

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

July 11, 2007

Via Electronic Transmission

Elias A. Zerhouni, M.D.
Director
National Institutes of Health
9000 Rockville Pike
Bethesda, Maryland 20892

Dear Director Zerhouni:

As a senior member of the United States Senate and the Ranking Member of the Committee on Finance (Committee), I have a duty under the Constitution to conduct oversight into the actions of executive branch agencies, including the activities of the National Institutes of Health (NIH/agency). In this capacity, I must ensure that NIH, as the primary federal agency responsible for conducting and supporting medical research, properly fulfills its mission to advance the public's welfare and makes responsible use of the public funding provided to accomplish this task. Often, the work of the NIH forms the basis for action taken by the Medicaid and Medicare programs.

Careful Congressional oversight of the NIH is especially important to ensure that NIH upholds its responsibility to provide vital medical research. Senior officials in any government agency are expected to cooperate with legitimate Congressional oversight activities, not to impede Congressional inquiries, conceal information from Congress, or make thinly veiled threats to employees who might speak out. Interfering with Congressional oversight hurts not only the agency, but also the American public. It is also important that senior officials assure their employees that it is both acceptable and within their rights to speak to Congress, should they feel compelled to do so.

I was extremely troubled after reading the last line of *The Washington Post* article dated June 27, 2007 identifying numerous allegations of mismanagement at the National Institute of Environmental Health Sciences (NIEHS/Institute). Commenting on problems at the Institute due to the leadership of David Schwartz, Director of the NIEHS, an anonymous source told *The Washington Post*, "Morale is just horrible." The *Post* reported that this individual spoke "**on the condition of anonymity for fear of retribution.**"

Several people, both inside and outside of NIEHS, alerted my staff to the fact that NIEHS employees have recently had discussions with management that left them with the impression that there would be retaliation if it was discovered that they had provided information to among others, congressional investigators. Such discussions can and often do have a chilling effect on NIEHS employees' sharing with Congress needed

information. For example, one employee said that it was implied that leaks of information could affect employee bonuses.

Often employees and other internal sources have crucial information to share and courageous whistleblowers, including NIH employees, have played important roles in Congressional inquiries in the past. To me, any attempts by senior leadership at NIEHS to stifle a Congressional investigation by me or any other Senator or Congressman demonstrates poor judgment, intolerance for dissenting opinions, and an aversion to transparency.

I continually rely on whistleblowers and others to alert me to fraud and mismanagement. In fact, I co-authored the Whistleblower Protection Act of 1989 and helped to include whistleblower protections in Sarbanes-Oxley legislation to safeguard those who expose corporate fraud, waste, and abuse. Also, I have the highest respect for whistleblowers because they are among the most patriotic people I know—men and women who come to me when they are disillusioned with the system.

With this in mind, I would like to ensure that the NIH is aware of the fact that interfering with a Congressional inquiry is against the law. I have attached a copy of 18 U.S.C. § 1505 to this letter for your reference. That law states in pertinent part that:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Additionally, denying or interfering with employees' rights to furnish information to Congress is also against the law. I have attached a copy of 5 U.S.C. § 7211 to this letter for your reference. That law states:

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

Finally, federal officials who deny or interfere with employees' rights to furnish information to Congress are not entitled to have their salaries paid by taxpayers' dollars. I have attached a copy of P.L. 109-115 § 818 to this letter for your reference. As enacted by continuing resolution (H.J. Res 20, P.L.110-5) P.L. 109-115 § 818 continues in effect. P.L. 109-115 § 818 states:

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

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or
- (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

NIH employees, like employees at any other government agency, have the right to talk to Congress. If NIH employees have concerns to share, it is not anyone's place to forbid them from doing so. Any actions to discourage employees at the NIEHS from talking to congressional investigators make me wonder what the NIEHS is trying to hide. Sunshine is the best disinfectant. If there are problems at NIEHS, I am certain that concealing them is not the solution. It does a disservice to federal employees, and ultimately to the public who entrust their well-being to this critical institute.

If discouraging NIEHS employees from talking to Congress was not the intent, then I suggest that NIEHS leadership correct any misconceptions they may have caused and that they correct those perceptions now. After all, it is well known that what people perceive is often their reality.

I propose that you tell NIEHS employees that you are aware of these allegations and that any attempt to threaten federal employees, either directly or indirectly, for speaking to congressional investigators will not be tolerated. This can best be accomplished by notifying NIEHS employees that they are free to talk to Congress and that you intend to protect their right to come forward and share information. To help you in this endeavor, we are sending you the fax number for the Committee (202-228-2131), in case your employees would feel more comfortable sending us information in confidence. However, if you feel it is appropriate to prohibit NIEHS employees from bringing their concerns to Congress then please articulate that position in writing.

I thank you for your prompt attention to this matter and your continued cooperation. If you have any questions please contact my Committee staff, Angela Choy or Paul Thacker at (202) 224-4515. Any formal correspondence should be sent electronically in PDF searchable format to thomas_novelli@finance-rep.senate.gov.

Sincerely,



Charles E. Grassley
Ranking Member

Enclosures:

Statutory text 18 U.S.C. § 1505

Statutory text 5 U.S.C. § 7211

Statutory text P.L. 109-115 § 818

18 U.S.C.A. § 1505

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Effective: December 17, 2004

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 73--OBSTRUCTION OF JUSTICE

→§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in [section 2331](#)), imprisoned not more than 8 years, or both.

Current through P.L. 110-11 approved 03-07-07

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5 U.S.C.A. § 7211



Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III--EMPLOYEES
SUBPART F--LABOR-MANAGEMENT AND EMPLOYEE RELATIONS
CHAPTER 72--ANTIDISCRIMINATION; RIGHT TO PETITION CONGRESS
SUBCHAPTER II--EMPLOYEES' RIGHT TO PETITION CONGRESS
→§ 7211. Employees' right to petition Congress

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

Current through P.L. 110-11 approved 03-07-07

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as well as any other space used primarily by the individual or the use of which is directly controlled by the individual.

SEC. 815. Notwithstanding section 1346 of title 31, United States Code, or section 809 of this Act, funds made available for the current fiscal year by this or any other Act shall be available for the interagency funding of national security and emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities, as provided by Executive Order No. 12472 (April 3, 1984).

SEC. 816. (a) None of the funds appropriated by this or any other Act may be obligated or expended by any Federal department, agency, or other instrumentality for the salaries or expenses of any employee appointed to a position of a confidential or policy-determining character excepted from the competitive service pursuant to section 3302 of title 5, United States Code, without a certification to the Office of Personnel Management from the head of the Federal department, agency, or other instrumentality employing the Schedule C appointee that the Schedule C position was not created solely or primarily in order to detail the employee to the White House.

(b) The provisions of this section shall not apply to Federal employees or members of the armed services detailed to or from—

- (1) the Central Intelligence Agency;
- (2) the National Security Agency;
- (3) the Defense Intelligence Agency;
- (4) the offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs;
- (5) the Bureau of Intelligence and Research of the Department of State;
- (6) any agency, office, or unit of the Army, Navy, Air Force, and Marine Corps, the Department of Homeland Security, the Federal Bureau of Investigation and the Drug Enforcement Administration of the Department of Justice, the Department of Transportation, the Department of the Treasury, and the Department of Energy performing intelligence functions; and
- (7) the Director of National Intelligence or the Office of the Director of National Intelligence.

SEC. 817. No department, agency, or instrumentality of the United States receiving appropriated funds under this or any other Act for the current fiscal year shall obligate or expend any such funds, unless such department, agency, or instrumentality has in place, and will continue to administer in good faith, a written policy designed to ensure that all of its workplaces are free from discrimination and sexual harassment and that all of its workplaces are not in violation of title VII of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241), as amended, the Age Discrimination in Employment Act of 1967 (Public Law 90-202, 81 Stat. 602), and the Rehabilitation Act of 1973 (Public Law 93-112, 87 Stat. 355).

SEC. 818. No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee

of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

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

~~SEC. 819. (a) None of the funds made available in this or any other Act may be obligated or expended for any employee training that—~~

(1) does not meet identified needs for knowledge, skills, and abilities bearing directly upon the performance of official duties;

(2) contains elements likely to induce high levels of emotional response or psychological stress in some participants;

(3) does not require prior employee notification of the content and methods to be used in the training and written end of course evaluation;

(4) contains any methods or content associated with religious or quasi-religious belief systems or "new age" belief systems as defined in Equal Employment Opportunity Commission Notice N-915.022, dated September 2, 1988; or

(5) is offensive to, or designed to change, participants' personal values or lifestyle outside the workplace.

(b) Nothing in this section shall prohibit, restrict, or otherwise preclude an agency from conducting training bearing directly upon the performance of official duties.

SEC. 820. No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952