leading up to his impeachment, “a disgrace to our country.”⁸⁷ Other attacks on this whistleblower include attempting to cast doubt on the motives of the whistleblower by calling him “highly partisan”⁸⁸ and impugning the whistleblower’s status by referring to him as a “#FakeWhistleblower,”⁸⁹ a “so-called” whistleblower⁹⁰ whose “2ND HAND description of the call [between President Trump and the Ukrainian President] is a fraud.”⁹¹ President Trump also suggested that the whistleblower was a spy,⁹² worked for Joe Biden,⁹³ and was a “Deep State” operative.⁹⁴ President Trump attacked the veracity and underlying accuracy of the whistleblower’s allegations, tweeting that one of the alleged statements by the whistleblower “is a very big Lie [sic],”⁹⁵ and that the whistleblower “had the facts wrong about the phone call.”⁹⁶

⁸⁷ Riley Beggin, *The Whistleblower’s Lawyer Says Attacking Him Is Illegal as Trump’s Attacks Continue*, VOX (Nov. 9, 2019, 10:24 AM), <https://www.vox.com/policy-and-politics/2019/11/9/20956525/trump-impeachment-whistleblower-lawyer-cease-desist-letter> [<https://perma.cc/8Y3H-3BAW>].

⁸⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 20, 2019, 8:27 AM), <https://www.thetrumparchive.com/?searchbox=%22%E2%80%9Chighly+partisan%E2%80%9D+whistleblowers%22> [<https://perma.cc/UW5B-YW2P>]. Twitter permanently suspended President Trump’s account in January 2021 “due to the risk of further incitement of violence.” Permanent Suspension of @realDonaldTrump, TWITTER: BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [<https://perma.cc/SQ4B-V9RS>].

⁸⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 30, 2019, 8:44 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22%23FakeWhistleblower%22> [<https://perma.cc/SA2B-ZN2E>].

⁹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 22, 2019, 8:03 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22supposedly+comes+from+a+so-called%22> [<https://perma.cc/GZ8D-BBE7>].

⁹¹ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 30, 2019, 8:03 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%222nd+hand+description%22> [<https://perma.cc/MTN7-4NV3>].

⁹² Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 27, 2019, 9:42 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22whistleblower+spy%22> [<https://perma.cc/JCN2-L4XY>].

⁹³ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 23, 2019, 12:05 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22whistleblower+deep+state%22> [<https://perma.cc/ZF33-48W6>].

⁹⁴ *Id.*

⁹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 9, 2019, 7:43 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22is+a+very+big+lie%22> [<https://perma.cc/B8D6-Z772>].

⁹⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 4, 2019, 9:11 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22had+the+facts+wrong%22> [<https://perma.cc/L39H-SFSZ>].

More recently, President Trump attacked Captain Crozier, the naval officer whose letter disclosing large numbers of COVID-19 infections on his vessel and asking for assistance was leaked to the press. President Trump commented that “I thought it was terrible, what he did, to write a letter.”⁹⁷ Promptly after the President made these comments, Captain Crozier was removed from his command of an aircraft carrier.⁹⁸ Trump also attacked Dr. Bright, the whistleblower on the issue of the government’s coronavirus response, tweeting that Dr. Bright “fabricates stories,” “spews lies,” and is “a creep.”⁹⁹

President Trump’s attacks sometimes focused on the employee’s job performance as a cover for reprisals taken. For example, when he ordered the removal of Michael Atkinson as Inspector General for the intelligence community, President Trump said that “[Atkinson] did a terrible job, absolutely terrible.”¹⁰⁰

Similarly, President Trump tweeted about LTC Vindman: “[H]e was very insubordinate, reported contents of my ‘perfect’ calls incorrectly & . . . was given a horrendous report by his superior, the man he reported to, who publicly stated that Vindman had problems with judgement, adhering to the chain of command, and leaking information.”¹⁰¹

Yet another approach taken by Trump in the media to attack whistleblowers was to call for an investigation of the whistleblower—not the allegations made by the whistleblower, but an investigation into the whistleblower him- or herself. For instance, as to the whistleblower whose complaint launched the impeachment, President Trump tweeted, “Why isn’t the IG [Inspector General] investigating his so-called whistleblower?”¹⁰² More broadly, President Trump called for an investigation into the overall system of protecting whistleblowers, tweeting that “[t]his whole

⁹⁷ Max Boot, Opinion, *Capt. Crozier’s Firing Shows the Growing Trumpification of the Military*, WASH. POST (Apr. 7, 2020, 9:26 AM), <https://www.washingtonpost.com/opinions/2020/04/07/acting-navy-secretary-fired-then-insulted-navy-hero-he-must-go/> [https://perma.cc/2HEQ-3JQA].

⁹⁸ *Id.*

⁹⁹ Donald J. Trump (@realDonaldTrump), Twitter (May 17, 2020, 10:15 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22fabricates+stories%22> [https://perma.cc/NA3E-D26M]; Donald J. Trump (@realDonaldTrump), TWITTER (May 17, 2020, 10:15 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22spews+lies%22> [https://perma.cc/6U2Y-TUM2].

¹⁰⁰ Savage, *supra* note 58.

¹⁰¹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2020, 9:41 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22very+insubordinate%22> [https://perma.cc/6FS3-BWAK].

¹⁰² Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 10, 2019, 9:42 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22the+IG+his+so-called+whistleblower%22> [https://perma.cc/Q9TB-7SFM].

Whistleblower [sic] racket needs to be looked at very closely, it is causing great injustice & harm.”¹⁰³

In addition to personally attacking whistleblowers, President Trump attempted to intimidate whistleblowers by using the press and social media. For example, he made repeated efforts to reveal the identity of the whistleblower in the intelligence community whose complaint led to the impeachment inquiry,¹⁰⁴ to the extent that the whistleblower’s attorney sent a cease-and-desist letter to the President.¹⁰⁵ Under the relevant statute, the whistleblower was entitled to bring his complaint anonymously, and the President’s repeated tweets asking where the whistleblower was threatened that right.¹⁰⁶ President Trump also appeared to endorse the idea of suing the whistleblower.¹⁰⁷

Similarly, the President attacked Dr. Bright, the official who alleged he was removed from his position coordinating the attempts to create a vaccine for COVID-19. When Dr. Bright filed his whistleblower complaint and testified before a congressional subcommittee on the failings of the Trump administration’s response to the novel coronavirus, President Trump called Dr. Bright, “nothing more than a really unhappy, disgruntled person.”¹⁰⁸ President Trump also suggested that Dr. Bright should be fired, tweeting that “to me he is a disgruntled employee, not liked or respected by people I spoke to and who, with his attitude, should no longer be working for our government!”¹⁰⁹

¹⁰³ Donald J. Trump (@realDonaldTrump), TWITTER (May 17, 2020, 10:15 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22it+is+causing+great+injustice%22> [<https://perma.cc/Q9QF-2CRG>].

¹⁰⁴ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 14, 2019, 6:39 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22we+must+determine+the%22> [<https://perma.cc/SK4R-NYYV>] (“We must determine the Whistleblower’s [sic] identity.”).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 11, 2019, 3:26 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22where+is+the+whistleblower+who+gave%22> [<https://perma.cc/GTH6-WZUH>] (“Where is the Whistleblower [sic] who gave so much false information? Must testify . . . !”); see also Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 17, 2019, 3:12 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22Where+is+the+Fake+Whistleblower%22> [<https://perma.cc/V9RV-MRZP>] (“Where is the Fake Whistleblower? [sic]”).

¹⁰⁷ See Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 11, 2020, 1:16 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22sue+the+whistleblower%22> [<https://perma.cc/RP4U-T4DF>] (retweeting @josepheschmitz’s call for the President to sue the whistleblower).

¹⁰⁸ Danielle Zoellner & Alex Woodward, *Coronavirus Whistleblower Says ‘Lives Were Lost’ After Trump Administration Removed Him from Meetings Where He Raised Alarms*, INDEP. (May 14, 2020, 4:57 PM), <https://www.independent.co.uk/news/world/americas/coronavirus-whistleblower-rick-bright-trump-white-house-a9514821.html> [<https://perma.cc/6Y33-2K9H>].

¹⁰⁹ Donald J. Trump (@realDonaldTrump), TWITTER (May 14, 2020, 8:37 AM),

Nor did President Trump limit his attacks to the whistleblowers themselves. President Trump attacked those associated with the whistleblowers. President Trump not only removed LTC Vindman from his position, he also had LTC Vindman's twin brother removed from his then-current position.¹¹⁰ As one commentator stated, "Such gratuitous score-settling carries a whiff of the Cosa Nostra, in which talking to the feds results in one's family being targeted—in part to send a message to other potential rats."¹¹¹ Similarly, Trump has attacked the Ukraine whistleblower's attorney, calling his behavior "treason."¹¹²

Not only did President Trump himself attack whistleblowers, those closely associated with him also did so. Donald Trump, Jr. attacked LTC Vindman's testimony before Congress, saying that "[a]nyone listening to Vindman stammer through this seemingly trying to remember the Catch Phrases he was well coached on should get that. He's a low-level partisan bureaucrat and nothing more."¹¹³

President Trump's targeting of whistleblowers and those close to them has encouraged his supporters to follow his lead. High level supporters, such as Rand Paul and other Republicans in Congress, called for the whistleblower to be publicly identified.¹¹⁴ Joseph DiGenova, a former prosecutor and Trump supporter, built on the idea of the whistleblower being a "spy" by saying that "[the whistleblower] worked at the CIA, and he is part of a political assassination."¹¹⁵ DiGenova followed up on this line of thought by calling the whistleblower "John Wilkes Booth."¹¹⁶ After President Trump

<https://www.thetrumparchive.com/?results=1&searchbox=%22to+me+he+is+a+disgruntled+employee%22> [<https://perma.cc/LT3T-LPYY>].

¹¹⁰ Abramson, *supra* note 52.

¹¹¹ Michelle Cottle, Opinion, *Vengeance Is Mine, Saith the President*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/opinion/trump-impeachment-enemies.html?searchResultPosition=1> [<https://perma.cc/2ARD-5Q3S>].

¹¹² Greg Sargent, Opinion, *Death Threat to Whistleblower's Lawyer Points to Trump's Depravity*, WASH. POST (Feb. 20, 2020, 4:42 PM), <https://www.washingtonpost.com/opinions/2020/02/20/death-threat-whistleblowers-lawyer-points-trumps-depravity/> [<https://perma.cc/5VJY-R8H8>].

¹¹³ Rebecca Shabad, *White House, Trump Associates Trash Lt. Col. Vindman's Testimony*, NBC NEWS (Nov. 19, 2019, 6:52 PM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/white-house-trump-associates-trash-lt-col-vindman-s-testimony-n1086351> [<https://perma.cc/VD6N-QDQH>].

¹¹⁴ Dustin Volz, *Trump Allies Ramp Up Efforts to Unmask Whistleblower*, WALL ST. J. (Nov. 3, 2019, 2:26 PM), <https://www.wsj.com/articles/trump-allies-ramp-up-efforts-to-unmask-whistleblower-11572724750?mod=searchresults&page=1&pos=1> [<https://perma.cc/6YWJ-QUTG>].

¹¹⁵ David Corn, *As Trump Attacks, Death Threats Against the Whistleblower and His Lawyers Increase*, MOTHER JONES (Nov. 12, 2019), <https://www.motherjones.com/politics/2019/11/as-trump-attacks-death-threats-against-the-whistleblower-and-his-lawyers-increase/> [<https://perma.cc/66EX-L6R5>].

¹¹⁶ *Id.*

attacked the impeachment whistleblower and his attorney, both were subjected to death threats.¹¹⁷ The threats were significant enough that law enforcement became involved,¹¹⁸ and ultimately one man was charged by federal prosecutors with making a death threat aimed at the whistleblower's attorney.¹¹⁹ Similarly, LTC Vindman received so many attacks on social media that he was provided with security for himself and his family.¹²⁰

The point of all of the President's attacks on whistleblowers was to discourage whistleblowers.¹²¹ Former Inspector General Michael Atkinson recognized the risks created by these types of public attacks, noting in March 2020 that "the past six months have been a searing time for whistleblowers" because whistleblowers are "allowed to be vilified, threatened, publicly ridiculed."¹²²

D. Cutting Whistleblower Protection Resources

One of the ways in which whistleblowers protections have indirectly been eroded in recent years is by the decreased funding of the OSC. OSC's FY 2021 Congressional Budget Justification shows a decrease in funding as compared with previous years.¹²³ OSC noted that the decrease in funding would result in the need to eliminate fifteen full-time employees and that it would not "be able to adequately carry out its mission."¹²⁴ In addressing its staffing levels, OSC stated that it has seen unprecedented increases in their caseload in recent years.¹²⁵ OSC also

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Natasha Bertrand, 'All Traitors Must Die': Feds Charge Man for Threatening Whistleblower Attorney, POLITICO (Feb. 20, 2020, 12:37 PM), <https://www.politico.com/news/2020/02/20/man-charged-threatening-whistleblower-attorney-116379> [<https://perma.cc/54WL-669B>].

¹²⁰ Luis Martinez, *Army Providing Security Assistance to Vindman, a Key Witness in Impeachment Hearings*, ABC NEWS (Nov. 19, 2020, 2:51 PM), <https://abcnews.go.com/Politics/army-providing-security-assistance-vindman-key-witness-impeachment/story?id=67137282> [<https://perma.cc/N7JH-3KWF>].

¹²¹ Sargent, *supra* note 112.

¹²² Letter from Michael Atkinson, Inspector Gen. of the Intel. Cmty., to Charles Schumer, Senate Minority Leader (March 18, 2020), <https://www.politico.com/f/?id=00000171-4737-d6b1-a3f1-c7f715270000> [<https://perma.cc/VQE3-4TEH>].

¹²³ U.S. OFF. SPECIAL COUNS., FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION & PERFORMANCE BUDGET GOALS 5 (2020), <https://osc.gov/Documents/Resources/Congressional%20Matters/Congressional%20Budget%20Justifications/FY%202021%20Congressional%20Budget%20Justification.pdf> [<https://perma.cc/5THF-2C4G>].

¹²⁴ *Id.*

¹²⁵ *See id.* at 6 ("Although OSC has received increased resources in previous appropriations packages, the growth in OSC's caseload and increases in personnel costs have far outpaced its budget.").

noted that its ability to respond to allegations of wrongdoing, fraud, and waste will be hampered by its budget.¹²⁶

OSC is a critically important fixture in promoting whistleblowing within the federal government. OSC provides information to prospective whistleblowers about the available ways in which federal employees can provide information on wrongdoing.¹²⁷ It allows employees to confidentially report wrongdoing, which OSC then investigates.¹²⁸ Furthermore, OSC's very nature promotes whistleblowing; social science research suggests that lower level employees are more likely to report wrongdoing when there is a reporting system that is external to their workplace.¹²⁹ OSC acts as that external reporting system due to its nature as an independent entity, separate and apart from the agencies within which federal employees work.

The other federal agency that plays a role in protecting whistleblowers is the Merit Systems Protection Board. The MSPB decides cases in which whistleblowers allege that they have been retaliated against. As with OSC, the MSPB's budget was targeted by the Trump administration. In FY 2021, the President's budget provided for \$42 million in funding, a cut of \$4 million from FY 2020.¹³⁰ The Merit Systems Protection Board, in its FY 2021 Congressional Budget Justification, noted that any reduction in its budget "would have a direct adverse impact on the agency's ability to protect the Federal merit systems, ensure due process, promote Government-wide merit system principles (MSPs), and prevent prohibited personnel practices (PPPs)."¹³¹ PPPs include claims made by whistleblowers who have suffered from retaliation.¹³²

Not only has there been there a lack of funding at the MSPB; there is also a huge backlog of cases. The MSPB has lacked a quorum for over three

¹²⁶ *Id.* at 7.

¹²⁷ OSC's website is one of the primary ways it provides this information to federal employees. See *Disclosure of Wrongdoing Overview*, U.S. OFF. SPECIAL COUNS., <https://osc.gov/Services/Pages/DU.aspx> [<https://perma.cc/G7XE-75UP>] (last visited Mar. 19, 2021) (describing services OSC provides for reporting wrongdoing).

¹²⁸ 5 U.S.C. § 1213(h) ("The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent"); see also *id.* (describing confidential reporting system).

¹²⁹ Jingyu Gao, Robert Greenberg & Bernard Wong-On-Wing, *Whistleblowing Intentions of Lower-Level Employees: The Effect of Reporting Channel, Bystanders, and Wrongdoer Power Status*, 126 J. BUS. ETHICS 85, 96–97 (2015).

¹³⁰ U.S. MERIT SYS. PROT. BD., CONG. BUDGET JUSTIFICATION FY 2021 1 (2020), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1699850&version=1705794&application=ACROBAT> [<https://perma.cc/7XWW-TAG4>].

¹³¹ *Id.*

¹³² *Id.* at 6.

years, beginning in January 2017 when Trump became president.¹³³ Without a quorum, no cases can be decided by the Board. This has created a backlog of over 2,500 cases, the largest in history.¹³⁴ The lack of a quorum on the board makes whistleblowers vulnerable to retaliation, according to the Executive Director of the Senior Executives Association.¹³⁵

III. REVITALIZING WHISTLEBLOWER PROTECTIONS

Given the myriad attacks on whistleblowers, directly and indirectly, by the Trump administration, it is essential to shore up whistleblower protections for federal employees. This is a matter of both substance and perception. Beyond the substantive changes in the legal system of protections, congressional action will help counteract the negative messages about whistleblowers during the Trump administration. I propose the following options as ways of improving the current situation and sending a message to whistleblowers that they will be protected by Congress.

Before detailing the options below, it is worth noting one option that I do not include revitalizing First Amendment protections. While scholars have spilled much ink agonizing over the current (minimal) state of First Amendment protections for federal employee-whistleblowers,¹³⁶ the practical reality is that the current Supreme Court has been making it more difficult for whistleblowing employees to obtain protections under the First Amendment, with no apparent desire to improve such protections.¹³⁷ Instead of focusing on the highly unlikely

¹³³ Nicole Ogrysko, *Lack of Quorum Hits 3-Year Mark at MSPB, With No Clear End in Sight*, FED. NEWS NETWORK (Jan. 24, 2020, 11:31 AM), <https://federalnewsnetwork.com/workforce/2020/01/lack-of-quorum-hits-3-year-mark-at-mspb-with-no-clear-end-in-sight/> [https://perma.cc/PKA9-2R9Z].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See, e.g., Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 274–75 (2018) (proposing new protections for whistleblowers under the First Amendment).

¹³⁷ See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (creating the additional requirement that an employee establish that his/her speech was not made as part of their professional duties for the speech to enjoy First Amendment protection). There are numerous scholarly works noting *Garcetti*'s negative effect on government employees. See, e.g., Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 118 (2008) (outlining the three "reason[s] for *Garcetti*'s magnified effect on federal employees."); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 7 (2009) (lamenting the "government's expansive claims to control public employees' expression" which "imperi[1] . . . the free speech rights of more than twenty million government workers."); Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 6–7 (2013) ("By stripping protections from

rescue of whistleblowers by the Supreme Court, this Article suggests other measures that have a greater likelihood of implementation.

A. Allow Anonymous Reporting to OSC

The current whistleblower protection laws for federal employees do not provide for anonymous reporting of wrongdoing by most civil servants.¹³⁸ There are some exceptions. Within the intelligence community, there are provisions for employees to blow the whistle anonymously, as illustrated by the impeachment whistleblower.¹³⁹ However, this is the exception, not the rule. At the present time, the only manner for most federal employees to disclose information without openly revealing their identities is for them to file a confidential complaint with the Office of the Special Counsel (OSC).¹⁴⁰ Note that this is not an anonymous report, only a confidential one, meaning that the Special Counsel at least will know the identity of the whistleblower.¹⁴¹ And while the Special Counsel is officially prohibited from revealing the identity of the whistleblower without their consent,¹⁴² in the current political environment it is quite plausible that identities could be leaked.

Creating a truly anonymous reporting option to OSC would promote whistleblowing by those who are concerned about the not only on-the-job retaliation, but also the public crucifixion of whistleblowers by presidents and their followers.

public employees and converting them to at-will status, civil service reforms create a chilling effect. Employees will be less likely to speak about government and express valuable dissent if their job is on the line.”).

¹³⁸ 5 U.S.C. § 1213(a) (describing who is entitled to make disclosures to the Special Counsel in OSC and Inspector Generals within agencies); *id.* at § 1213(h) (prohibiting the Special Counsel, but not Inspectors General, from revealing the identity of the employee making the disclosure without the employee’s consent).

¹³⁹ *See* 50 U.S.C. § 3033 (denoting the duties of the Office of the Inspector General of the Intelligence Community as to creating an effective, accountable office that honestly self-regulates).

¹⁴⁰ 5 U.S.C. § 1213(h); *see also Confidentiality & Anonymity When Filing A Disclosure Claim*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/DU-Confidentiality.aspx> [<https://perma.cc/783R-DGCT>] (last visited Mar. 10, 2021) (discussing confidentiality in reporting practices of OSC).

¹⁴¹ For a thorough discussion of the merits of anonymity versus confidentiality in whistleblowing, see Tanya M. Marcum & Jacob Young, *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COMM. L.J. 1, 31–32 (2019).

¹⁴² 5 U.S.C. § 1213(h).

B. Promote Anonymous Reporting Channels to Congress

Many congressional committees have created a form for online reporting by federal workers.¹⁴³ These forms do allow for anonymous reporting by allowing employees to withhold their names or contact information. However, it is unclear to what extent employees are aware of this option. There are outreach campaigns by the Office of Special Counsel to promote reporting wrongdoing to the OCS,¹⁴⁴ but no similar outreach by Congress. Especially if Congress fails to create an option for anonymous reporting to OSC, it would be beneficial to whistleblowers to make the anonymous reporting options to Congress more widely known. There are posting requirements for a number of federal employee protection laws;¹⁴⁵ it would not be difficult for Congress to require that federal workplaces post information on reporting options for whistleblowers. In addition, providing this information on the OSC website and ensuring that OSC personnel make this option known to employees would promote anonymous reporting.

C. Deter Identification of Anonymous Whistleblowers

In order to provide teeth to the anonymous reporting options described above, Congress should amend current whistleblower protection statutes to add provisions imposing consequences on those who disclose the identity of anonymous whistleblowers. In the wake of the first impeachment of President Trump, such provisions have been proposed as to anonymous whistleblowers within the intelligence community.¹⁴⁶ However, it is not merely whistleblowers in the intelligence community who should be protected from the potential for exposure and social media attacks. All

¹⁴³ See, e.g., *Whistleblower Rights*, HOUSE COMM. ON TRANSP. & INFRASTRUCTURE, <https://transportation.house.gov/whistleblower-rights> [<https://perma.cc/BU56-EFRT>] (last visited Mar. 10, 2021) (allowing anonymous reporting to the Committee on Transportation and Infrastructure); *Whistleblowers*, HOUSE COMM. ON FOREIGN AFF., <https://foreignaffairs.house.gov/whistleblowers> [<https://perma.cc/TS5L-J4RV>] (last visited Mar. 10, 2021) (allowing anonymous reporting to the Foreign Affairs Committee).

¹⁴⁴ See *Outreach, Training, & Certification Overview*, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/Outreach.aspx> [<https://perma.cc/EX2Z-XVSW>] (last visited Mar. 10, 2021) (listing outreach opportunities).

¹⁴⁵ See “*EEO is the Law*” Poster, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/eo-law-poster#:~:text=The%20law%20requires%20an%20employer,pay%2C%20disability%20or%20genetic%20information> [<https://perma.cc/VYK9-65CG>] (last visited Mar. 10, 2021) (listing display requirements for equal employment opportunity laws).

¹⁴⁶ Emma Loop, *After Trump’s Ukraine Scandal, Congress Is Moving to Strengthen Whistleblower Protections*, BUZZFEED NEWS (June 3, 2020, 4:37 PM), <https://www.buzzfeednews.com/article/emmaloop/trump-ukraine-impeachment-whistleblower-protections> [<https://perma.cc/YG6R-9CMR>].

anonymous whistleblowers within the federal government should have their anonymity preserved.

The difficulty with this approach is with determining how to deter the identification of anonymous whistleblowers. If the person who discloses the information is an employee within the civil service, it would be simple to mandate that divulging the employee's identity would be a disciplinary offense for which the offender would face suspension or dismissal, depending on the circumstances. Much more difficult to resolve would be the question of how to handle disclosures of whistleblowers by Congresspersons, Senators, and their staff. Making it a crime for a member of Congress or their staff to disclose a whistleblower's identity seems extreme. A lesser option would be to allow a civil claim if the whistleblower faces significant consequences, such as receiving threats of physical harm to themselves or their family. The parameters of this type of civil claim are discussed in detail in Section III.G, *infra*.

D. Protect Inspectors General from Retaliation

While federal law protects most federal employees against retaliation, it does not protect Inspectors General. This omission needs to be remedied. The relevant statute requires that Inspectors General be appointed, "by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."¹⁴⁷ As the statute indicates, Inspectors General represent a hybrid position in that the President has the power to select them but by statutory mandate, they are not to be mere partisan political operatives seeking to cover up wrongdoing.¹⁴⁸ Furthermore, the Inspectors General are a critical feature of the overall protection of federal employee-whistleblowers.¹⁴⁹ As Senator Charles Schumer stated: "Without the courage of whistleblowers *and the role of Inspectors General*, the American people may never have known how the President abused his power in the Ukraine scandal."¹⁵⁰

Inspectors General, when not inhibited by fear of retaliation, are a critical feature of the federal system of protections because they have the power to hinder or promote investigations into whistleblowers' allegations of

¹⁴⁷ 5 U.S.C. app. § 3(a).

¹⁴⁸ *Id.*

¹⁴⁹ See discussion *supra* Section I.A.

¹⁵⁰ Marianne Levine, *Schumer Asks Inspectors General to Investigate Whistleblower Retaliation After Vindman Firing*, POLITICO (Feb. 10, 2020, 5:30 AM) (emphasis added), <https://www.politico.com/news/2020/02/10/schumer-investigate-whistleblower-retaliation-vindman-113022> [https://perma.cc/CRL7-VF8N].

wrongdoing.¹⁵¹ One of the tasks of Inspectors General is to oversee the investigation of whistleblower allegations.¹⁵² If Inspectors General understand that they are likely to be removed for allowing allegations of wrongdoing to come to light, there is a clear incentive to bury such allegations. And while some allegations will not have negative political implications for the sitting administration, it is inevitable that some will, and that these may never come to light if Inspectors General are removed for doing their statutorily-mandated duties. This concern is particularly acute in areas where the whistleblower is dealing with information that is classified or otherwise protected by statute. As discussed in Section II.B., *supra*, with an increasing focus on investigating and prosecuting releases of such information, if the Inspector General does not investigate and take action, and the whistleblower discloses information to the media because they believe that the public needs to know of such information, then the whistleblower is putting themselves at a high risk of criminal investigation.

The challenge of the Inspector General position is determining what type of protection officers should be provided. While the Inspector General Act contemplates the appointment of an individual who will perform the duties of the office in a nonpartisan,¹⁵³ competent¹⁵⁴ way, these provisions are not enforceable because the President retains the nearly unlimited authority to remove the Inspectors General at any time by providing notice and a reason for the removal to Congress.¹⁵⁵ Thus, the integrity of the system depends entirely on the individuals appointed and the President. Some Inspectors General will follow their statutory mandates without regard to the fact that they can be removed at the whim of the President. Others, particularly after the purge of Inspectors General under President Trump, will become at least somewhat more circumspect.

In order to ensure that the system of Inspectors General actually works, one option is to change the nature of the Inspector General position. Inspectors General could become career civil service positions not subject to the appointments process. This approach would insulate Inspectors General from political pressures far more effectively than the current system. Furthermore, it has the potential to strengthen the civil service system by providing a powerful protector within the system who is not subject to the political whims of the

¹⁵¹ See discussion *supra* Section II.A.

¹⁵² 5 U.S.C. app. § 3(d)(1)(C).

¹⁵³ This is evident from the requirement that the Inspector General be appointed without regard to political affiliation. *Id.* § 3(a).

¹⁵⁴ This is evident from the requirement that the Inspector General have “demonstrated ability” in the skills necessary for the position. *Id.*

¹⁵⁵ See discussion *supra* notes 69–71 and accompanying text.

President.¹⁵⁶ However, there are a couple of flaws with this approach. First, it is possible that when a position becomes vacant and a new Inspector General is hired, those in charge of the hiring process will be political appointees and will focus on hiring an individual who, while not overtly political, shares a political perspective with them. Second, having a person with the powers of an Inspector General not be appointed by the President may infringe upon the President's rights under the Appointments Clause.

Even under the current statutory system, the constitutionality of the removal provision of Inspector General positions has long been questioned. When the Inspector General Act of 1978 was under consideration by Congress, the Department of Justice's Office of Legal Counsel opined that the draft legislation was unconstitutional for several reasons.¹⁵⁷ Three of the constitutional objections raised by the DOJ OLC focused on the reporting obligations of Inspectors General to Congress—requirements this Article does not touch upon.¹⁵⁸ However, the fourth constitutional concern raised by the DOJ OLC was that requiring the President to provide a reason for the removal of an Inspector General violated that President's constitutional right to "remove Presidentially appointed executive officers."¹⁵⁹ Despite this objection, the final version of the Act contained the requirement that the President provide a reason for the removal of an Inspector General.¹⁶⁰

The current state of the constitutionality of limitations on the appointments power and removal power is unclear. Scholars of administrative law such as Michael Livermore and Daniel Richardson have described its state as being at "the breaking point."¹⁶¹ While there are many reasons for this, one of the contributing factors is current Supreme Court doctrine interpreting the Appointments Clause. In 2018, the Supreme Court decided *Lucia v. SEC*,¹⁶² in which it determined that the Administrative Law Judges at the Securities and Exchange Commission were improperly considered a part of the civil service, and that they were properly to be considered "officers" of the executive branch who are to be appointed by the President.¹⁶³ The Court applied a multi-part test. First, if a position is

¹⁵⁶ A potential fringe benefit of this approach is that it might contribute to the lessening of partisan volatility, at least within the civil service. See Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 4–6 (2019) (noting several reasons for the current state of "partisan volatility" for which the current administrative law apparatus is ill-suited, including "the weakening of moderating institutions such as the civil service.").

¹⁵⁷ Inspector General Legislation, 1 Op. O.L.C 16, 18 (1977).

¹⁵⁸ *Id.* at 17–18.

¹⁵⁹ *Id.* at 18.

¹⁶⁰ 5 U.S.C. app. § 3(b).

¹⁶¹ Livermore & Richardson, *supra* note 156, at 6.

¹⁶² 138 S. Ct. 2044 (2018).

¹⁶³ *Id.* at 2055.

“continuing” rather than temporary, that suggests the position is more likely to be an “officer” rather than a mere “employee.”¹⁶⁴ Second, if individuals have “significant discretion” when carrying out “important functions,” that indicates that they are officers, not employees.¹⁶⁵ The Court, however, refused to provide any additional guidance as to the meaning of these very broad concepts. Part of this is likely due to an inability to reach consensus on the appropriate parameters of the test to determine whether an individual is an “officer” or a “mere employee.”¹⁶⁶ It is quite likely that changing the status of the Inspectors General to become part of the civil service will result in legal challenge. The outcome of this challenge is not clear for two reasons. First, it is not clear whether Inspectors General are “officers” who the president has the power to appoint and remove. Second, if the Inspectors General are in fact officers subject to presidential appointment, the Supreme Court has held that some for-cause removal provisions do not violate the Constitution.¹⁶⁷

As to the first point, because Inspectors General are clearly permanent positions, which weighs in favor of “officer” rather than “employee,” the bulk of the analysis will likely focus on whether they have “significant discretion.”¹⁶⁸ The fact that Inspectors General can conduct investigations within their agency without oversight, including obtaining documents and interviewing witnesses, suggests that they have significant discretion.¹⁶⁹ Thus, the question appear to devolve to whether these investigative powers constitute “important functions.”¹⁷⁰ The scope of what they can investigate, which includes investigating the head of the agency in which they work, tends

¹⁶⁴ *Id.* at 2052.

¹⁶⁵ *Id.*

¹⁶⁶ The case spawned a dissent by Justices Gorsuch and Thomas, on one hand, which argued for a new standard, and a separate dissent by Justices Breyer, Ginsburg, and Sotomayor, which suggested that there was no need to even reach the constitutional issue. The approach of the latter dissent may be to avoid reaching the constitutional issue out of concerns that the conservative majority would substantially change the standard to make more positions subject to the Appointments Clause. *See id.* at 2056–57 (Gorsuch, J., joined by Thomas, J., concurring); *id.* at 2057–64 (Breyer, J., joined by Ginsburg and Sotomayor, JJ., concurring in the judgement in part and dissenting in part).

¹⁶⁷ *See Wiener v. United States*, 357 U.S. 349, 356 (1958) (holding that the President’s power to remove an executive officer must be conferred by Congress); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935) (holding that President’s power to remove an officer “will depend upon the character of the office”).

¹⁶⁸ *See Lucia*, 138 S. Ct. at 2053 (discussing the exercise of “significant discretion” by the SEC’s administrative law judges).

¹⁶⁹ *See* 5 U.S.C. app. § 3(a) (“Neither the head of the establishment nor the officer next in rank below such head shall prevent . . . the Inspector General from initiating . . . any audit or investigation”); *id.* § 6(a) (providing the Inspector General with broad access to records, reports, documents, and federal grand jury materials).

¹⁷⁰ *Lucia*, 138 S. Ct. at 2053.

to indicate that their investigations, which are the heart of their position, are “important functions.”¹⁷¹ It is quite likely that a court would determine that Inspectors General are officers, not employees.¹⁷²

As to the right to limit removal of the Inspectors General, for-cause removal provisions have been allowed at times. The state of the law is quite complicated.¹⁷³ For cause removal provisions have been allowed when the position in question is adjudicatory in nature.¹⁷⁴ In the case of the Postmaster General’s position, congressional reservation of removal rights was held to be an improper usurpation of presidential power to remove at will.¹⁷⁵ Furthermore, for-cause removal provisions have been allowed as to the head of an independent agency.¹⁷⁶ Inspectors General do not fall neatly into any of these precedents.

Taking an approach along these lines, a bill was recently passed by the House of Representatives that would not make Inspectors General career civil service appointees, but would provide some limitations on firing them.¹⁷⁷ Under the Inspector General Independence Act, Inspectors General could only be removed for permanent incapacity, inefficiency, neglect of duty, knowing violation of a law, rule, or regulation, malfeasance, gross mismanagement, gross waste of funds, abuse of authority, or conviction of a felony or conduct involving moral turpitude.¹⁷⁸ This approach would not solve the constitutional issues discussed above because it still limits the authority of the President to remove a high-ranking official.

¹⁷¹ *Id.*

¹⁷² It is also possible that a court would not focus on the *Lucia* approach, but instead would draw upon the approach articulated in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 484 (2010), in which the Court allowed for-cause removal of members of the PAB. In that case, the focus of the Court was on presidential removal of officers who “execute the laws.” *Id.* at 492, 496, 501.

¹⁷³ *See id.* at 515 (Breyer, J., dissenting) (describing the conflict between congressional authority to create federal agencies and the presidential authority to appoint and remove officers of such agencies). Justice Breyer’s dissent explains the problem concisely: the Constitution is silent on removal authority, history is unclear on its scope, and the Court’s precedents do not lead to a clear outcome. *See id.* at 515–19.

¹⁷⁴ *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 623–28 (1935) (holding that FTC commissioners may be removed by the President for cause); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (holding that the President could not remove a member of an adjudicatory body “merely because he wanted his own appointees on such a Commission”).

¹⁷⁵ *See Myers v. United States*, 272 U.S. 52, 176 (1926) (“[T]he unrestricted power of removal of first-class postmasters is denied to the President”).

¹⁷⁶ *See Humphrey’s Ex’r*, 295 U.S. at 627–28 (permitting for-cause removal with respect to the FTC, which “cannot be characterized as an arm or an eye of the executive” and “acts as a legislative agency”).

¹⁷⁷ The Heroes Act, H.R. 6800, 116th Cong. § 70104 (2020).

¹⁷⁸ *Id.* § 70104(b)(2).

This is not the first time that this approach has been proposed. In 2008, the Inspector General Act was amended to require that Presidents provide thirty days advance notice of removals of Inspectors General.¹⁷⁹ The draft bill also proposed a seven-year term and limited removals to reasons similar to those in the Heroes Act.¹⁸⁰

A less transformative, more incremental approach to protecting Inspectors General would be to revise the statute to state that the President must state the reasons, in detail, for the removal or transfer of an Inspector General, including providing at least one specific example of the behavior, conduct, or action(s) of the Inspector General that led to his or her removal or transfer. This would help address the type of situation that arose when President Trump removed Michael Atkinson. The President's notice to Congress was very vague, stating that the President had lost confidence in the Inspector General, but there was no explanation of the circumstances that led to the loss of confidence.¹⁸¹ Some Senators pushed back on the President's letter, arguing that the legislative history of the removal provision in the statute made it clear that Inspectors General should be removed only for reasons such as malfeasance, failure to perform their duties, or for personal actions that would discredit the office of Inspector General.¹⁸² However, while the legislative history may provide information on the goal of the law, there is nothing in the statute as currently written that requires any degree of detail on the reasons for the removal of an Inspector General.¹⁸³ And, as discussed above, the statutory provision has been interpreted to allow the most minimal statement of a reason—losing the “fullest confidence” in the Inspector General.¹⁸⁴ Thus, the most minimal change to the statute would be to require greater detail in the reasons for the removal.

Another possibility would be to require that in the event of the removal of an Inspector General, not only must the President provide the reason(s) for the removal, but the notification to Congress would also trigger a congressional committee or subcommittee hearing on the reasons for the removal. The right to the hearing would provide a greater focus on the removal and could assist in bringing public pressure to bear on the decision

¹⁷⁹ Inspector General Reform Act of 2008, 110 Pub. L. No. 110-409, § 3(b), 122 Stat. 4302, 4302.

¹⁸⁰ BEN WILHELM, CONG. RSCH. SERV., IF11546, REMOVAL OF INSPECTORS GENERAL: RULES, PRACTICE, AND CONSIDERATIONS FOR CONGRESS (2020); H.R. 6800 § 70104.

¹⁸¹ See Savage *supra* note 58.

¹⁸² Letter from Charles Grassley et al., U.S. Senator, to Donald J. Trump, President of the United States (Apr. 8, 2020) (*citing* JOINT STAFF REP. OF S. COMM. ON FIN. & H. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., THE FIRING OF THE INSPECTOR GENERAL FOR THE CORPORATION/OR NATIONAL AND COMMUNITY SERVICE 47 (Comm. Print. 2009)).

¹⁸³ See 5 U.S.C. app. § 3(b) (failing to require the reasoning behind an Inspector General's removal).

¹⁸⁴ Walpin v. Corp. for Nat'l & Cmty. Servs., 630 F.3d 184, 187 (D.C. Cir. 2011).

to remove an Inspector General. It is far easier for a President to simply state a reason—which could be anything—when there is no real opportunity for the Inspector General to offer his or her version of events. This type of hearing could provide additional incentives for the President to not fire Inspectors General due to the more public nature of the termination.

E. Restore Necessary Resources for OSC and MSPB

An obvious way to shore up whistleblower protections is to ensure that the offices that support whistleblowers receive adequate resources. Congress should ensure that the budgetary needs of OSC are met so that the office is properly equipped to support whistleblowers and investigate disclosures made by whistleblowers. The MSPB also needs to be properly funded and staffed. Additional funding may be required for the MSPB to expeditiously eliminate the staggering backlog of cases.¹⁸⁵

As for vacancies on the MSPB, it seems unlikely that any will be appointed until after the November 2020 election. Regardless of the outcome of the election, appointing members to the MSPB must be a priority for the next administration. The political persuasion of the potential appointees is less important than the need to reduce the massive backlog of cases. Decisions by the MSPB are reviewable in federal court, which limits the degree to which partisan political operatives can alter existing interpretations of whistleblower protection laws.

F. Eliminate the Focus on Investigating Leaks, Amend the Espionage Act to Limit Prosecutions, and Overhaul the Classification System

There are three ways of handling the excessive focus on investigating and prosecuting federal employees and the media that began in the Obama administration and was expanded in the Trump administration. First, and most directly, the DOJ special unit focusing on leaks should be eliminated. There is no evidence that the leaks investigated by its office had a negative effect on our national security. Any small deterrent effect this unit has on those who do have truly nefarious goals is likely overshadowed by its chilling effect on disclosures that are legitimately in the public interest. At a minimum, the focus of the unit should be shifted away from “leakers” and instead into investigations of serious offenses.¹⁸⁶

¹⁸⁵ See *supra* text accompanying notes 133–35.

¹⁸⁶ Another option would be to retain the unit and create guidelines for determining what disclosures of information are appropriate for prosecution. See, e.g., David J. Ryan, *National Security Leaks, the Espionage Act, and Prosecutorial Discretion*, 6 *HOMELAND & NAT'L SEC. L. REV.* 59, 61 (2018) (explaining how the Obama administration created guidelines for

Another option would be for Congress to amend the Espionage Act. There have been numerous suggestions on how to do this to eliminate the targeting of journalists and whistleblowers. One option would be to create a scienter requirement; specifically, that the purpose of the individual disclosing classified information is to harm the interests of the United States and/or benefit the interests of a foreign government.¹⁸⁷ Another option is to create an exception to the statute to allow disclosures to the media so long as the whistleblower attempted to use internal reporting procedures, to no avail, before disclosing classified information to the media.¹⁸⁸

A third, and more indirect approach, would be to overhaul the classification system in the federal government. Even Judge Ellis, a conservative judge in the Fourth Circuit, has noted that the federal government officials responsible for classifying information “over-classify;” that is, when faced with information that might be considered classified, they err on the side of categorizing it as classified.¹⁸⁹ Indeed, the congressional advisory board tasked with assessing this issue recommended an overhaul of the current system.¹⁹⁰ The current system is a composite of executive orders and regulations, and a legislative overhaul is overdue. Part of this overhaul should include higher standards for classifying information.¹⁹¹ One of the spillover effects of this would be to make it more difficult for administrations to use the Espionage Act to target legitimate media reporting.¹⁹² This is long

such prosecutions, and yet in the Trump administration there has been an increased focus on prosecutions and investigations). Thus, it seems that incremental change is less likely to be effective in this area.

¹⁸⁷ See, e.g., Lindsay B. Barnes, *The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act*, 46 MCGEORGE L. REV. 511, 518–20 (2014) (exploring revisions to the intent requirement).

¹⁸⁸ See, e.g., Josh Zeman, “A Slender Reed Upon Which to Rely”: *Amending the Espionage Act to Protect Whistleblowers*, 61 WAYNE L. REV. 149, 165 (2015) (proposing that the Espionage Act be amended “to specifically preclude prosecution for those who leak information to the media.”).

¹⁸⁹ T. S. Ellis, III, *National Security Trials: A Judge’s Perspective*, 99 VA. L. REV. 1607, 1620 (2013).

¹⁹⁰ See PUB. INT. DECLASSIFICATION BD., *TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM: REPORT TO THE PRESIDENT* ii–iii (2012), <https://www.archives.gov/files/declassification/pidb/recommendations/transforming-classification.pdf> [<https://perma.cc/A3EE-LEZR>] (discussing recommendations pertaining to classification and declassification).

¹⁹¹ See Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 399–401 (2009) (discussing overclassification and the problems it creates).

¹⁹² See Anthony L. Fargo, *Protecting Journalists’ Sources Without A Shield: Four Proposals*, 24 COMM. L. & POL’Y 145, 147 (2019) (proposing that the federal government “[r]ein in the out-of-control system for classifying government documents as ‘confidential,’ ‘secret’ or ‘top secret’ to improve the free flow of information to the public and reduce sources’ perceived need to risk prosecution by leaking documents to the press about government activities whose disclosure would do no realistic harm to national security.”).

overdue, but it was not essential when presidents were not targeting the media. At this juncture, it seems prudent to take action to prevent another administration from continuing the escalation of prosecutions of journalists and the whistleblowers who disclose information to them.¹⁹³

G. Protect Whistleblowers from Social Media Attacks

It would be impossible in this Article to thoroughly discuss the ways in which the current social media system needs to be changed in order to effectively curb abuse online. The topic is complex and rapidly changing. However, there are a few core concepts from the literature that can help frame the issue in the context of whistleblowing.

1. Develop more effective internal rules in social media entities

First, social media platforms need to do a more effective job in eliminating speech that threatens whistleblowers. As is nearly universally recognized, at the present time, social media platforms do not manage speech on their platforms effectively. Speech that is innocuous, such as a newspaper posting portions of the Declaration of Independence, is censored, while hate speech, including attacks and threats to individuals,¹⁹⁴ proliferates.

Legal scholars have, of course, recognized this problem and proposed some solutions.¹⁹⁵ As Annemarie Bridy effectively stated:

[W]e need some ground rules [for social media companies]. Practices better than those that platforms currently demonstrate in this area include increased definitional clarity with respect to categories of prohibited speech, greater consistency with respect to content removals, and implementation of efficient processes that allow users both

¹⁹³ See Mark Norris, Comment, *Bad “Leaker” or Good “Whistleblower”?*—A Test, 64 CASE W. RESV. L. REV. 693, 706–07 (2013) (discussing one approach to balancing the interests of government in classifying information and the need to protect whistleblowers).

¹⁹⁴ See *supra* Part II (discussing examples of threats against whistleblowers in the Trump administration).

¹⁹⁵ There have been many approaches suggested on this topic. For additional examples—in addition to the ones discussed in the text—see Charlie Warzel, *Could Restorative Justice Fix the Internet?*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/opinion/internet-harassment-restorative-justice.html?searchResultPosition=1> [<https://perma.cc/2AM4-ME7Q>] (discussing Lindsay Blackwell’s concept of using restorative justice mediation principles); Ethan Baron, *Fighting Hate on Facebook, Twitter, Youtube: Brittan Heller*, E. BAY TIMES (Oct. 10, 2018, 9:54 AM), <https://www.eastbaytimes.com/2018/09/27/fighting-hate-on-facebook-twitter-youtube-brittan-heller/> [<https://perma.cc/JE8N-8S9U>] (explaining Brittan Heller’s suggestion that the way to eliminate harassment and hate speech is via changing online social norms).

to flag potential violations and to contest removals they believe are unjustified.¹⁹⁶

Bridy, while not explicitly stating this, appears to suggest that social media platforms should be required to undertake these steps in order to retain their immunity from legal liability for the speech that occurs on the platforms.¹⁹⁷

Other scholars have been more cautious in suggesting that social media platforms should better manage their content. For example, Cindy Cohn argues that censoring speech tends to harm those who are less powerful and that it has not been effective in the past.¹⁹⁸ Thus, she is not enthusiastic about platforms engaging in self-censorship because of these risks. Cohn proposes some increased filtering by platforms, as well as other changes, such as platforms being more transparent about their censorship decisions and developing tools for individuals to filter the content they wish or do not wish to see.¹⁹⁹

Another potential approach for social media platforms to follow is found in international law. Existing international human rights standards are one potential set of standards that social media platforms could use.²⁰⁰ The European Union has also set out requirements for social media platforms to adhere to in order to eliminate hate speech and harassment.

Others have suggested that social media platforms not only need to better regulate speech; they should also be legally liable for some harmful speech on their platforms. Tort liability for these social media providers is one such proposal, using existing tort claims such as negligence.²⁰¹ Another model that has been suggested is based off of copyright infringement claims.²⁰²

In short, as part of the need for social media platforms to better regulate speech, consideration should be given to protecting whistleblowers from online harassment.

¹⁹⁶ Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193, 219–20 (2018).

¹⁹⁷ See *id.* (recommending that social media companies implement clearer, more consistent, and more efficient processes).

¹⁹⁸ Cindy Cohn, *Bad Facts Make Bad Law: How Platform Censorship Has Failed So Far and How to Ensure That the Response to Neo-Nazis Doesn't Make It Worse*, 2 GEO. L. TECH. REV. 432, 437–446 (2018).

¹⁹⁹ *Id.* at 450–51.

²⁰⁰ See Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH. REV. 26, 35 (2018) (concluding that speech codes can be based upon international human rights standards).

²⁰¹ See, e.g., Elizabeth M. Jaffe, *From Terrorists to Trolls: Expanding Web Host Liability for Live-Streaming, Swatting, and Cyberbullying*, 26 B.U. J. SCI. & TECH. L. 51, 61–62 (2020) (proposing a regime of tort liability for web hosts).

²⁰² Natalia Homchick, *Reaching Through the "Ghost Doxer:" An Argument for Imposing Secondary Liability on Online Intermediaries*, 76 WASH. & LEE L. REV. 1307, 1333 (2019).

2. Expand civil litigation and criminal prosecution of harassers

In addition to changing how social media platforms police their own content, the law also has a role to play in combatting harassment of whistleblowers. Again, this is an area of the law that cannot effectively be covered in a segment of a law review article; it deserves its own full analysis. Looming over all lawsuits is the First Amendment.²⁰³ Freedom of speech does not, however, insulate all speech from liability.²⁰⁴ Working within the confines of the First Amendment can still allow effective protection of whistleblowers. These potential protections can be separated into two components: civil claims and criminal prosecutions.

There are relatively few criminal prosecutions of those who engage in online harassment.²⁰⁵ One of the reasons for this is the relative dearth of state laws criminalizing the behavior;²⁰⁶ another is the failure of local police to recognize it as within their purview. The federal laws criminalizing cyber harassment and cyber stalking also have been underenforced.²⁰⁷ Even if the police are willing to investigate, there is a whole host of other issues with prosecuting harassers.²⁰⁸ And many statutes fail to criminalize those who encourage harassment,²⁰⁹ which is one manner in which whistleblowers have been targeted. A multitude of different approaches have been advocated to make criminal law more effective,²¹⁰ well beyond the scope of this Article to

²⁰³ See Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE W. RES. J.L. TECH. & INTERNET 1, 8 (2015) (discussing the role of the First Amendment).

²⁰⁴ *Id.*

²⁰⁵ See Emma Marshak, *Online Harassment: A Legislative Solution*, 54 HARV. J. LEGIS. 503, 508–17 (2017) (noting that less than 5% of cyber harassment victims report the harassment to police and that local police often don't consider it a crime).

²⁰⁶ See *id.* at 514–16 (discussing lack of statutes specifically targeting cyber harassment); *id.* at 517–20 (discussing lack of police response).

²⁰⁷ Citron, *supra* note 203, at 5. Between 2012 and 2016, there were only prosecutions of forty-one cases of cyberstalking and 280 cases of online threats. Joshua Eaton, *Department of Justice Turns a Blind Eye to Online Stalking and Abuse*, THINK PROGRESS (Sept. 18, 2017, 12:21 PM), <https://archive.thinkprogress.org/exclusive-department-of-justice-fails-to-prosecute-on-line-stalking-and-abuse-new-data-shows-c82e9cdc21ff/> [<https://perma.cc/9QQ5-PC5N>].

²⁰⁸ See Marshak, *supra* note 205, at 521–23 (discussing problems identifying the harasser and prosecuting them).

²⁰⁹ See, e.g., Nicolle Parsons-Pollard, *Cyberstalking Laws in the United States: Is There a Need for Uniformity?*, 46 CRIM. L. BULL. 1, 3 (2010) (discussing need for this coverage).

²¹⁰ See, e.g., *id.* (suggesting changes such as clearly defining harassment and including text messaging in the category of cyberstalking behavior); Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1107 (2011) (suggesting modification of current laws, such as revisions to criminal statutes and using civil rights statutes, as well as proposing “extra-legal regulatory mechanisms that might better protect individual reputations online”); Homchick, *supra* note 202, at 1315 (recommending imposing criminal

discuss. In general, though, improving the investigation and prosecution of online harassment will assist in protecting whistleblowers.

As for civil litigation, suing those who have engaged in online harassment has had mixed results. Civil claims are allowed under the First Amendment for harassing/stalking speech in some circumstances.²¹¹ For instance, the tort claim of intentional infliction of emotional distress has been suggested as a viable claim in online harassment situations.²¹² In some instances, defamation claims are also viable.²¹³ In addition, there are proposals for new statutory claims. One proposal has been to create a new statutory claim under federal law where a person is “placed in reasonable fear of death or serious bodily injury because of a perpetrator’s actions” by virtue of receiving harassing communications via the internet.²¹⁴ Such a statute would do much to potentially benefit whistleblowers subject to such online harassment, particularly if the statute provides for attorney’s fees.²¹⁵

CONCLUSION

The actions of the Trump administration revealed weaknesses in the system of encouraging and protecting whistleblowers. His administration targeted whistleblowers directly, by attacking them on social media and in

liability for doxing on the perpetrator, and if that individual is not identifiable, the online platform); A. Meena Seralathan, *Making the Time Fit the Crime: Clearly Defining Online Harassment Crimes and Providing Incentives for Investigating Online Threats in the Digital Age*, 42 BROOK. J. INT’L L. 425, 432 (2016) (proposing redefining portions of criminal law and importing standards for punishment of cyberstalking from other countries); P. Brooks Fuller, *Mosaic Theory and Cyberharassment: Using Privacy Principles to Clarify the Law of Digital Harms and Free Speech*, 22 COMM. L. & POL’Y 309, 315 (2017) (suggesting an incremental approach under which “states reconceptualize unprotected harassment as any intentional, patterned, persistent course of conduct that places the victim in a state of fear”).

²¹¹ For an excellent overview of the problems of cyber harassment, see Citron, *supra* note 203, at 1.

²¹² See, e.g., *id.* at 5; Juan M. Acevedo García, *Intentional Infliction of Emotional Distress Torts as the Best Legal Option for Victims: When Cyberbullying Conduct Falls Through the Cracks of the U.S. Criminal Law System*, 85 REV. JUR. U. P.R. 127, 160–65 (2016) (discussing the viability of intentional infliction of emotional distress as a legal claim for online harassment).

²¹³ See, e.g., Heidi Frostestad Kuehl, *Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers*, 36 N. ILL. U. L. REV. 28, 30 (2016) (discussing defamation claims for online harassment).

²¹⁴ Kara Powell, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, 25 RICH. J.L. & TECH. 1, 28 (2019).

²¹⁵ Without attorney’s fees, it is unlikely that the recovery of damages would be sufficient to induce attorneys to take the case. This would lead to a situation where only wealthy individuals can afford to take action to stop online harassment. For federal employees, who tend to earn less than their private sector counterparts, an attorney’s fees award is essential for such a statute to provide meaningful relief.

the news as well as by firing them, removing them from their jobs, and ramping up criminal investigations into leaks within the federal government.²¹⁶ The Trump administration also targeted whistleblowers indirectly, by failing to adequately support or fund existing whistleblower protection resources and by refusing to enact policies to expand whistleblower protections.²¹⁷ The cumulative effect of this has been to fundamentally change the culture of the federal government so that whistleblowers have been discouraged and ceased disclosing wrongdoing. This undermines the legislative work that Congress has done to improve whistleblower protections over the years.²¹⁸ Congress needs to shore up and expand whistleblower protections in order to prevent a continued reduction in whistleblower disclosures by federal employees as well as to take action to prevent or limit retaliation against them.

²¹⁶ *See supra* Sections II.A–C.

²¹⁷ *See supra* Section II.D.

²¹⁸ *See supra* Section I.A.