

House Considers Enhanced Protections for Federal Government Whistleblowers

By [Kathryn Evans](#)
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The [Whistleblower Protection Act](#) prohibits most employers in the federal executive branch from retaliating against employees and job applicants who lawfully report what they reasonably believe to be a legal violation or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” Any covered employee or applicant who blows the whistle on such misconduct and then faces retaliation at work [generally must first file a complaint](#) with the Office of Special Counsel, which will investigate the complaint and may [seek corrective action](#) for the employee if it finds unlawful retaliation. If the Office of Special Counsel does not take action within 120 days or determines that there was no unlawful retaliation, the employee [may appeal](#) their case to the [Merit Systems Protection Board \(MSPB\)](#), a federal agency. The case will first be heard by an Administrative Law Judge (ALJ), a full-time employee of the MSPB. After a hearing, the ALJ issues an initial decision which can then be appealed to the three-member Board that heads the MSPB. A final decision by the Board, or an ALJ’s initial decision that is not appealed for 35 days and therefore [becomes final](#), can be [appealed to the U.S. Court of Appeals for the Federal Circuit](#).

The three Board members at the head of the MSPB are appointed by the president and confirmed by the Senate to seven-year, non-renewable terms, and [only two](#) may be members of the same political party. The Board can only issue decisions on appeals if there is a [quorum of two](#) members, [which it has not had since January of 2017](#). It has had no members for the past two years. Over four years without a functioning Board has led to a [backlog of over 3,000 petitions for review](#) pending at MSPB headquarters in Washington, D.C. President Biden nominated [Cathy Ann Harris as Chair](#) and [Raymond Linton as Vice Chair](#) of the Board on June 24, 2021, but thus far the nominations have only been referred to the Committee on Homeland Security and Governmental Affairs, with possible delays of a few months before they are confirmed. In the years 2009 through 2019 the average Senate confirmation process for positions below the Cabinet [lasted 115 days](#), although it lowered to 68 days in the first year of each new administration, as we are in now. [According to Congressman Gerry Connolly](#), the Senate has indicated that it will not consider the two current nominees until President Biden names a third, who by law cannot be a Democrat if both Harris and Linton are confirmed.

Even when the MSPB is fully staffed, it does not function in the most whistleblower-friendly way. The Government Accountability Project found that MSPB Administrative Law Judges rule [against whistleblowers in 95% of cases](#), and cites lack of judicial independence and high workloads as factors contributing to this statistic. From Fiscal Years 2005 through 2015, 68% of cases that were appealed to the Board settled without a final decision, but of the

remaining 32%, the Board found in favor of the [government employer 80% of the time](#). Of the cases that were then appealed to the Federal Circuit Court of Appeals, 92% were affirmed.

The Whistleblower Protection Improvement Act of 2021

The [Whistleblower Protection Improvement Act of 2021](#) (WPIA) was introduced in the House of Representatives on May 4, 2021, and [approved by the House Committee on Oversight and Reform](#) on June 29, meaning it can now be debated on the House floor. The bill would improve protections for federal government whistleblowers in a number of ways, [largely in response](#) to the prevalence of both whistleblowing and retaliation in the Trump administration. For example, the bill would extend whistleblower protections to non-career appointees in the [Senior Executive Service](#), which includes some of the highest executive branch officials. In a clear response to the government's handling of the COVID-19 pandemic, the new law would also extend coverage to commissioned officers in the Public Health Service, and would explicitly protect employees who disclose information that they reasonably believe evidences "censorship related to research, analysis, or technical information," including "any effort to distort, misrepresent, or suppress research, analysis, or technical information."

In addition to expanding which federal employees are protected, the WPIA would also add to the list of actions that are prohibited as retaliation against whistleblowers. First, it adds as a prohibited personnel action "the commencement, expansion, or extension" of a discretionary investigation into the employee, or a discretionary referral of the employee to an Inspector General because the employee blew the whistle or otherwise engaged in protected activity under the statute. Second, the WPIA would prohibit most government employees from willfully communicating any information that could identify a whistleblower to anyone outside of the government. While this provision is a step in the right direction to prevent public harassment of whistleblowers, the fact that it only prohibits disclosing a whistleblower's identity outside of the government leaves a large gap in protections. For instance, the WPIA would still allow government employees to reveal identifying information about whistleblowers to members of Congress, who can then reveal that information on the House or Senate floor with immunity under the [Speech or Debate Clause](#) of the U.S. Constitution. During the first impeachment trial of Donald Trump, Senator Rand Paul [notoriously read the name of the alleged whistleblower](#) whose complaint started the impeachment process, after Chief Justice John Roberts had twice refused to read Senator Paul's question aloud because it attempted to out the whistleblower. Even under the new WPIA, Senator Paul would have been immune from a lawsuit or other repercussions because he made the statement in the course of an official Senate session.

The WPIA would also address some of the issues that have led to the build-up of appeals currently pending at the MSPB and the low success rate of whistleblower claims that go through the MSPB process. The new law would allow individuals to file a lawsuit in a federal district court if the MSPB does not make a final decision within 180 days, and the individual gives 20 days' notice to the Special Counsel and the MSPB. The district court would hear the case [de novo](#), meaning it does not need to consider any Office of Special Counsel or ALJ decisions about the case in making its decision. In contrast, under the current system where whistleblowers can only appeal final MSPB decisions to the Federal Circuit Court of Appeals,

the court can only overrule the MSPB's decision [if it finds that it was](#) "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." Under the new law, whistleblowers would have the option of having their trial at the district court heard by a jury. This option of a de novo jury trial at the employee's local district court could provide more independent decision-makers than the current system in which executive branch employees in the MSBP make initial determinations that are very difficult to have reversed in the Federal Circuit. In testimony to the House Committee on Oversight and Reform, Government Accountability Project Legal Director Tom Devine called this provision the "[cornerstone](#)" of the WPIA, decrying the MSPB's "monopoly on due process" and the Federal Circuit's hostility toward government whistleblowers. The WPIA would also provide a mechanism for the thousands of individuals with appeals currently pending before the MSPB to withdraw those appeals and file lawsuits in federal district court.

In addition to Representative Carolyn Maloney of New York, who introduced the bill, the WPIA has 28 cosponsors in the House. Representative Nancy Mace, the only Republican cosponsor, [called the bill "common sense" reform](#) to protect taxpayer dollars, citing recent whistleblowing around fraud in programs such as the Paycheck Protection Program. She also said that she has recently spoken with individuals whose lives were ruined by retaliation after they reported fraud in Department of Defense contracts, indicating that there should be stronger anti-retaliation protections. Representative James Comer argued that the bill would allow disgruntled employees to prevent the implementation of presidential policies by speaking against the president and calling themselves whistleblowers, but did not provide any specific example of how the WPIA would enable such conduct. If the bill passes a vote in the House, it will move to the Senate, which has not yet introduced its own version of the bill.

The Merit Systems Protection Board Empowerment Act of 2021

The House Committee on Oversight and Reform [also referred](#) the Merit Systems Protection Board Empowerment Act of 2021 to the House floor on June 29. [The bill](#) would require MSPB employees who decide whistleblower retaliation cases, including Administrative Law Judges and Board Members, to complete training about the Whistleblower Protection Act's protections. Having decision-makers who fully understand the law could lead to more favorable outcomes for whistleblowers. The bill would also require the Office of Personnel Management and other agencies to assist the MSPB in its periodic [surveys of federal employees](#) to ensure that agencies are following the laws with respect to their employees. Finally, the new bill would officially reauthorize the MSPB through 2026. The [Whistleblower Protection Act of 1989](#) only authorized appropriations for the MSPB through 1994, and Congress has reauthorized the agency multiple times since then. The last authorization expired in 2007, although Congress has continued to fund the agency since then—it [spent over \\$40 million](#) in Fiscal Year 2020.

During Committee debate on the bill, Representatives Gerry Connolly and Carolyn Maloney expressed frustration with the current status of the MSPB, including the lack of Congressional authorization for over a decade, lack of quorum for four years, and lack of Senate movement to confirm President Biden's nominations for Board positions. Congressman Jody Hice expressed his preference for a different [Merit Systems Protection Board Reauthorization Act](#) which he introduced in March. His version would also accomplish the [technicality](#) of

reauthorizing the MSPB through Fiscal Year 2026, but would make the agency even more unfriendly to whistleblowers through provisions such as instituting filing fees for MSPB appeals, introducing a process for summary judgment to dismiss claims before hearings, and limiting the Board's ability to reverse retaliatory personnel actions. This version of the bill has not been approved by the committee, but Representatives Hice and Connolly expressed willingness to work together to amend the version that was approved as it moves forward in the House. Representative Connolly expressed particular interest in Mr. Hice's suggestion to allow Board Members to serve more than one term, which may decrease the chances of lengthy Board vacancies in the future.

If these bills pass, federal government employees may soon have more robust protections from retaliation and speedier resolution of their claims, which would be beneficial to American taxpayers as well as the whistleblowers.