

STIFLING DISSENT

How the Federal Government's Channels for Challenging Policies from Within Fall Short

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PROJECT ON GOVERNMENT OVERSIGHT

ABOUT

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THE PROJECT ON GOVERNMENT OVERSIGHT (POGO) IS A NONPARTISAN INDEPENDENT WATCHDOG that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

WE CHAMPION REFORMS to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.



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Executive Summary

The Project On Government Oversight (POGO) reviewed official government channels at six agencies that allow federal employees to express their disagreement with policies or policy proposals, or to propose policies or policy changes (“dissent channels”). POGO found:

- Many federal employees say these channels are a waste of time, and that they fear retaliation. Some have said they fear or have faced reprisal from agency management for using them; there are also some employees who have used the channels who say they were not retaliated against. There appear to be few public success stories where use of dissent channels led to change, or factored into a serious reconsideration of policies.
- Agency dissent channels vary considerably:
 - Some agencies set up their channel as a dissent *reporting* mechanism while others go farther and set up a dissent *resolution* mechanism. Reporting mechanisms primarily serve to ensure that leaders are aware of dissenting opinions. Resolution mechanisms exist mostly in agencies where the dissent is primarily technical in nature. Resolution mechanisms aim to investigate and reach a conclusion on the contested issue.
 - Some agencies allow only agency employees to access the dissent channel, while others allow contractor employees to express policy dissent as well.
 - Some agencies provide dissenters with a process for appealing the initial agency response to their dissent, while others do not.
 - Some agencies offer an avenue for dissenting against almost any kind of agency policy or for proposing almost any kind of new policy, while others only provide a channel for a specific subset of issues.
 - Some agencies are fairly transparent about the policy dissents communicated through their channels, while others release almost no information.
- Existing statutory whistleblower protections do not always protect policy dissent and, according to the federal Office of Special Counsel, it is “untested” whether statutory law would protect use of a dissent channel.
- Congressional oversight of these channels—including how management responds to dissent and whether employees fear retaliation—is vital. Congress needs to ensure that policy dissent communicated to Congress and in other ways is protected.

POGO made recommendations for executive branch and congressional action to improve dissent channels where they currently exist and to create effective ones at agencies considering creating them, for improving protections for communicating policy disagreements, for improving transparency and oversight of dissent channel use, and for improving the government’s culture regarding policy dissent from within.

Introduction

“They should either get with the program or they can go.”
– Sean Spicer, former White House press secretary¹

As of publication, the coronavirus pandemic has claimed the lives of about 150,000 people in the U.S. alone and has ravaged the U.S. economy.² Future reviews of the government’s response, such as by a 9/11 Commission-style panel that has been proposed, may unearth instances of federal employees who sought policy changes that could have significantly reduced the toll of the coronavirus but the government did not heed their input or unduly delayed their proposals.³ Yet retrospective oversight is no substitute for mechanisms within the government bureaucracy that offer a protected channel for employees to propose policy changes or point out concerns with policies before a disaster occurs.⁴

And then, in the midst of the pandemic, a Minneapolis police officer, Derek Chauvin, was filmed killing George Floyd, a Black man, even as Floyd and those witnessing the horror pleaded for his life. Chauvin knelt on Floyd’s neck for nearly nine minutes even as Floyd was handcuffed on the ground and long after he ceased moving.⁵ The killing—one of innumerable unjust deaths of Black Americans at the hands of police⁶—has sparked widespread protests across America. It has led commentators to revisit policy changes made early in the Trump administration that significantly eased federal civil rights oversight of local law enforcement,⁷ with some arguing these policy shifts

¹ Mark Landler, “State Dept. Officials Should Quit if They Disagree With Trump, White House Warns,” *New York Times*, January 31, 2017. <https://www.nytimes.com/2017/01/31/us/politics/sean-spicer-state-dept-travel-ban.html>

² “Cases in the U.S.,” Centers for Disease Control and Prevention, last modified July 29, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>; “An Incalculable Loss,” *New York Times*, updated May 27, 2020. <https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html>; Nick Schwellenbach, “The First 100 Days of the U.S. Government’s COVID-19 Response,” Project On Government Oversight, May 6, 2020. <https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response>

³ Congressional Research Service, *Proposals for a COVID-19 Congressional Advisory Commission: A Comparative Analysis*, R46330 (April 28, 2020). <https://crsreports.congress.gov/product/pdf/R/R46330>; One high-level career civil servant has already become public. Rick Bright, who led the Biomedical Advanced Research and Development Authority, has said he pushed the administration to act faster to procure personal protective equipment. Norah O’Donnell, “The government whistleblower who says the Trump administration’s coronavirus response has cost lives,” *60 Minutes*, May 18, 2020. <https://www.cbsnews.com/news/rick-bright-whistleblower-trump-administration-coronavirus-pandemic-response>

⁴ Relatedly, the Project On Government Oversight has recently written about the broader need for scientific integrity policies and about the growing number of whistleblower claims related to the coronavirus. Rebecca Jones, “A Pandemic Response that Puts Politics Before Science is Doomed to Fail,” Project On Government Oversight, May 1, 2020. <https://www.pogo.org/analysis/2020/05/a-pandemic-response-that-puts-politics-before-science-is-doomed-to-fail/>; Nick Schwellenbach, “Watchdog Examining Dozens of Federal Coronavirus Whistleblower Cases,” Project On Government Oversight, May 4, 2020. <https://www.pogo.org/investigation/2020/05/watchdog-examining-dozens-of-federal-coronavirus-whistleblower-cases/>

⁵ Kim Barker and Matt Furber, “Bail Is at Least \$1 Million for Ex-Officer Accused of Killing George Floyd,” *New York Times*, June 8, 2020. <https://www.nytimes.com/2020/06/08/us/derek-chauvin-court.html>

⁶ Wayne McElrath and Sarah Turberville, “Poisoning Our Police: How the Militarization Mindset Threatens Constitutional Rights and Public Safety,” Project On Government Oversight, June 9, 2020. <https://www.pogo.org/analysis/2020/06/poisoning-our-police-how-the-militarization-mindset-threatens-constitutional-rights-and-public-safety/>

⁷ Steve Benen, “A fresh look at Trump reversing Obama’s police investigations policy,” MSNBC, June 1, 2020. <https://www.msnbc.com/rachel-maddow-show/fresh-look-trump-reversing-obama-s-police-investigations-policy-n1221056>; Vanita

have enabled more police abuses.⁸ One anonymous Justice Department official told *ProPublica* in 2018 that one of the most sweeping policy changes came “with no notice and no discussion” internally within the department.⁹

The coronavirus and the killing of Floyd are far from the first national crises where the public has been left wondering whether different government policies could have averted, or at least mitigated, tragic and harmful outcomes. In some of those crises, it has come to light that there were significant internal disagreements within the federal bureaucracy about the government’s policies.

The U.S. war in Afghanistan is just one example. In December 2019, the *Washington Post* published what it dubbed “the Afghanistan Papers”—confidential government interviews of more than 400 government officials and others involved in the conflict on their views of what went wrong. The records show that top U.S. diplomats and military officials had expressed profound doubts to an independent government office about the United States’ policy goals in the conflict, what winning the war looked like, and whether there was even a plausible chance at success. “The American people have constantly been lied to,” Special Inspector General for Afghanistan Reconstruction John Sopko, who leads the office that conducted the interviews, told the *Post*.¹⁰

Others were less private about their concerns. In 2012, Lieutenant Colonel Daniel L. Davis published an article in the *Armed Forces Journal* publicly accusing military leaders of systematically deceiving the public to make themselves and the ongoing war look better. “When having to decide whether to continue a war, alter its aims or to close off a campaign that cannot be won at an acceptable price, our senior leaders have an obligation to tell Congress and [the] American people the unvarnished truth and let the people decide what course of action to choose.”¹¹ His assessments led to widespread media attention, and he gave classified briefings to members of Congress, but little to nothing changed.¹²

Gupta, “What a just Justice Department would do about George Floyd’s death,” *Washington Post*, June 2, 2020.

<https://www.washingtonpost.com/opinions/2020/06/02/what-just-justice-department-would-do-about-george-floyds-death/>

⁸ Ryan J. Reilly, “Trump Justice Department Killed Police Reform Programs That Could Have Helped Minneapolis,” *Huffington Post*, June 1, 2020. https://www.huffpost.com/entry/trump-doj-police-reform-minneapolis-protests_n_5ed11aa0c5b6228cfe1b4cf; Sean Collins, “Trump’s policies have enabled police violence against black Americans,” *Vox*, May 30, 2020.

<https://www.vox.com/identities/2020/5/30/21275588/trump-policing-policies-doj-george-floyd-protests>; Pema Levy, “Trump and Sessions Released Cops From Federal Oversight. Now We See the Results,” *Mother Jones*, June 2, 2020. <https://www.motherjones.com/crime-justice/2020/06/jeff-sessions-george-floyd/>

⁹ Ian MacDougall, “Why Jeff Sessions’ Final Act Could Have More Impact Than Expected,” *ProPublica*, November 18, 2018. <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected>

¹⁰ Craig Whitlock, “At War With the Truth,” *Washington Post*, December 9, 2019.

<https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-documents/>

¹¹ Daniel L. Davis, “Truth, lies and Afghanistan,” *Armed Forces Journal*, February 1, 2012. <http://armedforcesjournal.com/truth-lies-and-afghanistan/>

¹² *The Afghanistan Papers: Costs and Benefits of America’s Longest War: Hearing before the Senate Homeland Security and Government Affairs Committee*, 116th Cong. (February 11, 2020) (statement of retired Army Lieutenant Colonel Daniel L. Davis).

https://www.hsgac.senate.gov/imo/media/doc/Davis_Testimony1.pdf; Institutional disclosure: Davis serves on a Project On Government Oversight advisory board.

In the government, those who dissent face significant professional risks by speaking out.¹³ Davis, for instance, was risking his military career to tell the truth when he believed military leadership was telling lies. Even when employees have certain protections for communicating policy concerns through official channels, there is still risk because the protections are often limited, and the personnel operating the channels often cannot act on the concerns raised regarding policy disagreements. As for those who spoke with the inspector general about their concerns, they were faced with the fact that inspectors general operate “in a narrow area” and “are not to settle policy disputes,” as Council of the Inspectors General on Integrity and Efficiency Chairman Michael Horowitz said in 2018.¹⁴ Inspectors general are typically focused on identifying waste, fraud, or abuse, and violations of laws, rules, or regulations, and cannot weigh in on policy discussions, except in limited ways.¹⁵

Federal employees can and do help identify and fix ill-conceived or otherwise flawed policies—if empowered to do so. In some cases, the impacts from changing policies or avoiding bad policies can be substantial and affect the nation as a whole, yet, understandably, not all federal employees are willing to risk their livelihoods in order to challenge bad policies. An official government mechanism that not only protects insiders who raise policy concerns but also requires leaders to respond to them and, if appropriate, act on them could improve government oversight and accountability.

Throughout this report, the Project On Government Oversight (POGO) will refer to such mechanisms generally as dissent channels. These are formal avenues for employees within an organization to express their professional concerns about an agency policy or policy proposal. If valid expert concerns and truth telling are heeded, such dissent could conceivably protect our nation from attack or keep the U.S. out of a war, prevent the meltdown of the economy, better prepare the nation for deadly pandemics, or otherwise help the nation avert or mitigate a crisis.

In 2019, months before the Post published the Afghanistan Papers, two members of Congress sought to allow members of the military and Defense Department civilians to “privately provide dissenting views regarding Department of Defense and United States national security policy

¹³ There are various definitions of “dissent.” In this report, the word means “to differ in opinion” when used as a verb and a “difference of opinion” when used as a noun. It is not a reference to “political opposition to a government or its policies,” which is another definition of the word. “Dissent,” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/dissent>; A 1976 State Department newsletter acknowledged that the word “dissent” has “taken on an unfortunate pejorative connotation. Those who are unsympathetic even sometimes confuse ‘dissent’ with ‘disloyalty.’” Neil A. Boyer, “The dissent channel: Who’s using it?” Department of State Newsletter, issue 183, October 1976, 29. <https://tinyurl.com/y8js67sx>

¹⁴ Charles S. Clark, “Inspectors General Mark 40th Year Feeling Needed But Stretched,” *Government Executive*, July 12, 2018. <https://www.govexec.com/federal-news/2018/07/inspectors-general-mark-40th-year-feeling-needed-stretched/149689/>

¹⁵ Sopko’s office commendably brought a broad critical eye to the U.S. presence in Afghanistan with a series of “Lessons Learned” reports. But, Sopko testified, “our Lessons Learned Program does not address the broader policy debate of whether or not our country should be in Afghanistan.” *The Afghanistan Papers: Costs and Benefits of America’s Longest War: Hearing before the Senate Homeland Security and Government Affairs Committee*, 116th Cong. (February 11, 2020) (statement of John F. Sopko, Special Inspector General for Afghanistan Reconstruction). <https://www.hsgac.senate.gov/imo/media/doc/Sopko%20Testimony2.pdf>

without fear of retribution.”¹⁶ The attempt failed, so service members and Defense Department civilians are still without a protected dissent channel.¹⁷ And they are not alone: Other agencies also lack protected channels for expressing policy dissent.

The Federal Reserve and its various regional banks, for example, didn’t have a dissent channel that exists outside the regular chain of command—at least until recently. In 2009, an expert review commissioned by the New York Federal Reserve Bank—a key part of the Federal Reserve System overseeing Wall Street—described employees who, in the lead up to the financial crisis, “saw issues but did not respond” and were afraid of “speaking up in contradiction to others, especially superiors.”¹⁸ Across the Federal Reserve, those who wanted to challenge Wall Street “were beaten down pretty regularly,” Phil Angelides, who led the official Financial Crisis Inquiry Commission, told the Huffington Post. “For so long the regulators and bank supervisors were held back by the leadership of the Fed.”¹⁹

The 2009 review of the New York Fed recommended it “launch a sustained effort to overcome excessive risk-aversion and get people to speak up when they have concerns, disagreements or useful ideas. Encourage a culture of critical dialogue and continuous questioning.”²⁰ The review advised the New York Fed to “set up a channel for handling systemic concerns when they arise, a formal channel for turning systemic concerns into recommendations for action”—in other words, a dissent channel. The Fed’s senior managers “need to encourage dissent rather than stifle it,” according to the review.²¹

In the years that followed, Federal Reserve employees remained afraid of dissenting. A 2013 survey found that only a third of Fed employees believed it was “safe to speak up and constructively challenge things.”²² According to a 2016 report from the Federal Reserve’s inspector general, all regional banks have “various internal channels through which employees can raise a variety of concerns, in some cases anonymously,” but that at least within the New York Fed, “some

¹⁶ *Text of H.R. 2500, National Defense Authorization Act for Fiscal Year 2020*, House Rules Committee Print No. 116-19 (amendment 283) (2019). <https://amendments-rules.house.gov/amendments/Dissent%20Channel%20Kildee62519092107217.pdf>; Representatives Dan Kildee (D-MI) and Jackie Speier (D-CA) sponsored the amendment. House Rules Committee, “H.R. 2500 - National Defense Authorization Act for Fiscal Year 2020.” <https://rules.house.gov/bill/116/hr-2500>; Kildee reintroduced the amendment in June 2020. *Text of H.R. 6395, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, House Rules Committee Print No. 116-57 (amendment 307) (2020). <https://amendments-rules.house.gov/amendments/Dissent%20Channel%20Kildee62519092107217.pdf>

¹⁷ A retired Army lieutenant general also recently recommended a dissent channel for the military. David Barno and Nora Bensahel, “Loyalty and Dissent: Getting Flag Officers to Hear the Truth,” *War on the Rocks*, March 19, 2019. <https://warontherocks.com/2019/03/loyalty-and-dissent-getting-flag-officers-to-hear-the-truth/>

¹⁸ David Beim et al., *Federal Reserve Bank of New York: Report on Systemic Risk and Bank Supervision*, Discussion Draft, September 10, 2009, 2-3. <https://www.documentcloud.org/documents/1303305-2009-08-18-frbny-report-on-systemic-risk-and.html>; A 2014 *ProPublica* and *This American Life* story made the report public for the first time. Jake Bernstein, “Inside the New York Fed: Secret Recordings and a Culture Clash,” *ProPublica*, September 26, 2014. <https://www.propublica.org/article/carmen-segarras-secret-recordings-from-inside-new-york-fed>

¹⁹ Shahien Nasiripour, “Federal Reserve Employees Afraid To Speak Put Financial System At Risk,” *Huffington Post*, August 28, 2013. https://www.huffingtonpost.com/2013/08/28/federal-reserve-employees-survey_n_3826165.html

²⁰ Beim et al., *Federal Reserve Bank of New York: Report on Systemic Risk and Bank Supervision*, 4 [see note 18].

²¹ Beim et al., *Federal Reserve Bank of New York: Report on Systemic Risk and Bank Supervision*, 2, 10 [see note 18].

²² Nasiripour, “Federal Reserve Employees Afraid To Speak Put Financial System At Risk” [see note 19].

interviewees identified reservations, including whether anything would be done in response to their concern or whether these channels are truly independent.”²³ According to a Government Accountability Office report, as of 2017, the Federal Reserve was developing “an independent channel at each Reserve Bank ... outside of the normal chain of command for employees to voice supervisory concerns or disagreements.”²⁴ In response to a question about the status of the development of these channels, the Federal Reserve office of inspector general told POGO that it considers its recommendation for Federal Reserve Banks to “increase employees’ willingness to share views” addressed as of September 2017.²⁵

Agencies that lack dissent mechanisms can learn from several other federal agencies with existing ones.

The first federal dissent channel was created in the State Department nearly half a century ago, after then-Secretary of State William Rogers found that he wasn’t receiving accurate information about what was happening on the ground during the Vietnam War. Since then, a handful of other federal agencies have created their own. The impetus for creating such channels is often a disaster, scandal, or significant government failure. For instance, the Nuclear Regulatory Commission (NRC), which oversees the nuclear industry, established its Differing Professional Opinion process in 1980, just a year after the meltdown at the Three Mile Island nuclear power plant. The National Aeronautics and Space Administration (NASA) created a limited, safety-focused reporting process after the space shuttle Challenger exploded in 1986, and added a dissent resolution process covering a broader array of policy issues in the aftermath of the 2003 space shuttle Columbia disaster.

And more experts are beginning to recognize the need for such channels. “Internal checks and balances like these are essential to preserving our founders’ vision of government,” Neal Katyal, constitutional expert and former top Justice Department official, wrote in 2016.²⁶

Still, federal dissent channels have not received much serious examination. POGO examined several dissent mechanisms to better understand how they operate, and particularly how they can be

²³ Office of Inspector General for the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau, *Opportunities Exist to Increase Employees’ Willingness to Share Their Views About Large Financial Institution Supervision Activities*, 2016-SR-B-014 (November 14, 2016), 42-43.

<https://oig.federalreserve.gov/reports/board-employee-views-large-financial-institution-supervision-nov2016.pdf>

²⁴ Government Accountability Office, *Improved Implementation of Federal Reserve Policies Could Help Mitigate Threats to Independence*, GAO-18-118 (November 2017), 32. <https://www.gao.gov/assets/690/688140.pdf>

²⁵ Email from Federal Reserve Office of Inspector General Spokesperson John Manibusan to POGO Senior Investigator Nick Schwellenbach about the status of a recommendation, July 15, 2020.

²⁶ Neal Katyal, “Washington Needs More Dissent Channels,” *New York Times*, July 1, 2016.

<https://www.nytimes.com/2016/07/02/opinion/washington-needs-more-dissent-channels.html>; Frederick A.O. Schwarz Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: The New Press, 2008), 214.

<https://tinyurl.com/yayswfbv>; However, for internal checks and balances—even for more robust ones such as inspectors general—to work effectively and independently in the executive branch, they need to be backed up by Congress. Danielle Brian, “It’s Time for Congress to Stand Up To Trump,” Project On Government Oversight, April 2, 2020. <https://www.pogo.org/analysis/2020/04/its-time-for-congress-to-stand-up-to-trump/>

improved. We sifted through agency and court records, conducted interviews with former career civil servants and political appointees, and obtained previously unpublished information from the Office of Special Counsel, United States Agency for International Development, and the Nuclear Regulatory Commission about how policy dissent is handled in those agencies.

At their best, the channels encourage constructive dissent, and there is evidence that at times they have helped agencies craft more effective policies or reassess them. For example, a dissent channel message sent in early 2013 by diplomat David Holmes said an overlapping, duplicative, and confusing division of State Department authority for Afghanistan and Pakistan “hindered our diplomatic effectiveness” in South Asia.²⁷ According to an award he was given by the American Foreign Service Association, his dissent prompted department leaders to reassess their approach to the region. “His message was so good and so influential that it went all the way to the secretary of state,” according to Eric Rubin, the president of the American Foreign Service Association.²⁸ A press report said the Obama administration planned to dismantle the office of the special representative for Afghanistan and Pakistan—a focus of Holmes’ dissent. (The Trump administration ultimately ended the special representative position, faster than experts say the Obama administration planned to do.)²⁹

For some federal employees, though, the channels are seen as a waste of effort and cases such as Holmes, at least at the State Department, appear to be rare.³⁰ In former State Department diplomat Elizabeth Shackelford’s book, *The Dissent Channel: American Diplomacy in a Dishonest Age*, she writes of the department’s dissent channel that “One could generously describe it as a type of departmental suggestion box, though it would be more accurate to picture it as a shredder.”³¹

At their worst, internal government channels are seen by some employees as traps that help management target those they deem to be “disloyal” employees.³² Whether that’s the case or not,

²⁷ American Foreign Service Association, “A Call for a More Strategic Approach to South Asia,” *Foreign Service Journal*, Vol. 91, No. 9 (September 2014): 60.

https://www.afsa.org/sites/default/files/flipping_book/0914/files/assets/basic-html/index.html#60; “Former State Department Employee Dan Feldman On His Time Working With David Holmes,” National Public Radio, November 15, 2019. <https://www.npr.org/2019/11/15/779902395/former-state-department-employee-dan-feldman-on-his-time-working-with-david-holm>

²⁸ Braktkon Booker, “A Diplomat With A History Of Voicing Concerns Set To Testify In Impeachment Inquiry,” National Public Radio, November 21, 2019. <https://www.npr.org/2019/11/21/781464927/a-diplomat-with-a-history-of-voicing-concerns-set-to-testify-in-impeachment-inqu>

²⁹ American Foreign Service Association, “A Call for a More Strategic Approach to South Asia” [see note 27]; [Robbie Gramer](#), “State Department to Scrap Afghanistan-Pakistan Envoy,” *Foreign Policy*, June 23, 2017. <https://foreignpolicy.com/2017/06/23/state-department-to-scrap-afghanistan-pakistan-envoy/>

³⁰ Hannah Gurman, *The Dissent Papers: The Voices of Diplomats in the Cold War and Beyond* (New York: Columbia University Press, 2012), 175-179.

³¹ Elizabeth Shackelford, *The Dissent Channel: American Diplomacy in a Dishonest Age* (New York: Public Affairs, 2020), 245.

³² Robert J. McCarthy, “Taking the Stand: Paying the Price of Disclosure,” *Washington Lawyer*, October 2012. <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2012-taking-the-stand.cfm> William J. Burn, “Trump’s Bureaucratic Arson,” *The Atlantic*, November 19, 2019. <https://www.theatlantic.com/ideas/archive/2019/11/deep-state-isnt-problem-weak-state/602131/>

throughout this report, POGO recounts several cases where federal employees say they faced retaliation for using their agency’s dissent channel.

Despite professing to prize independent and critical thought, bureaucracies often tend to penalize it in practice, especially when it concerns an administration’s policy priorities and might embarrass or anger agency leadership and even the White House.³³ Retaliation and the fear of being seen as disloyal are powerful disincentives to dissent, and need to be countered with strong protections and, ideally, positive incentives for using the channels correctly, such as awards. This is a key reason dissent channels should allow employees to be anonymous when they dissent. This is also why the independence of those running the dissent channels is important.

Overall, we found that most existing channels are used infrequently. Across presidential administrations, irrespective of political party, and at agencies across the government these channels are often viewed as ineffectual, and many career employees with access to a dissent channel still fear retaliation for using it. These employees say their agency’s organizational culture stigmatizes and sometimes punishes those who use the channel. Other former senior officials we interviewed offered a different explanation for the low usage rates, saying the low use may also suggest that employees feel comfortable dissenting in less formal ways.

³³ There appears to be a heightened risk of retaliation against dissenters under the current administration:

- “Trump appears to be launching the biggest assault on the nation’s civil service system since the 1883 Pendleton Act ended the spoils system,” said Paul C. Light, a New York University professor who has written widely on the federal government and oversight. Peter Baker, “Trump’s Efforts to Remove the Disloyal Heightens Unease Across His Administration,” *New York Times*, February 22, 2020. <https://www.nytimes.com/2020/02/22/us/politics/trump-disloyalty-turnover.html>
- In April 2020, Trump terminated Intelligence Community Inspector General Michael Atkinson, a Trump appointee, in what appeared to be retaliation for communicating a whistleblower’s disclosure to congressional intelligence committees as required by law. The disclosure concerned the president’s dealings with Ukraine, which appeared to be aimed at hobbling a political rival, Joe Biden. The disclosure sparked impeachment proceedings that led to the House’s impeachment and the Senate’s subsequent acquittal of Trump. Trump said at a press conference after he terminated Atkinson that Atkinson “took this terrible, inaccurate whistleblower report and he brought it to Congress.” Atkinson’s transmission to Congress was required by law. [Kyle Cheney, “Atkinson: Trump fired me because I handled the whistleblower complaint properly,” *Politico*, April 5, 2020. <https://www.politico.com/news/2020/04/05/atkinson-trump-fired-whistleblower-complaint-167371>](https://www.politico.com/news/2020/04/05/atkinson-trump-fired-whistleblower-complaint-167371)
- Then-acting director of the Office of Management and Budget Mick Mulvaney said in a speech at Oxford leaked to the *Washington Post* that federal employees “should put their name on the effing ballot” if they want to have a say in making policy rather than implementing the administration’s priorities. While it is the job of civil servants to implement policy decisions as long as they are legal, every administration should welcome constructive criticism, as federal employees are likely to have in-depth and knowledgeable perspectives on the pitfalls and benefits of policy choices. Toluse Olorunnipa, Ashley Parker, and Josh Dawsey, “Trump embarks on expansive search for disloyalty as administration-wide purge escalates,” *Washington Post*, February 21, 2020. https://www.washingtonpost.com/politics/were-cleaning-it-out-trump-embarks-on-expansive-search-for-disloyalty-as-administration-wide-purge-escalates/2020/02/21/870e6c56-54c1-11ea-b119-4faabac6674f_story.html
- Scott Shuchart, a senior career official at the Department of Homeland Security’s Office for Civil Rights and Civil Liberties, resigned in the summer of 2018 over the Trump administration’s policy of separating families at the U.S.-Mexico border. He told POGO that he quit in part because his office had essentially been cut out of several major immigration policy decisions with civil rights implications, including the family separation policy. “Political leadership,” he said, “also has to be able to learn from the career workforce what the facts really are, what the challenges to accomplishing political objectives will really be, and—in my area at least—some realism about what is legally and constitutionally possible.” Nick Schwellenbach, “A Conversation with Former DHS Official Who Resigned over Family Separation,” Project On Government Oversight, December 5, 2018. <https://www.pogo.org/analysis/2018/12/conversation-with-former-dhs-official-who-resigned-over-family-separation/>

POGO also found agencies use these channels differently. Some set up their channel as a dissent reporting mechanism while others go farther and set up a dissent resolution mechanism. Reporting mechanisms typically place minimal obligations on leadership to respond or investigate, and primarily serve to ensure that leaders are aware of dissenting opinions or information that might otherwise be filtered out by multiple layers of bureaucracy. The State Department's Dissent Channel is the best-known example of a dissent reporting mechanism.

Resolution mechanisms exist mostly in agencies where the dissent is primarily technical in nature. Resolution mechanisms are typically more complex systems aimed at determining the agency's formal position on a contested issue. Because of this, resolution processes generally require more involvement by agency leadership and take longer, but are much more likely to result in identifiable changes. The Nuclear Regulatory Commission's Differing Professional Opinion process and NASA's Dissenting Opinion Process are the primary examples of dissent resolution mechanisms.

There are also differences in who may use these channels. For instance:

- Some agencies allow only agency employees to access the dissent channel, while others allow contractor employees to express policy dissent as well.
- Some agencies provide dissenters with a process for appealing the initial agency response to their dissent, while others do not have an appeals process.
- Some agencies offer an avenue for dissenting against almost any kind of agency policy or for proposing almost any kind of new policy, while others only provide a channel for a specific subset of issues.
- Some agencies are fairly transparent about the policy dissents communicated through their channels, while others release almost no information.

This report recommends ways to improve dissent channels where they currently exist and outlines ways to create effective ones in agencies that lack them. The report should also serve as a catalyst for additional examination of dissent channels. Many agencies do not publicly release even basic information about their dissent channels, such as how often they are used, and were not forthcoming or did not respond to POGO's queries for such data. In sum, there is room for more study in this arena.

In addition, congressional oversight of these channels and their use—including how management responds to dissent and whether employees fear retaliation—is vital.

Congress should explicitly include the expression of policy dissent, whether through a formal dissent channel or not, under statutory whistleblower protections. Currently, there is only a patchwork of agency policies protecting dissent, and statutory whistleblower protections do not cover many kinds of policy dissent, including when employees constructively propose improved

policies.³⁴ Statutory whistleblower protections do protect “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation”—a clause that has typically applied to formal grievances or legal complaints and appeals—but whether the clause would apply to the use of a dissent channel remains untested, the Office of Special Counsel told POGO.³⁵

And Congress needs to protect federal employees who communicate their policy dissent to the legislative branch. Although the First Amendment and a statute more than a century old protect these communications, in practice, they are not enough on their own to defend against executive branch assaults on Congress’s constitutional prerogatives.³⁶

³⁴ In order for a dissenter’s policy disclosure to be legally protected under civil service whistleblower law, the Merit Systems Protection Board requires the dissenter to demonstrate that the impropriety of the policy is not “debatable among reasonable people.” This is a very high bar. *O’Donnell v. Department of Agriculture*, No. CH-1221-12-0436-W-1 (M.S.P.B. September 10, 2013), 7, citing *White v. Department of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004). <https://www.documentcloud.org/documents/4425567-O-Donnell-v-Agriculture.html>; Examples of failed attempts to receive protection for policy dissent include:

- *Webb v. Department of the Interior*, No. DA-1221-14-0006-W-1, p. 4 (M.S.P.B. January 13, 2015). <https://www.documentcloud.org/documents/4454098-Webb-v-Interior.html>
- *Standley v. Department of Energy*, No. DC-1221-16-0168-W-1 (M.S.P.B. January 3, 2017). <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1369583&version=1374953>
- *Fowke v. Department of Commerce*, No. DC-1221-17-0421-W-1 (M.S.P.B. May 17, 2017). <https://www.documentcloud.org/documents/4425566-FOWKE-MARGARET-L-v-DOC.html>
- *Tarrab v. Department of Transportation*, No. DC-1221-16-0401-W-1 (M.S.P.B. September 23, 2016), 4. <https://www.documentcloud.org/documents/4425568-TARRAB-ALAN-v-DOT.html>

³⁵ 5 U.S.C. §2302(b)(9); Email from OSC Communications Director Zachary Kurz to POGO Investigator Daniel Van Schooten about Prohibited Personnel Practices September 10, 2018; The Office of Special Counsel filed a relevant amicus curiae brief with the Merit Systems Protection Board (which is currently unable to rule on the matter as it lacks a quorum). According to the office, an administrative judge created “an unwarranted distinction between agency components that investigate or review ‘the agency’ and those that investigate or review ‘internal complaints and issues.’” Brief of the U.S. Office of Special Counsel as Amicus Curiae Supporting Petitioner, *Timothy Mohler v. Department of Homeland Security*, Merit Systems Protection Board (2020). [https://osc.gov/Documents/PPP/Amicus%20Curiae%20Briefs/OSC%20Amicus%20Curiae%20Brief%20in%20Mohler%20v.%20Department%20of%20Homeland%20Security%20\(MSPB\)%20filed%20January%2029,%202020.pdf](https://osc.gov/Documents/PPP/Amicus%20Curiae%20Briefs/OSC%20Amicus%20Curiae%20Brief%20in%20Mohler%20v.%20Department%20of%20Homeland%20Security%20(MSPB)%20filed%20January%2029,%202020.pdf); Employees who engage in either protected whistleblowing or policy related dissent cannot rely on the Constitution to protect their jobs. In the 2006 Supreme Court case *Garcetti v. Ceballos*, the court held that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.” A public employee is most likely to receive First Amendment protections for speech while off the job and unrelated to their official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Opinion at p. 12. <https://www.supremecourt.gov/opinions/05pdf/04-473.pdf>

³⁶ The executive branch—through multiple administrations stretching back decades and as recently as the Trump administration—has sought to limit communications from federal employees to Congress. The Justice Department’s influential Office of Legal Counsel (OLC) has asserted that communications by executive branch employees to Congress cannot be unfettered. Some OLC memos in this vein are as follows:

- Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, Office of Legal Counsel, May 21, 2004. <https://www.justice.gov/file/18866/download>
- “Urgent Concern” Determination by the Inspector General of the Intelligence Community, Office of Legal Counsel, September 3, 2019. <https://www.justice.gov/olc/opinion/file/1205711/download>;

The First Amendment and the Lloyd-Lafollette Act of 1912 give federal employees the right to petition Congress, and they set no limits on what can be communicated (despite OLC’s contrary view). However, if the communication is not considered a protected whistleblower disclosure, the means of legal recourse for a federal employee who faces retaliation is murkier than it should be. The courts have ruled that federal employees have to rely on the administrative framework under Title 5 civil service law to seek redress. (“Without exhausting these administrative remedies, this Court lacks jurisdiction.” *Hardy v. Hamburg*, 69 F. Supp. 3d (D.D.C., 2014). <https://casetext.com/case/hardy-v-hamburg-1>;

- One solution under Title 5 is protecting non-whistleblowing communications under 5 U.S.C. 2302(b)(12), a catch-all section of law that offers protection for any violation of a law, rule, or regulation that implements or directly concerns merit systems principles. The Office of Special Counsel found in an investigation involving a Department of Veterans Affairs (VA) employee that

To be clear, even if an employee’s dissent is legally protected, employees are still obligated to obey orders—including ones they disagree with—as long as the orders are lawful.³⁷

Legal protections are only one piece of the puzzle: Arguably the most important factor behind effective dissent mechanisms and an “open organizational culture” is leadership commitment, according to a 2013 study commissioned by the Nuclear Regulatory Commission.³⁸ If leaders do not value dissent, the organization as a whole will see dissent as a bureaucratic burden and perceive dissenters as troublemakers instead of constructive, engaged employees. (Paradoxically, when leaders embrace dissent, specific channels for dissent are needed less, since dissent can safely be expressed in less formal ways.)

The other key factors identified in the study were clear policies, training for employees about how and when to use the mechanism, open and honest communication, and a set process for transparently evaluating the program. Clear policies are easier to learn, follow, and—importantly—enforce. Training and honest communication help set and manage expectations and prevent confusion. And regular and transparent evaluations, which are perhaps the most often overlooked of the best practices, ensure that problems and misperceptions can be corrected.

These factors were a useful framework as POGO sought to understand what was needed for successful dissent channels. However, we did not have access to enough information to adequately assess how well—if at all—federal dissent channels met these criteria. Leadership commitment can be especially hard to assess for many reasons, including the fact that leaders change over time,

because the VA terminated the employee “based on his communication to Congress, it violated section 2302(b)(12),” but noted the Merit Systems Protection Board “has not yet decided a section 2302(b)(12) case involving the termination of an employee for, among other things, petitioning Congress.” *Report of Prohibited Personnel Practice OSC Case No. MA-13-4085*, Office of Special Counsel, 10, 11.

[https://osc.gov/Documents/PPP/PPP%20Reports%20of%20Investigation%20\(Redacted\)/Prohibited%20Personnel%20Practices%20Report.%205%20U.S.C.%202302\(b\)\(12\).%20Corrective%20Action.pdf](https://osc.gov/Documents/PPP/PPP%20Reports%20of%20Investigation%20(Redacted)/Prohibited%20Personnel%20Practices%20Report.%205%20U.S.C.%202302(b)(12).%20Corrective%20Action.pdf);

- Additionally, a policy rider attached to annual appropriations bills passed by Congress creates a mechanism where an official can have their federal salary clawed back if they impede a federal employee from communicating with Congress. But this provision does not protect the federal employee directly. Department of Health and Human Services—Chief Actuary’s Communications with Congress, B-302911 (Comp. Gen. Sept. 7, 2004). <https://www.gao.gov/decisions/appro/302911.pdf>; Senator Chuck Grassley, “Grassley Discusses History of Oversight: The Lloyd-La Follette Act,” July 2, 2018. <https://www.grassley.senate.gov/news/news-releases/grassley-discusses-history-oversight-lloyd-la-follette-act>;
- Congress has other powers at its disposal, such as its power of the purse. Dylan Hedtler-Gaudette, “The Purse Is Mightier than the Sword. Now Congress Needs to Use It,” Project On Government Oversight, April 16, 2020. <https://www.pogo.org/analysis/2020/04/the-purse-is-mightier-than-the-sword-now-congress-needs-to-use-it/>

³⁷ 5 U.S.C. §2302(b)(9)(d) protects federal civilian employees for refusing to obey an order they have a reasonable belief violates a law, rule, or regulation. That section of the U.S. Code was most recently amended by the Follow the Rules Act of 2017, signed into law by Trump. Ralph R. Smith, “Follow the Rules Act Signed Into Law,” FedSmith, June 15, 2017.

<https://www.fedsmith.com/2017/06/15/follow-rules-act-signed-into-law/>; Furthermore, the existence of protections does not mean that federal employees who engage in misconduct or are poor performers are immune from discipline and accountability. Nick Schwollenbach, “Gutting Civil Service Laws Would Reduce Senior Official Accountability,” Project On Government Oversight, February 7, 2018. <https://www.pogo.org/investigation/2018/02/gutting-civil-service-laws-would-reduce-senior-official-accountability/>

³⁸ Nuclear Regulatory Commission Office of Enforcement, *2014 Differing Professional Opinions Program Assessment* (2014), Appendix D. <https://adamswebsearch2.nrc.gov/webSearch2/view?AccessionNumber=ML14272A541>

rhetoric may not translate into action, and a leader's embrace of dissent in one situation may not occur in another.

Robust dissent channels that truly protect employees from retaliation and lead to appropriate action may not be the first option an employee turns to, the only option they turn to, or even one they turn to at all, but it's one that should exist if agencies are serious about crafting better policies, improving their ability to execute their missions, and avoiding pitfalls.

Agency Dissent Mechanisms

“A free and open discussion of alternative approaches and differing professional views is essential to the development of sound regulatory policy and decisions.”

– Nuclear Regulatory Commission³⁹

In this report, POGO focuses on two agencies with long-standing channels for conveying policy disputes: the State Department and the Nuclear Regulatory Commission. More briefly, POGO also describes channels at other agencies where public information is more limited: the U.S. Agency for International Development, the Energy Department, NASA, and the Food and Drug Administration’s Center for Drug Evaluation and Research.

Each section contains information about an agency’s dissent channel, and some sections contain accounts of user experiences or those of people who have administered the channel or received dissent communications. POGO also highlights other information when relevant such as an agency’s track record regarding whistleblower retaliation, which is a barometer of the agency management’s overall receptiveness to criticism.

³⁹ NRC, *2014 Differing Professional Opinions Program Assessment*, 3 [see note 38].

State Department

State Department: The Basics

<i>Official name of dissent channel</i>	Dissent Channel
<i>Who can dissent</i>	Direct-hire employees
<i>Scope of allowed dissent</i>	Foreign policy
<i>Who receives the dissent</i>	Office of the Secretary (Policy Planning)
<i>Response obligations</i>	Response generally in 60 days
<i>Right to appeal</i>	No
<i>Publicly available usage data</i>	No
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	Yes; Inspector general/chain of command
<i>Link to official dissent channel policy</i>	https://fam.state.gov/fam/02fam/02fam0070.html

The State Department has the federal government's oldest dissent reporting mechanism: the Dissent Channel. During the Vietnam War, department leadership realized that avenues for dissent were insufficient, and that leaks were increasing across the federal government (this was the era of the Pentagon Papers). In 1971, agency leadership created the Dissent Channel to help solve these problems.⁴⁰ Through the channel, any direct-hire employee of either the department or the U.S. Agency for International Development who is a U.S. citizen can send a message straight to the top—the policy planning staff within the Office of the Secretary—and usually get a response generally within 60 days. Agency policy prohibits retaliation against those who use it, and tasks the inspector general with investigating retaliation and recommending action.⁴¹

Because the Dissent Channel is a mechanism for reporting dissent and does not require a resolution, the process is successful when it makes agency leaders aware of alternative views and

⁴⁰ "Secretary of State Christopher's Message on the Dissent Channel, August 8, 1995," Department of State Archive 2001-2009. <https://2001-2009.state.gov/s/p/of/abt/18990.htm>; Gurman, *The Dissent Papers: The Voices of Diplomats in the Cold War and Beyond*, 175-179 [see note 30].

⁴¹ "Dissent Channel" in *Foreign Affairs Manual*, Department of State, 071.3, 074.1d. <https://fam.state.gov/fam/02fam/02fam0070.html>

allows them to consider those views during decision-making processes. There is evidence that this occasionally occurs.

In 2017, Elzar Camper, a diplomatic security specialist, submitted a Dissent Channel cable advocating, among other things, that the department empower its Bureau of Diplomatic Security to better vet visa applicants. Department leadership expressed some appreciation, but didn't engage with his main concerns, he later wrote. The bureau's leadership was more supportive, even using some of the recommendations he submitted through the channel "as talking points ... when meeting with officials from the National Security Council to discuss future visa security initiatives."⁴²

The association has chosen both Camper and David Holmes—whose dissent was mentioned above in the introduction—as recipients of its annual "constructive dissent" award, which recognizes members of the Foreign Service who take a stand against the status quo. In the absence of publicly available official data and records about the Dissent Channel, the association's awards, ceremonies, and subsequent write-ups in the *Foreign Service Journal* provide the public with rare glimpses into the status of dissent within the department.⁴³

Still, State Department employees rarely use the Dissent Channel. With the exception of a surge during the Carter administration in the late 1970s (some of which can be attributed to one individual), it has averaged between just five and 10 uses per year during its nearly 50-year existence.⁴⁴ Many within the department see it as a last, desperate attempt at change, and one former foreign service officer described it as a "nuclear option"—the highest escalation of an issue and most drastic option available.⁴⁵ Using the channel goes over a supervisor's head and demands that senior officials pay attention to your opinion.

As such, using the Dissent Channel can carry a degree of stigma. To some, using it signifies a failure to effectively advocate a position through normal channels. Coworkers can also easily perceive the self-confidence required to use the Dissent Channel as arrogance—as if dozens of people with more

⁴² Elzar T. Camper, "DS Could Advance Overseas Visa and Passport Security," *Foreign Service Journal*, Col. 94, No. 7 (September 2017): 54. <https://www.afsa.org/ds-could-advance-overseas-visa-and-passport-security>

⁴³ Despite cash prizes, the awards are hardly competitive: Some years, there are no nominations for certain awards, and, over the last 15 years, the association hasn't awarded a winner roughly one-third of the time. Email from AFSA Awards Coordinator Perri Green to POGO Investigator Daniel Van Schooten about dissent award nominations, August 16, 2017.

⁴⁴ While the exact numbers for a given year or administration are difficult to find, journalists have dug them up from time to time. At least part of the surge under Carter is attributable to one foreign service officer, Arthur Purcell, who used the Dissent Channel quite a few times in 1977. Kai Bird, "Dissent in the Foreign Service," Alicia Patterson Foundation, 1985. <http://aliciapatterson.org/stories/dissent-foreign-service>; Guy Taylor, "State Department has a dearth of diplomats to award for dissent," *Washington Times*, June 26, 2013.

<https://www.washingtontimes.com/news/2013/jun/26/state-department-has-a-dearth-of-diplomats-to-award/>; Kai Bird, "The Decline of Dissent," *Foreign Service Journal*, Vol. 62, No. 2 (February 1985): 26-31. https://www.afsa.org/sites/default/files/fsj-1985-02-february_0.pdf; David Jones, "Advise and Dissent: The Diplomat as Protester," *Foreign Service Journal*, Vol. 77, No. 4 (April 2000): 36-40. <http://www.afsa.org/foreign-service-journal-april-2000>; Nate Jones, Tom Blanton, and Emma Sarfity, "Department of State's Dissent channel Revealed," National Security Archive, March 15, 2018. <https://nsarchive.gwu.edu/briefing-book/foia/2018-03-15/department-states-dissent-channel-revealed>; Jon Finer (former chief of staff to Secretary John Kerry), interview with POGO investigator Daniel Van Schooten, August 23, 2017.

⁴⁵ Email from former Foreign Service Officer Ron Capps to POGO Investigator Daniel Van Schooten about the Dissent Channel, July 27, 2017.

experience haven't likely already provided their input. More cynical coworkers may suspect that dissenters are simply "grandstanding and want to make a name for themselves," former Ambassador Jonathan Addleton, who used the Dissent Channel in 2012, told POGO.⁴⁶

Dissenters normally receive a response within 60 days, but there is no guarantee that the response will substantively engage with the dissenting view. The available evidence indicates that it's common for dissenters to receive a response that does not engage the merits of the dissent. In one instance from as far back as 1975, a dissenter called the response to his cable "mealy-mouthed."⁴⁷ Several former State Department employees told POGO that more recent responses may simply reiterate the administration's existing position.⁴⁸

In the absence of a meaningful and timely response, dissenters understandably doubt whether the system is working. About five years after the invasion of Iraq, Joseph Cassidy, then a 20-year veteran of the foreign service, used the Dissent Channel to challenge the U.S. embassy's political strategy in Iraq. He remembers being told that his message had been raised in a National Security Council meeting, but the government's stance did not change and he doesn't recall receiving a formal response. It was only long afterwards that he informally heard from policy planning staff that his memo did have merit, just "not enough to stop 'the train moving down the tracks.'"⁴⁹

In what appears to be an exception to the norm, then-Secretary of State John Kerry personally met with several of the authors of a 2016 Dissent Channel memo related to Syria that was leaked to the press, engaging with their concerns and making sure that they understood that he was taking those concerns seriously. Media reports at the time indicated that Kerry was sympathetic to the memo's arguments.⁵⁰

Dissenters who don't use the Dissent Channel must contend with the department's bureaucracy as they attempt to persuade ever more people—beginning with bosses and colleagues, and then expanding as needed to other offices, then bureaus, and then department leadership—of not only why their issue is worthy of attention but also why it should be prioritized over other issues.

⁴⁶ Jonathan Addleton (former U.S. ambassador to Mongolia), interview with Daniel Van Schooten, August 16, 2017.

⁴⁷ Kai Bird, "Dissent in the Foreign Service" [see note 44].

⁴⁸ John Brady Kiesling (former foreign service officer), interview with Daniel Van Schooten, August 2, 2017; Peter Van Buren (former foreign service officer), interview with Daniel Van Schooten, July 31, 2017; Jonathan Addleton (former U.S. ambassador to Mongolia), interview with Daniel Van Schooten, August 16, 2017; Camper, "DS Could Advance Overseas Visa and Passport Security," 54-56 [see note 42].

⁴⁹ Joseph Cassidy, "The Syria Dissent Channel Message Means The System Is Working," *Foreign Policy*, June 19, 2016. <https://foreignpolicy.com/2016/06/19/syria-obama-assad-state-department/>; The same dynamic is at play for those who dissent up the chain of command. Retired Ambassador Donald Steinberg told POGO that while he was serving as ambassador to Angola in the late 1990s, he sent a cable to headquarters disagreeing with a softening of the Clinton administration's stance against landmines in the country. It had quite the impact, with half of the relevant staff loving it and the other half wanting him fired. But, he told POGO, he received no response while he was in the field; he only found out that his cable had been so contentious after he completed his assignment and returned to headquarters. Donald Steinberg (former U.S. ambassador to Angola), interview with Daniel Van Schooten, February 5, 2020.

⁵⁰ Mark Landler, "John Kerry Is Said to Side With Diplomats' Critical Memo on Syria," *New York Times*, June 17, 2016. <https://www.nytimes.com/2016/06/18/world/middleeast/john-kerry-syria-diplomats-criticism-memo-assad.html>

According to several former State Department dissenters who spoke with POGO and the stories shared publicly by others, that process is usually arduous. Even so, insiders say that approach is generally preferred over using the Dissent Channel.⁵¹

Fear and Retaliation

“The State Department personnel system is so subjective, and an unblemished reputation is so essential to promotion and good assignments, that the potential for stealthy retaliation is significant.”

*– Joseph Cassidy, former foreign service officer*⁵²

The State Department’s history and culture of facilitating dissent is long, but many employees still fear retaliation for using the Dissent Channel, even though department policy prohibits retaliation.⁵³

In the few public cases where the State Department or its inspector general confirmed retaliation against people for using the Dissent Channel, there is little indication that retaliators were held accountable. This can undermine faith in the entire system; the same goes when retaliation in non-Dissent Channel contexts goes unpunished. This is exacerbated by the foreign service’s personnel system, which fires those who don’t get promoted, and by the department’s track record of keeping a tight lid on information related to dissent, both of which can introduce fear and uncertainty and further undermine the system’s effectiveness.⁵⁴

⁵¹ One example of how arduous the process is to register dissent when not using the Dissent Channel is current foreign service officer Amelia Shaw, who won an American Foreign Service Association award for constructive dissent in 2015. She advocated that the department formally request that Congress change the standard for unwed U.S. citizen mothers living abroad who wanted to confer citizenship on their children. She described the six-month process for writing and getting the necessary approvals for a single official cable as “excruciating.” However, Shaw still chose to do that over using the Dissent Channel, which she described as a last resort for “those who have pulled every lever and bent every ear, to no effect.” Despite some positive responses, the State Department did not change its position. Amelia Shaw, “Citizenship and Unwed Border Moms: The Misfortune of Geography,” *Foreign Service Journal*, Vol. 92, No. 3, (April 2015): 16. <http://www.afsa.org/citizenship-and-unwed-border-moms-misfortune-geography>; Amelia Shaw, “Deconstructing Dissent,” *Foreign Service Journal*, Vol. 92, No. 7 (September 2015): 33-36. <http://www.afsa.org/deconstructing-dissent>; In 2017 the Supreme Court held that the standard for unwed mothers was unconstitutional. *Sessions v. Morales-Santana*, 582 U.S. (2017)

⁵² Cassidy, “The Syria Dissent Channel Message Means The System Is Working” [see note 49].

⁵³ Numerous articles by former foreign service officers mention fear of retaliation as a given. Examples include multiple previous dissent award winners and the current president of the American Foreign Service Association:

- Diana Putman, 2010 American Foreign Service Association dissent award winner: “I have State colleagues, in particular, who continue to express concerns about speaking out.” Diana Putman, “Dissent = Effective Advocacy,” *Foreign Service Journal*, Vol. 89, No. 1 (January 2012): 47, 59. http://www.afsa.org/sites/default/files/flipping_book/0112/files/assets/seo/page49.html, http://www.afsa.org/sites/default/files/flipping_book/0112/files/assets/seo/page61.html
- Amelia Shaw, 2015 American Foreign Service Association dissent award winner: “It’s no secret that many officers fear using the Dissent channel.” Shaw, “Deconstructing Dissent” [see note 51].
- Barbara Stephenson, former American Foreign Service Association president: “Pointing out that something Washington wants just won’t fly requires courage and often risks repercussions.” Barbara Stephenson, “Calling It Like We See It,” *Foreign Service Journal*, Vol. 93, No. 7 (September 2016): 6-7. http://www.afsa.org/sites/default/files/flipping_book/0916/files/assets/basic-html/page-6.html

⁵⁴ Most federal agencies do not employ an up-or-out system of managing personnel because their employees are in the civil service. Those that do include military services. George B. Lambrakis, “‘Up or Out’ Is Harming American Foreign Policy,” American Foreign Service Association, September 2014. <https://www.afsa.org/up-or-out-harming-american-foreign-policy>; Claudia Grisales, “Military experts,

Examples of retaliation go back nearly to the creation of the Dissent Channel. In 1978, a State Department board that hears employment disputes found that Arthur Purcell, a labor officer serving in Australia, had been retaliated against and pushed into retirement for using the channel. Purcell's messages, sent via the channel, had been critical of the Australian government and were politically inconvenient. In the end, the board expunged several poor ratings from his file and found that an ambassador had retaliated against him for his use of the Dissent Channel, but it imposed no penalties and the ambassador remained in office for another three years.⁵⁵

In 1994, U.S. Ambassador to Ireland Jean Kennedy Smith retaliated against two subordinates for using the Dissent Channel to argue against her decision to grant a visa to the president of Sinn Féin, the political arm of the Provisional Irish Republican Army, prior to the organization's disarmament. After the State Department inspector general substantiated the retaliation claims the following year (more than two years after the original dissent), Secretary of State Christopher Warren "formally reprimanded" Smith.⁵⁶ But Smith—a sister of former president John F. Kennedy and then-Senator Ted Kennedy—kept her job, and the inspector general report was never publicly released.

The State Department Office of Inspector General doesn't specifically track whether allegations of retaliation are related to the Dissent Channel, making it difficult to pinpoint how many times such retaliation has been substantiated over the years. The most recent formal allegations of retaliation for using the channel, one in 2014 and one in 2015, were not substantiated, the State Department Office of Inspector General told POGO in May 2020.⁵⁷ POGO sought more recent statistics shortly before publication of this report, but did not receive a response.

In early 2017, Dissent Channel history was made when, over a few days, over 1,000 department employees signed a Dissent Channel memo taking issue with the first version of President Donald Trump's travel ban on certain Muslim-majority nations.⁵⁸ The memo leaked, leading to a storm of media coverage and to a hostile response from the administration. At a press conference shortly thereafter, then-White House Press Secretary Sean Spicer said that dissenting department employees "should either get with the program or they can go."⁵⁹ In a 2017 letter to then-Secretary of State Rex Tillerson, several senators raised concerns with Spicer's comment, saying that his

leaders say 'up or out' promotion system outdated," *Stars and Stripes*, January 24, 2018. <https://www.stripes.com/news/military-experts-leaders-say-up-or-out-promotion-system-outdated-1.508382>

⁵⁵ Kai Bird, "Dissent in the Foreign Service" [see note 44]; Office of the Historian of the Department of State, "Philip Henry Alston Jr. (1911-1988)." <https://history.state.gov/departmenthistory/people/alston-philip-henry>

⁵⁶ Richard Gilbert, "Dissent in Dublin - For 2 FSOs, Cable Drew Retribution And Frustration," *Foreign Service Journal*, Vol. 73, No. 7 (July 1996): 28-35. [https://web.archive.org/web/20070927041339/http://www.afsa.org/fsj/July/julfocus.cfm: Stephen Engelberg, "U.S. Says Envoy to Ireland Wrongly Punished 2 Colleagues," *New York Times*, March 8, 1996. <https://www.nytimes.com/1996/03/08/world/us-says-envoy-to-ireland-wrongly-punished-2-colleagues.html>](https://web.archive.org/web/20070927041339/http://www.afsa.org/fsj/July/julfocus.cfm: Stephen Engelberg,)

⁵⁷ Email from State Department Office of Inspector General to POGO investigator Daniel Van Schooten about Dissent Channel retaliation, May 12, 2020.

⁵⁸ Felicia Schwartz, "State Department Dissent, Believed Largest Ever, Formally Lodged," *Wall Street Journal*, February 1, 2017. <https://www.wsj.com/articles/state-department-dissent-believed-largest-ever-formally-lodged-1485908373>

⁵⁹ C-SPAN, "White House Daily Briefing," January 30, 2017, 0:40:42. <https://www.c-span.org/video/?423194-1/sean-spicer-briefs-reporters-white-house&start=2430>

statement “seems intended as a veiled threat” and that the Dissent Channel “serves as an important symbol” to staff that their input is valued.⁶⁰

Former foreign service officer Bethany Milton, the memo’s primary author, told POGO that she never felt retaliated against for her role in the dissent, but knows one individual that she believes was. That individual chose to quietly retire rather than attempt a fight, she said.⁶¹

Recent examples of politically motivated retaliation have also undermined trust within the department. In a November 2019 report, the State Department’s inspector general confirmed that Brian Hook, the political appointee overseeing the department’s Dissent Channel during the first year of the Trump administration, removed a career employee from her job for political reasons. Hook, who now leads the department’s efforts on Iran, denies he did anything improper.⁶² He has not been publicly disciplined. This isn’t the only troubling episode that shows there is a hostile environment within the State Department for career staff. And when staff are retaliated against and called traitors simply for doing their jobs, they can easily imagine what would happen if they actually used the Dissent Channel.⁶³

The danger of dissent being conflated with disloyalty is not unique to the Trump administration, as the examples above from the Carter and Clinton administrations show. Joseph Cassidy, who retired from the foreign service in 2015, admitted to advising a colleague against using the Dissent Channel unless “this is *the* issue of her career,” as using the channel multiple times can make it easy to be painted as disloyal or unmanageable.⁶⁴ (Emphasis in original)

Just as going through official channels can be risky, so too can using other avenues to voice concerns. Although public dissent is always an option, it can be especially perilous to one’s career,

⁶⁰ Letter from Senator Benjamin Cardin and ten other senators to Rex Tillerson, Secretary of State, about the dissent channel, February 16, 2017. <https://www.foreign.senate.gov/imo/media/doc/2-16-17%20BLC%20joint%20letter%20to%20Tillerson%20on%20Dissent%20Channel.pdf>

⁶¹ Bethany Milton (former foreign service officer), interview with Daniel Van Schooten, December 16, 2019.

⁶² Department of State Office of Inspector General, *Review of Allegations of Politicized and Other Improper Personnel Practices Involving the Office of the Secretary*, ESP-20-01 (November 2019), 5-12. <https://www.stateoig.gov/system/files/esp-20-01-public.pdf>

⁶³ The department’s Bureau of International Organization Affairs provides another recent example of leadership fixating on employees’ loyalty rather than on their job performance. In August 2019, the State Department Office of Inspector General published a report detailing numerous instances of misconduct by the two political appointees running the bureau. Their misconduct included harassment, intimidation, accusing staff of being “traitors” or “disloyal,” violating a multitude of department policies, and at one point, even attempting to make “conformance to the President’s beliefs” an official job requirement for all new positions. The appointees sometimes retaliated against subordinates just for carrying out inconvenient parts of their jobs. The chilling effect was compounded when departmental leadership did little to rein in the two appointees. The report quotes an employee who heard one of the appointees state that raising concerns about her management “was pointless because the Trump administration ‘has my back.’” That appointee voluntarily left the government after about a year, during which time approximately 50 of the bureau’s 300 U.S.-based employees departed, with the inspector general report pointing out that “nearly all of the former employees who OIG [the Office of Inspector General] interviewed stated that poor leadership of the bureau contributed to their decision to depart.” The other appointee, in his official response to the report, denied many of the Inspector General’s findings and remains in his position, having been counselled by department leadership. Department of State Office of Inspector General, *Review of Allegations of Politicized and Other Improper Personnel Practices in the Bureau of International Organization Affairs*, ESP-19-05 (August 2019), 8-10, 18. <https://www.stateoig.gov/system/files/esp-19-05.pdf>

⁶⁴ Cassidy, “The Syria Dissent Channel Message Means The System Is Working” [see note 49].

and many would rather remain silent than take that risk.⁶⁵ In 2011, then-foreign service officer Peter Van Buren published a memoir critical of the State Department's role in rebuilding Iraq. Van Buren abided by department policies that require employees to submit draft publications for review and approval, but did not hear back from the department within the required 30 days after his submission. However, the department reached out to the book's publisher, asserting the book contained classified information, which Van Buren denied. The publisher moved forward with releasing the book, setting off what Van Buren contended was a wave of retaliation by the department against him that included suspending his security clearance, banning him from the department's headquarters, and coming close to firing him.⁶⁶ He voluntarily resigned from the department in 2012.⁶⁷

After Van Buren, the department significantly tightened its policies on public statements, so that any employee's personal public communications—including books, blogs, *Foreign Service Journal* articles, speeches (in some cases including congressional testimony), and even tweets—"must be reviewed if they are on a topic 'of Departmental concern.'"⁶⁸ This limits "safe" public dissent to what the agency pre-approves.

Moreover, while many diplomats are happy to have their dissent made public if it might help change policy, some are concerned about the impact that a public and controversial dissent might have on their career if it were tied to their name. For instance, when tough decisions have to be made about politically charged international incidents, sometimes "people won't write the truth if they are afraid it will come out," said Chas Freeman, former U.S. ambassador to Saudi Arabia.⁶⁹

Indeed, when the Dissent Channel was created, top State Department official William Macomber said, "The right of dissent is very important" but "we want to keep it in the house." Department officials required that dissent memos be classified as top secret.⁷⁰

Foreign service officers are especially protective of their reputations given the nature of the department's personnel system. Like the armed forces, the foreign service uses a highly competitive "up or out" system, in which failing to receive a promotion in a given time frame automatically

⁶⁵ For some ways of getting the message out without exposing the identity of a source inside the government: Nick Schwellenbach, ed., *Caught Between Conscience and Career: Exposing Abuse Without Exposing Your Identity* (Washington, DC: Project On Government Oversight, Government Accountability Project, and Public Employees for Environmental Responsibility, 2019). <https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/>

⁶⁶ Lisa Rein, "State Dept. moves to fire Peter Van Buren, author of book critical of Iraq reconstruction effort," *Washington Post*, March 14, 2012. https://www.washingtonpost.com/blogs/federal-eye/post/state-dept-moves-to-fire-peter-van-buren-author-of-book-critical-of-iraq-reconstruction-effort/2012/01/31/gIQAiXNSCS_blog.html

⁶⁷ Dave Seminara, "U.S. Foreign Service Officer Blacklisted for Scathing Exposé," *Washington Diplomat*, July 31, 2012. http://washdiplomat.com/index.php?option=com_content&view=article&id=8467:us-foreign-service-officer-blacklisted-for-scathing-expose:

⁶⁸ "Review of Public Speaking, Teaching, Writing, and Media Engagement," in *Foreign Affairs Manual*, Department of State, 3 FAM 4170. <https://fam.state.gov/fam/03fam/03fam4170.html>

⁶⁹ Chas Freeman (former U.S. ambassador to Saudi Arabia), interview with Daniel Van Schooten, August 4, 2017.

⁷⁰ Gurman, *The Dissent Papers: The Voices of Diplomats in the Cold War and Beyond*, 175-179 [see note 30].

results in termination.⁷¹ Promotions can depend on assignments, and assignments are determined through a highly competitive process that foreign service officers have described as opaque and subjective.⁷² The perception that someone is a troublemaker or not a “team player” could be enough to stop a career in its tracks.

Jonathan Finan, who served as chief of staff for Kerry, told POGO that the incentive structures of “promotion schedules and appointments are the only things that matter” when it comes to changing an organizational culture like widespread reluctance to dissent.⁷³ Changing the personnel system to reward dissent rather than to potentially penalize it is necessary to create a department culture that embraces criticism and speaking out even when it creates discomfort for leaders. Ultimately leaders benefit from inculcating a workplace culture that embraces internal criticism—such criticism can help identify pitfalls in policies and help leaders avoid catastrophes and improve government performance.

Transparency

While the State Department’s policies on how to use the Dissent Channel are clear and well publicized, the department doesn’t make public any information about the content or quantity of messages submitted, how those messages are handled, or how often employees who use the channel feel retaliated against. It is unclear if some of this information is even collected. Most of the available information consists of personal anecdotes from current and former diplomats.

It is possible to boost transparency while still protecting dissenters as well as the foreign affairs and national security information that is truly sensitive. The Nuclear Regulatory Commission, for example, allows dissenters to indicate whether they want to publish their dissent and management’s response, either with or without their name attached. If they do, management performs a suitability review and decides what, if any, information needs to be withheld.⁷⁴

The department’s lack of transparency isn’t limited to keeping the details of how the Dissent Channel is used secret from the public; it has even withheld that information from Congress.

In 1974, a Greek-led coup on the island of Cyprus led to a subsequent Turkish invasion and resulted in the deaths of thousands of people—including the U.S. ambassador—and the political tensions that continue on the island to this day.⁷⁵ In 1975, a House committee subpoenaed then-

⁷¹ Civil Service RIF – 3 FAM 2530; Foreign Service RIF – 3 FAM 2580; Mandatory Retirement (TIC) – 3 FAM 6200

⁷² Matthew Keene, “More Hemingway, Less Kafka,” *Foreign Service Journal*, Vol. 93, No. 2 (March 2016): 21-23.
<http://www.afsa.org/more-hemingway-less-kafka-please>

⁷³ Jonathan Finan (former State Department director of policy planning), interview with Daniel Van Schooten, August 23, 2017.

⁷⁴ Nuclear Regulatory Commission, “Directive Handbook 10.159: NRC Differing Professional Opinion Program,” August 11, 2015, [PDF 16-23]. <https://www.nrc.gov/docs/ML1513/ML15132A664.pdf>

⁷⁵ Association for Diplomatic Studies & Training, “Cyprus—August 1974: ‘It was a blind shot that got the Ambassador.’”
<https://adst.org/2013/08/cyprus-august-1974-it-was-a-blind-shot-that-got-the-ambassador/>; “U.S. Ambassador killed on Cyprus,”
Boca Raton News, Vol. 19, Issue 194, August 19, 1974, 1, 3.

<https://news.google.com/newspapers?id=UdsPAAAAIBAJ&sjid=TIODAAAAIBAJ&pg=5706%2C6889436>; Encyclopedia.com, “Cyprus: An

Secretary of State Henry Kissinger, asking for a Dissent Channel memo submitted by Thomas Boyatt, who led the department's efforts in Cyprus during the Turkish invasion.⁷⁶ Boyatt and other diplomats had criticized the Nixon administration's Cyprus policy—a policy of involvement based on judgments Boyatt described as “divorced from reality”—which he believed failed to preempt a foreseeable and preventable disaster.⁷⁷ Kissinger managed to convince the committee to accept an “amalgamation” of the contents of various memos instead, arguing that providing the complete memos to Congress would be a disservice to the diplomats who submitted them in confidence.⁷⁸ According to Boyatt, his “memorandum was cut into pieces, and those pieces were interspersed with other drivel made up by S/P [the Office of Policy Planning] designed to disguise what was the Boyatt memorandum.”⁷⁹

Congress and the department have not publicly fought over access to dissent memorandums since, but it appears some concessions have been made, as the department reportedly handed over the text of a classified 2016 Dissent Channel memo on Syria after removing the 51 signers' names.⁸⁰

As for Boyatt's memorandum, it took over 30 years for the department to publicly release it, and even then it only did so because it lost a Freedom of Information Act lawsuit brought by the nonprofit National Security Archive. As a result of that lawsuit, the department is obligated to release Dissent Channel memos that are more than 25 years old. The first of several expected batches of those memos was published in March 2018, but no additional documents have been published in the two years since.⁸¹

Whether the department withholds dissent memorandums from Congress does not prevent an individual diplomat from communicating directly with Congress should they choose to do so. Boyatt told POGO he stands by his decision not to bypass his management and give the memo to Congress or the press, as he believes it would poison management's attitude towards both his dissent and those that others might submit in the future.⁸² But it wasn't an easy decision: “I chose to keep my

Island Divided,” *History Behind the Headlines: The Origins of Conflicts Worldwide*. <https://www.encyclopedia.com/history/energy-government-and-defense-magazines/cyprus-island-divided>

⁷⁶ John Crewdson, “House Unit Calls on Kissinger for a Memo on Cyprus,” *New York Times*, October 3, 1975.

<https://www.nytimes.com/1975/10/03/archives/house-unit-calls-on-kissinger-for-a-memo-on-cyprus.html>

⁷⁷ Memorandum from Samuel W. Lewis, Deputy Director of Policy Planning, State Department, about “Your Dissent Memorandum, ‘Critique of the Substantive Handling of the Cyprus Crisis’ dated August 9, 1974,” December 9, 1974.

<https://nsarchive2.gwu.edu//dc.html?doc=4389160-Documents-12-Deputy-Director-of-Policy-Planning>; Shortly thereafter, Kissinger removed Boyatt from his assignment in Cyprus. Boyatt credits the “old boy network” for saving his career and for the fact that he eventually became an ambassador. The State Department took four months to respond to the memo, violating the agency policy that requires a response within at most 60 days. Thomas Boyatt, Presentation at the Foreign Service Institute, March 8, 1990, Foreign Affairs Oral History Project (The Association for Diplomatic Studies and Training, 1998), 10. <https://adst.org/wp-content/uploads/2012/09/Boyatt-Thomas-D.-Cyprus.pdf>

⁷⁸ Gurman, *The Dissent Papers: The Voices of Diplomats in the Cold War and Beyond*, 188. [see note 30].

⁷⁹ Boyatt, Presentation at the Foreign Service Institute, 7, 10, 11 [see note 77]; Gurman, *The Dissent Papers: The Voices of Diplomats in the Cold War and Beyond*, 188 [see note 30].

⁸⁰ Diplopundit, “More on the Syria Dissent Channel Memo, and Chasing Down Concerning Rumors,” June 22, 2016.

<https://diplopundit.net/2016/06/22/more-on-the-syria-dissent-channel-memo-and-chasing-down-concerning-rumors/>

⁸¹ Jones, Blanton, and Sarfity, “Department of State's Dissent Channel Revealed” [see note 44].

⁸² Thomas Boyatt (former U.S. ambassador to Burkina Faso and then Colombia), interview with Daniel Van Schooten, August 2, 2017.

dissent in house, and have been haunted by that decision since,” Boyatt wrote after he retired from the foreign service. “The decision on ‘outing the dissent’ is neither easy to make, nor easy to live with.”⁸³

⁸³ Thomas Boyatt, “In Defense of Dissent,” *Foreign Service Journal*, Vol. 93, No. 7 (September 2016): 62.
http://www.afsa.org/sites/default/files/flipping_book/0916/files/assets/basic-html/page-62.html

Nuclear Regulatory Commission

“Reprisal is a case in which perception is as important as reality.”
 – Nuclear Regulatory Commission Office of Enforcement⁸⁴

Nuclear Regulatory Commission: The Basics – Part 1

<i>Official name of dissent channel</i>	Differing Professional Opinion process
<i>Who can dissent</i>	All employees and contractors
<i>Scope of allowed dissent</i>	“Any technical, legal, or policy issue, including administrative and corporate support policies”
<i>Who receives the dissent</i>	Office Director/Regional Administrator via Program Manager
<i>Response obligations</i>	No hard deadlines. Review panel: Statement of Issues and Report. Decision-maker: Official decision memo.
<i>Right to appeal</i>	Yes, to Executive Director of Operations
<i>Publicly available usage data</i>	Yes
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	Yes; cites multiple internal options, inspector general, union, and external whistleblower protection offices
<i>Link to official dissent channel policy</i>	https://www.nrc.gov/docs/ML1513/ML15132A664.pdf

In 1980, one year after the Three Mile Island nuclear meltdown, the Nuclear Regulatory Commission (NRC) created its Differing Professional Opinion process, a dissent resolution mechanism. This process is significantly longer and more involved than the State Department’s Dissent Channel. The NRC is also relatively open about it compared to the State Department, and has published details

⁸⁴ Nuclear Regulatory Commission, *Study of Reprisal and Chilling Effect for Raising Mission-Related Concerns and Differing Views at the NRC*, January 2018, 6. <https://www.documentcloud.org/documents/4586975-NRC-January-2018-Reprisal-Study.html>

about how often the process is used, the subject of dissents, how dissents are resolved, and how the mechanism is perceived by both previous users and employees generally.

The rare degree of transparency is laudable, even as it reveals a troubling picture. One survey of dissenters in the NRC showed that every single respondent felt they had experienced at least some negative consequences as a result of using the process.⁸⁵

Any NRC employee or contractor can submit concerns via email about any technical, legal, or policy issue, including administrative and corporate support policies. While some dissent reporting mechanisms allow for anonymous submissions, resolution mechanisms require engagement from all stakeholders and typically do not allow submitters to remain anonymous. The NRC's dissent resolution mechanism is unique in that it gives the dissenter the option of working through a surrogate in order to remain anonymous.⁸⁶ If any clarification or additional communication is needed, the surrogate serves as the middleman between a review panel and the submitter.

If the submission meets certain requirements, such as disputing a final decision rather than a draft or proposed one, and if the submitter has either attempted to resolve the difference informally or explained why they haven't, it moves forward. The Differing Professional Opinion program manager—who runs, evaluates, and works to improve the program—accepts the submission and facilitates the creation of an at least three-person review panel.⁸⁷

Whenever feasible, the panelists come from outside the involved parties' chains of command and have technical expertise applicable to the issue at hand. In order to ensure that the panel is not one-sided, one member is supposed to come from a list the submitter is encouraged to provide. These guidelines are intended to give the panel credibility as it evaluates what are often highly technical concerns about nuclear power plant operations.⁸⁸

The panel first creates a "summary of issues" that all parties sign off on. This serves as the framework for the panel, which then has free rein to review internal documents and interview employees as needed to create a report. The panel provides the report to both the submitter and the final decision-maker (usually a regional administrator or office director) who then determines how to resolve the issue, after holding any additional consultations they deem necessary.⁸⁹

The deciding official is encouraged to interact with the submitter throughout the process, and once the case is closed, the submitter can request that the case files be made public, with or without their name redacted. Management makes the final call on whether to release case files and what level of redaction is necessary. If they are not released, these files are subject to review and release

⁸⁵ Dave Lochbaum, "NRC's Reprisal Study Reveals Safety Agency Has a Chilled Work Environment," Union of Concerned Scientists, July 2, 2018. <https://allthingsnuclear.org/dlochbaum/nrc-reprisal-study>

⁸⁶ NRC, "Directive Handbook 10.159," 10 [PDF 25] [see note 74].

⁸⁷ NRC, "Directive Handbook 10.159," 12-13 [PDF 27-29] [see note 74].

⁸⁸ NRC, "Directive Handbook 10.159," 12-13 [PDF 27-29] [see note 74].

⁸⁹ NRC, "Directive Handbook 10.159," 14 [PDF 29] [see note 74].

under the Freedom of Information Act—in contrast to State’s Dissent Channel messages and responses, which the department considers categorically exempt if the records are less than 25 years old. For power plant contractors who the NRC oversees, the process ends there. Agency employees, however, can appeal the decision to the executive director of operations, a senior career official. That official is not bound by any set process for an appellate review, and once a decision on the appeal is issued, it is final.⁹⁰

In 2006, the NRC created a second dissent resolution process called the Non-Concurrence Process specifically for dissenters involved in decision-making on an issue before the decision is finalized.⁹¹ The Non-Concurrence Process is used more frequently than the Differing Professional Opinion process, possibly because it is less involved and its scope involves proposals rather than final decisions. From 2010 to 2018, the Non-Concurrence Process was used an average of almost 15 times a year, compared to the Differing Professional Opinion’s average of a little over three times a year during the same period.⁹²

⁹⁰ NRC, “Directive Handbook 10.159,” 16-23 [PDF 31-38] [see note 74].

⁹¹ Nuclear Regulatory Commission, “Management Directive 10.158: NRC Non-Concurrence Process” (DT-17-214), March 14, 2014. <https://www.nrc.gov/docs/ML1807/ML18073A296.pdf>

⁹² Nuclear Regulatory Commission Office of Enforcement, “Understanding and Using the NRC’s Differing Views Program,” August 26, 2019. https://www.nrc.gov/public-involve/conference-symposia/ric/past/2019/docs/posters/17_15-differing-views.pdf

Nuclear Regulatory Commission: The Basics – Part 2

<i>Official name of dissent channel</i>	Non-Concurrence Process
<i>Who can dissent</i>	Only employees involved in a decision
<i>Scope of allowed dissent</i>	Only regarding documents an employee “had a role in creating or reviewing”
<i>Who receives the dissent</i>	Typically a Senior Executive Service-level manager
<i>Response obligations</i>	No hard deadlines. Dissenter gets regular updates, at least one meeting, contributes to a consensus-based Statement of Issues, and can receive a written evaluation of their dissent upon request.
<i>Right to appeal</i>	Can only appeal decisions about a submission’s eligibility.
<i>Publicly available usage data</i>	Yes
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	Yes; cites multiple internal options, inspector general, union, and external whistleblower protection offices.
<i>Link to official dissent channel policy</i>	https://www.nrc.gov/docs/ML1807/ML18073A296.pdf

The agency is in the process of making changes to both dissent mechanisms. A November 2018 report reveals the results of numerous stakeholder interviews and recommends 20 changes primarily aimed at making it easier to resolve issues prior to using the mechanisms, and making the mechanisms less of a burden on management when they are used.⁹³

The most significant changes are geared toward the Differing Professional Opinion process, and include reducing the burden on managers who sit on the review panels and shortening the review process. Most cases between 2005 and 2013—the most recent information available on processing time—took from 200 to 300 days to address instead of the recommended 120.⁹⁴ Even so, survey

⁹³ John Harrison, Nuclear Regulatory Commission Office of Enforcement, *Final Report: Differing Views Program Improvement Project Rev 1.3* (November 2018), 13-19. <https://www.documentcloud.org/documents/6022613-DVIP-Final-Report-Redacted.html>

⁹⁴ NRC, *2014 Differing Professional Opinions Program Assessment*, Appendix F, 1 [see note 38].

results from 2013 show that 89% of submitters who responded felt that the panel “performed a timely review of the issues.”⁹⁵ A 2018 survey shows that most dissenters (for both mechanisms) are more concerned with effectiveness of the mechanisms than their efficiency.⁹⁶ Although faster results may benefit both dissenters and management, any effort to speed up the process should carefully consider the potential costs, both real and perceived, of reducing the quality or consistency of review.

Other 2018 recommendations represent significant changes such as allowing decision-makers to form a panel with fewer than three members or even skip the panel process entirely if they determine that “a more extensive review is not required.”⁹⁷

The agency plans to implement all 20 of the recommendations, and has already completed 12 of them. All but one should be fully implemented by the end of 2020, according to an NRC spokesperson.⁹⁸

Retaliation and Chilling Effects

“The problem of going through channels is that those who control [them] have myriad ways to obstruct those channels.”

– Lawrence Criscione, Nuclear Regulatory Commission engineer⁹⁹

The public record reveals that using the Differing Professional Opinion process can lead to changes. For example, in 2019, an NRC employee’s dissent regarding fuel used in nuclear reactors led the NRC to clarify its policies and processes after the employee appealed an initial rejection of his dissent. “I commend you for your critical thinking, diverse perspectives, and honest feedback,” the NRC’s executive director for operations wrote in response to the employee’s appeal. “Several important changes have been made or will be made to our processes that ensure public health and safety as a result of your willingness to participate in this process.”¹⁰⁰

Changes to policies, clarification of what policies mean, and commendations for dissenters are not uncommon results of the NRC’s dissent processes. Nevertheless, employees say they still fear using the process. A 2016 survey of those who have submitted a Differing Professional Opinion shows that

⁹⁵ NRC, *2014 Differing Professional Opinions Program Assessment*, Appendix C, 8 [see note 38].

⁹⁶ Harrison, NRC, *Final Report*, 10 [see note 93].

⁹⁷ Harrison, NRC, *Final Report*, 13 [see note 93].

⁹⁸ Email from Nuclear Regulatory Commission Public Affairs Officer Scott Burnell to POGO Investigator Daniel Van Schooten about the implementation of several recommendations, February 7, 2020.

⁹⁹ Lawrence Criscione, Nuclear Regulatory Commission, “Truth Be Told: Whistleblowers, Journalism & Democracy,” March 14, 2018. <https://event.on24.com/eventRegistration/EventLobbyServlet?target=reg20.jsp&referrer=&eventid=1626507&sessionid=1&key=A6E11FB1274CAF03B1805E3CEA7C19B0®Tag=&sourcepage=register>

¹⁰⁰ Memorandum from NRC Executive Director for Operations Daniel Dorman to Plant Licensing Branch Chief Michael Markley, about “Differing Professional Opinion Appeal Decision Involving NRC Response to NEI Concerning the Regulatory Path for Accident Tolerant Fuel Lead Test Assemblies (DPO-2018-002),” March 14, 2019, 6, 14. <https://www.documentcloud.org/documents/6668378-NRC-Accident-Tolerant-Fuel-DPO-Case-File.html>

100% of respondents said that using the process had led to negative consequences, such as changes to their professional responsibilities or being excluded from meetings or career development opportunities.¹⁰¹ The most recent survey results available for Non-Concurrence Process users are from 2013 and they are similarly concerning: 75% of respondents claimed to have received a worse performance rating as a result of using the process.¹⁰² While the pools of people who have used those dissent channels are small, an agency-wide safety culture survey from 2015 revealed that fear of retaliation was well-established. Twenty percent of respondents to that survey did not believe they could raise concerns, whether through a set dissent process or not, without fear of retaliation.¹⁰³

These surveys reflect perceived retaliation rather than substantiated cases—or formal allegations—of reprisal. However, retaliation is often difficult to prove, and even the perception of it can have a dramatic effect on agency culture. “Regardless of whether negative consequences actually occurred,” a 2014 self-assessment of the Differing Professional Opinions program states, the Office of Enforcement “recognizes that the perception of negative consequences can have a chilling effect on employees.”¹⁰⁴

“I have filed three differing professional opinions,” wrote NRC scientist Raymond Gallucci in a 2017 letter to the editor in the *Washington Post*, “and I have found myself not being assigned to projects or excluded from working groups on which I am ‘the’ agency expert, or being denied support for professional conferences that others with smaller roles and fewer presentations are permitted to attend.”¹⁰⁵ In a self-published paper, Gallucci reported a 2016 travel denial to the agency’s inspector general as potential retaliation, but said the inspector general declined to investigate. Gallucci retired from the agency in 2018.¹⁰⁶

The 2014 self-assessment also identified the importance of management preventing and countering any stigma associated with using the Differing Professional Opinion process. “The DPO Program will gain greater support and credibility if its use is seen as a positive way to address concerns in an NRC process rather than a weakness in resolving concerns through informal communications,” the

¹⁰¹ Lochbaum, “NRC’s Reprisal Study Reveals Safety Agency Has a Chilled Work Environment” [see note 85].

¹⁰² Nuclear Regulatory Commission Office of Enforcement, *2014 Non-Concurrence Policy Program Assessment* (2014), 15. <https://www.nrc.gov/docs/ML1405/ML14056A294.pdf>

¹⁰³ One survey result in the 2014 Differing Professional Opinion assessment shows that only 36% of NRC employees believe that using the process has no negative effect on career development (p. 37). Forty-six percent were unsure, and 18% thought it definitely had a negative effect. As no other agency has released survey results like this, there is no benchmark for what typical levels of doubt in an institution might be, or to what degree the NRC may be better or worse in this regard than the State Department. NRC, *Study of Reprisal and Chilling Effect for Raising Mission-Related Concerns and Differing Views at the NRC*, 45 [see note 84]; NRC, *2014 Differing Professional Opinions Program Assessment*, Appendix A, 7 [see note 38].

¹⁰⁴ NRC, *2014 Differing Professional Opinions Program Assessment*, 24 [see note 38].

¹⁰⁵ Raymond Gallucci, “How whistleblowers are retaliated against,” *The Washington Post*, July 20, 2017. https://www.washingtonpost.com/opinions/how-whistleblowers-are-retaliated-against/2017/07/30/4498dd1a-7338-11e7-8c17-533c52b2f014_story.html

¹⁰⁶ Raymond Gallucci, “Risk-Deformed Regulation: What Went Wrong with NFPA 805,” *Vixra.org*, 2018, 16. <http://vixra.org/pdf/1805.0403v1.pdf>

agency wrote. “Management should demonstrate this clearly and frequently through their actions and communications.”¹⁰⁷

Three years later, one dissenter—the director of reactor projects for one of the agency’s four regions—highlighted how the agency still has work to do in this area. “I believe senior NRC staff need to rethink how DPO’s are viewed,” Troy Pruett wrote in response to the agency’s June 2017 decision on his Differing Professional Opinion case. “Statements from senior executives that ‘DPO’s are nuclear bombs’ and ‘Managers submitting DPO’s cause staff to not trust management’ and ‘The NRC receives too much negative public and media attention when DPOs are submitted’ reflect poorly on agency values.”¹⁰⁸

NRC policies state that retaliating against dissenters for using either dissent mechanism will not be tolerated, and list a variety of potential resources for those alleging retaliation. Of the nine resources available, five are internal to the agency. Namely, employees can go to their supervisor, any other manager, the manager of the dissent mechanism, human resources office, or an administrative grievance resolution process for non-union employees.¹⁰⁹ However, the in-house processes to address dissent-related retaliation “have been ad hoc” and “may not be understood by employees,” not to mention that the agency’s legal teams “may be viewed as supporting management,” a 2018 NRC study on retaliation found.¹¹⁰

One point of confusion is that agency policy places the responsibility on managers to both prevent retaliation and respond to allegations of it. But “it is not clear,” the 2018 NRC report states, “how offices ensure compliance with these expectations.”¹¹¹ An NRC working group recommended the creation of a “neutral fact-finding process” as an administrative avenue for dissenters alleging retaliation.¹¹² NRC has tasked “the Office of the Chief Human Capital Officer (OCHCO) to lead the future neutral fact-finding process associated with allegations of retaliation or reprisal for raising safety concerns,” a spokesperson told POGO in February 2020.¹¹³

Retaliation investigations conducted by an agency accused of it may be seen as lacking sufficient independence, and an agency’s human resource office, which may have had some involvement in

¹⁰⁷ NRC, *2014 Differing Professional Opinions Program Assessment*, 26 [see note 38].

¹⁰⁸ Memorandum from Troy Pruett, NRC Director of Reactor Projects, Region IV, to William Dean, NRC Director of the Office of Nuclear Reactor Regulation, regarding “Response to Director of NRR Memorandum Regarding DPO-2017-01 and DPO-2017-02,” 3. <https://www.documentcloud.org/documents/5683614-Troy-Pruett-2017-DPO-Response-Memo.html>

¹⁰⁹ NRC, “Directive Handbook 10.159,” 24-25 [PDF 35-36] [see note 74].

¹¹⁰ NRC, *Study of Reprisal and Chilling Effect for Raising Mission-Related Concerns and Differing Views at the NRC*, 23-24 [see note 84].

¹¹¹ NRC, *Study of Reprisal and Chilling Effect for Raising Mission-Related Concerns and Differing Views at the NRC*, 25 [see note 84].

¹¹² Memorandum from Director of the Office of Enforcement for the NRC Anne Boland and three others to NRC Executive Director of Operations Victor McCree about “Evaluation of considerations identified within a study of reprisal and chilling effect for raising mission-related concerns and differing views at the Nuclear Regulatory Commission,” June 11, 2018, 2. <https://www.documentcloud.org/documents/4576898-NRC-Reprisal-Working-Group-Document.html>

¹¹³ Email from NRC Public Affairs Officer Scott Burnel to POGO Investigator Daniel Van Schooten about the implementation of several recommendations, February 7, 2020.

employment actions that are allegedly retaliatory, may be seen as far from neutral.¹¹⁴ Internal agency whistleblower offices also can be seen as ineffective.¹¹⁵

If an employee doesn't want to pursue a retaliation claim internally, or has tried and failed, there are four external options for addressing retaliation: the Office of Special Counsel, the Department of Labor's Office of Whistleblower Protection, union grievance processes, and the NRC inspector general.¹¹⁶ Each of those third parties have specific jurisdictions.

The Office of Special Counsel and the Labor Department have authority over whistleblower retaliation claims—the former with jurisdiction over federal government employees and the latter with jurisdiction over contractors.¹¹⁷

Workers who are union members can also file complaints through the union's pre-negotiated grievance process, should it apply. If they do so, the resolution process can include informal meetings with human resources or senior NRC leadership, and mediation or arbitration.¹¹⁸

Agency inspectors general are empowered to investigate and report on any violations of law, rule, or regulation within their agency, and have full access to agency records and personnel. Even so, they have some significant limitations. When inspectors general confirm violations, they cannot compel agency actions and can only make recommendations. There are also times when the inspector general gives the retaliation complaint to the agency to handle. The agency's 2018 study on retaliation acknowledged that employees may not feel safe going to the inspector general, as the watchdog office "may choose not to investigate an allegation and choose to refer the concern to the same management chain involved in the claim of reprisal"—an obvious concern since the chain of command cannot independently and objectively review their own actions.¹¹⁹

¹¹⁴ "At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions." Whistleblowers and Job Safety: Are Existing Protections Adequate to Build a Safer Workplace: Hearing before the Senate Committee On Health, Education, Labor and Pensions, Subcommittee on Employment and Workplace Safety, 113th Cong. 9. (April 29, 2014) (testimony of Tom Devine, Legal Director, Government Accountability Project) <https://www.help.senate.gov/imo/media/doc/Devine.pdf>

¹¹⁵ For instance, the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection has been criticized by the Government Accountability Office, the VA Office of Inspector General, and its own staff for ineffectiveness. Department of Veterans Affairs Office of Inspector General, *Office of Accountability & Whistleblower Protection: Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, 18-04968-249 (October 24, 2019). <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>; Government Accountability Office, *Department of Veterans Affairs: Actions Needed to Address Employee Misconduct Process and Ensure Accountability*, GAO-18-137 (July 2018). <https://www.gao.gov/assets/700/693268.pdf>; Daniel Van Schooten, "'Terrified' of Retaliation Inside Veterans Affairs Whistleblower Office." Project On Government Oversight, March 5, 2020. <https://www.pogo.org/investigation/2020/03/terrified-of-retaliation-inside-veterans-affairs-whistleblower-office/>

¹¹⁶ NRC, "Directive Handbook 10.159," 24-25 [PDF 35-36] [see note 74].

¹¹⁷ U.S. Department of Labor, "Whistleblower Protection." <https://www.whistleblowers.gov/about-us>

¹¹⁸ "U.S. Nuclear Regulatory Commission and National Treasury Employees Union Collective Bargaining Agreement," November 9, 2015, 155-162. <https://www.nrc.gov/docs/ML1609/ML16092A326.pdf>

¹¹⁹ NRC, *Study of Reprisal and Chilling Effect for Raising Mission-Related Concerns and Differing Views at the NRC*, 23 [see note 84].

One example demonstrates particularly well why NRC employees may not trust the inspector general to protect them. In 2012, the inspector general referred for criminal prosecution an NRC reliability and risk engineer named Lawrence Criscione. Criscione believed the NRC was ignoring an important report on the danger faced by a nuclear reactor downstream of a large dam should that dam catastrophically fail. He sent an unclassified report to several congressional offices, and included his superiors on those communications. At least one of the congressional offices shared that report with the public.¹²⁰ Soon afterwards, Criscione's superiors asked the inspector general to investigate, and the inspector general referred the case to the Justice Department to investigate Criscione for alleged computer fraud—a federal felony. This criminal referral was especially egregious given that the inspector general is at least partially responsible for upholding the whistleblower laws that explicitly protect going to Congress and even the media, so long as the material isn't restricted by law.¹²¹ The prosecutor declined to bring a case, with the declination form indicating that no federal offense had been committed, and Criscione remains at the agency.¹²²

¹²⁰ Hullspeed, *Lawrence Criscione, of the U.S. NRC, receives the Joe A. Callaway Award for Civic Courage*, January 15, 2017, 8:50.

<https://youtu.be/E6TT15gFzPY?t=530>

¹²¹ 5 U.S. Code § 7211; *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015).

¹²² NRC Office of the Inspector General, "Agent's Investigative Report," February 4, 2013.

<https://www.documentcloud.org/documents/4446090-ML16216A703.html> (annotated by Lawrence Criscione)

United States Agency for International Development

“I felt that my dissent bounced like a dead cat.”
– José Garzón, former USAID foreign service officer ¹²³

U.S. Agency for International Development: The Basics

<i>Official name of dissent channel</i>	Direct Channel
<i>Who can dissent</i>	All employees and contractors
<i>Scope of allowed dissent</i>	Any “substantive USAID and development program issues”
<i>Who receives the dissent</i>	Office of the Administrator
<i>Response obligations</i>	Acknowledgement in four days, response in 30
<i>Right to appeal</i>	No
<i>Publicly available usage data</i>	No
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	No
<i>Link to official dissent channel policy</i>	None

In 2011 the U.S. Agency for International Development (USAID) created a dissent reporting mechanism they called the Direct Channel, and made it open to direct-hire employees and to contractors. (USAID direct-hire employees can use the State Department’s Dissent Channel as well, given their close ties to the department, but contractors cannot.) Through the Direct Channel, employees and contractors can submit dissent on any “substantive USAID and development program issues,” criteria significantly broader than State’s criteria that limits dissent to

¹²³ José Garzón, “I dissent! And so should you,” *The Craft of Development*, February 5, 2018.
<https://web.archive.org/web/20180826073453/http://craftofdevelopment.com/i-dissent-and-so-should-you/>

“substantive foreign policy issues.”¹²⁴ That means administrative issues involving such things as travel, housing, and pay policies could also be reported through the channel.

The Direct Channel consists of an email account managed by the USAID Office of the Deputy Administrator. Very little information about the Direct Channel is publicly available, including the agency’s official policy guidance about how to use it, what impact it has had, and whether using it is explicitly protected, making an analysis of the channel difficult.

USAID declined to provide usage statistics for this report, but did provide a copy of an agency notice announcing the new channel. That notice states that submissions will be acknowledged within four business days and substantively responded to within 30 days.

Retired Ambassador Donald Steinberg, who served as USAID deputy administrator from 2011 to 2013 and played a key role in the channel’s creation, told POGO that the channel was created primarily to allow people to report things that they had seen or heard that might fall outside the scope of their regular job responsibilities. A worker responsible for distributing food, for example, might have difficulty reporting human rights violations up the chain when those violations are unrelated to food distribution.¹²⁵

Steinberg said he only remembers the channel being used once, over a year after its creation. He saw, however, an increase in reporting of issues directly to his office after the channel was announced, particularly with regard to human rights situations in Myanmar and Syria. Although those messages were not sent to the Direct Channel email account, he told POGO he made an effort to treat them as if they had been.

Although he worked to publicize the mechanism when it was created, he said he regretted not incorporating it into the agency’s various training curricula. When he left the agency in 2013, his position was filled by a string of short-term placements, and he thinks the Direct Channel was likely sidelined in the shuffle.

Susan Reichle, who served as counselor (the highest-ranking position for a career official at USAID) from 2013 until she left the agency in 2017, told POGO that the channel generally received only a handful of submissions in a year. She attributed the low usage rates to the fact that it is relatively easy for employees to reach the agency’s leadership through regular channels, although she, too, expressed regret for not doing more to elevate the Direct Channel’s profile within the agency.¹²⁶

Although agency employees may have relatively easy access to leadership, that does not explain why contractor staff—who lack the same access—don’t use the Direct Channel more. Contractor

¹²⁴ USAID, “Agency Notice 1142: Launch of USAID Direct Channel,” November 7, 2011.

<https://www.documentcloud.org/documents/5837533-USAID-Agency-Notice-1142.html>

¹²⁵ Donald Steinberg (former U.S. ambassador to Angola), interview with Daniel Van Schooten, February 5, 2020.

¹²⁶ Susan Reichle (former USAID counselor), interview with Daniel Van Schooten, November 21, 2017.

employees outnumber USAID's roughly 3,500 direct-hire employees, as USAID does most of its aid work through contracts, some of which are worth billions of dollars every year.¹²⁷

The large number of contractor employees without direct access to agency leadership suggests that the Direct Channel's disuse is primarily influenced by something other than access.

One possible reason for the lack of use of the channel is that it's not well advertised. A search of USAID's website revealed only one official mention of the Direct Channel, buried in a 2015 field guide for preventing mass atrocities.¹²⁸ The only other online sources POGO's review found discussing the channel are a few brief mentions from the American Foreign Service Association and the *Foreign Service Journal* it publishes, and a blog run by José Garzón, a former USAID foreign service officer. Garzón wrote on his blog that used the channel in 2013 to raise concerns about the agency's historic lack of Hispanic representation, compared to the State Department and other government agencies.¹²⁹

Submissions have, however, helped shape at least some policy decisions, according to Reichle.¹³⁰

And Steinberg described how, in response to Garzón's dissent, the agency made changes to its hiring standards, which at the time filtered out applicants who lacked a master's degree. The agency found that the standard, which was used to cut its massive applicant pool down to a more manageable size, removed a disproportionately high percentage of minority applicants.¹³¹

As for protections against retaliation, Steinberg told POGO that the Direct Channel largely copied those at the State Department's Dissent Channel, which administratively prohibit retaliation and task the inspector general with enforcement.

¹²⁷ "As the number of U.S. direct-hire staff declined, missions began relying on other types of employees, primarily foreign national personal services contractors, to manage mission operations and oversee development activities implemented by third parties." Government Accountability Office, *USAID Needs to Improve Its Strategic Planning to Address Current and Future Workforce Needs*, GAO-10-496, June 2010, 10. <https://www.gao.gov/assets/310/306295.pdf>; USAID, "Top 40 Vendors," updated May 7, 2019. <https://www.usaid.gov/results-and-data/budget-spending/top-40-vendors>; USAID, *Agency Financial Report: Fiscal Year 2019*, 3. https://www.usaid.gov/sites/default/files/documents/1868/USAIDFY2019AFR_508R.pdf

¹²⁸ USAID, *Field Guide: Helping Prevent Mass Atrocities*, April 2015, 16.

https://www.usaid.gov/sites/default/files/documents/1866/Field_Guide_Mass_Atrocities.pdf

¹²⁹ Garzón, "I dissent! And so should you" [see note 123].

¹³⁰ Susan Reichle (former USAID counselor), interview with Daniel Van Schooten, November 21, 2017.

¹³¹ Donald Steinberg (former U.S. ambassador to Angola), interview with Daniel Van Schooten, February 5, 2020.

Department of Energy

“In organizations as large as the DOE complex, voices can be missed. Efforts must be taken to encourage personnel to speak out and ensure that paths are readily available to communicate safety issues.”

– Department of Energy¹³²

Department of Energy: The Basics

<i>Official name of dissent channel</i>	Differing Professional Opinion process
<i>Who can dissent</i>	All employees and contractors
<i>Scope of allowed dissent</i>	Technical concerns related to environment, safety, and health
<i>Who receives the dissent</i>	Under Secretary selects decision-maker via Program Manager
<i>Response obligations</i>	Panel review, followed by official decision within 80 days
<i>Right to appeal</i>	Yes, to Undersecretary or Deputy Secretary
<i>Publicly available usage data</i>	No
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	Yes; cites whistleblower protections
<i>Link to official dissent channel policy</i>	https://www.energy.gov/ehss/doe-differing-professional-opinions

The Department of Energy mandated the creation of its own department-wide Differing Professional Opinion process in 2005 after reviewing investigations into a 2002 “near-miss” incident at a commercial nuclear power plant and the 2003 Columbia Space Shuttle disaster.¹³³ The department’s process is a dissent resolution mechanism modeled in part on the Nuclear Regulatory

¹³² Department of Energy, *Action Plan: Lessons Learned from the Columbia Space Shuttle Accident and Davis-Besse Reactor Pressure-Vessel Head Corrosion Event* (July 2005), 12. <https://ehss.energy.gov/deprep/2005/TB05L29F.PDF>

¹³³ Department of Energy, *Action Plan*, 12-13 [see note 132].

Commission's system but is more limited in scope, applying only to "technical concerns related to environment, safety and health."¹³⁴ Its stated goal is to "encourage personnel to speak out" and to ensure that managers take employee concerns seriously, especially those about safety.¹³⁵

Although the scope of the Department of Energy's dissent system is somewhat limited, its use does extend to department contractors, who are not only allowed to use the system but also are given the right to appeal decisions to department headquarters—an important feature, given that the department can select a senior manager employed by the contractor to serve as the initial decision-maker. The Department of Energy's panel structure also differs from that of the Nuclear Regulatory Commission, as the review panel is only required to have one department employee on it, and in some circumstances can consist of just one person. Additionally, a decision-maker who wants to deviate from the panel's recommendations needs to seek and receive approval from a senior department official.¹³⁶

Department of Energy policy prohibits retaliation, citing statutory whistleblower protections. However, it is not entirely clear that everyone who uses the department's channel would legally qualify as a whistleblower. For example, if an employee believes that the department's elimination of a program for detecting nuclear explosions creates a risk to public safety, it isn't clear whether disputing the elimination would be a protected disclosure based on a "reasonable belief" of danger or whether it would simply be a debatable policy disagreement.¹³⁷

A factor that may deter employees from raising concerns is the department's well-documented history of contractors (who run its national laboratories) that have retaliated against employees for speaking up.¹³⁸ Over 95,000 personnel work for the department's contractors, versus the department's 14,000 government employees.¹³⁹

¹³⁴ NRC, *2014 Differing Professional Opinions Program Assessment*, 9 [see note 38].

¹³⁵ Department of Energy, *Action Plan*, 12-13 [see note 132].

¹³⁶ Department of Energy, "Differing Professional Opinions for Technical Issues Involving Environmental, Safety, and Health Technical Concerns," October 5, 2016. <https://www.directives.doe.gov/directives-documents/400-series/0442.2-BOrder-chg1-pgchg/@@images/file>

¹³⁷ This issue arose in *Standley v. Department of Energy* [see note 34]; As mentioned previously, the Office of Special Counsel has told POGO that whether use of agency dissent channels is protected under statutory protections is "untested." Email from OSC Communications Director Zachary Kurz to POGO Investigator Daniel Van Schooten about Prohibited Personnel Practices, September 10, 2018.

¹³⁸ Peter Cary, Patrick Malone, and R. Jeffrey Smith, "Nuclear Negligence," The Center for Public Integrity, June 18, 2017–February 8, 2018. <https://apps.publicintegrity.org/nuclear-negligence/>; Madison Hopkins and Brett Chase, "Power Struggle," Better Government Association, December 20, 2017. <https://projects.bettergov.org/power-struggle/index.html>; Joe Davidson, "Senators rap Energy Dept. for enabling contractor retaliation against whistleblowers," *Washington Post*, August 1, 2016.

<https://www.washingtonpost.com/news/powerpost/wp/2016/08/01/senators-rape-energy-dept-for-enabling-contractor-retaliation-against-whistleblowers/>; Government Accountability Office, *Department of Energy: Whistleblower Protections Need Strengthening*, GAO-16-618 (July 11, 2016). <https://www.gao.gov/products/GAO-16-618>

¹³⁹ Office of Management and Budget, "Department of Energy." <https://www.performance.gov/energy/>

National Aeronautics and Space Administration

*“I don’t know how you can change a culture that doesn’t see the value of dissent.”
– Peter Spidaliere, mission systems engineer at Goddard Space Flight Center¹⁴⁰*

National Aeronautics and Space Administration: The Basics

<i>Official name of dissent channel</i>	Dissenting Opinion Process
<i>Who can dissent</i>	Direct-hire employees
<i>Scope of allowed dissent</i>	Any “substantive disagreement with a decision or action that an individual judges is not in the best interests of NASA”
<i>Who receives the dissent</i>	Lowest manager with authority
<i>Response obligations</i>	No hard deadlines. Decisions to be made in writing.
<i>Right to appeal</i>	Yes, can repeatedly appeal all the way to the Administrator
<i>Publicly available usage data</i>	No
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	No
<i>Link to official dissent channel policy</i>	https://nodis3.gsfc.nasa.gov/NPD_attachments/N_PD_1000_000C_.pdf

After the 2003 Columbia shuttle disaster, the National Aeronautics and Space Administration (NASA) created a dissent resolution process with a broad mandate: Any “substantive disagreement with a decision or action that an individual judges is not in the best interests of NASA” can qualify.¹⁴¹ Through this process, the disagreeing parties must work together to create a joint

¹⁴⁰ APPEL News, “The Role of Dissent in Driving Project Success,” July 15, 2016. <https://appel.nasa.gov/2016/07/15/the-role-of-dissent-in-driving-project-success/>

¹⁴¹ NASA, “NASA Policy Directive 1000.0C,” January 29, 2020, 33. https://nodis3.gsfc.nasa.gov/NPD_attachments/N_PD_1000_000C_.pdf

document outlining the agreed-upon facts and each side's position, including rationales, impacts, and recommendations. This document is then provided to the relevant manager or managers, who decide how to proceed. If a situation is particularly urgent, managers can waive the requirement for a written document and allow the parties involved to present their cases orally.¹⁴²

While there are no set time limits in the process, dissenting opinions are supposed to be “handled in an expeditious manner wherever possible,” according to a 2016 NASA presentation for senior management.¹⁴³ The timing can vary dramatically, however, because dissenters who are not satisfied with the initial result can appeal up the chain of command, all the way to the head of NASA. That has happened on at least two occasions, Nigel Packham, the manager of NASA's Flight Safety Office at Johnson Space Center in Houston, wrote to POGO.¹⁴⁴

In a 2016 interview with the agency's internal news service, Packham said he helped facilitate two cases which he said took between four and seven months. He attributed some of that length to logistical difficulties that arise when the involved parties are based at different NASA facilities, making it difficult to get all the relevant people in the same room—a dynamic he said he finds hard to replicate with video conferencing.¹⁴⁵

Unlike some other dissent processes, dissenting opinions at NASA can be filed before the decision is final, and the decision is usually put on hold while it is being contested. Managers may, however, proceed with their preferred course of action despite the existence of dissent if they acknowledge and accept responsibility for the risk they are taking by moving forward with a decision that may still be reversed on appeal.¹⁴⁶ This policy helps ensure that frivolous or minor complaints do not obstruct an entire program.

NASA's dissent process is decentralized. Disputes are resolved at the lowest level possible, which makes it difficult to accurately track how often the process is used, how long it takes to resolve disputes, and whether certain issues are common or recurring. There is no central repository of dissenting opinions or reporting requirement for managers, and although the paper trail each policy dissent process leaves is subject to the Freedom of Information Act, the records are scattered throughout the agency's various facilities and various levels of management.¹⁴⁷

¹⁴² NASA, “NASA Procedural Requirements 7120.5E,” August 14, 2012, 51.

https://nodis3.gsfc.nasa.gov/npg_img/N_PR_7120_005E_/N_PR_7120_005E_.pdf.

¹⁴³ NASA, “Dissenting Opinions,” Presented by Nigel Packham, January 4, 2016, slide 4. https://sma.nasa.gov/docs/default-source/safety-messages/dissenting-opinion-presentation.pdf?sfvrsn=aa6ce4f8_2

¹⁴⁴ Packham's response was provided by a NASA spokesperson through email. Email message from NASA Public Affairs officer J.D. Harrington to POGO Investigator Daniel Van Schooten about the dissenting opinions process, February 6, 2020.

¹⁴⁵ APPEL News, “The Role of Dissent in Driving Project Success” [see note 140].

¹⁴⁶ APPEL News, “The Role of Dissent in Driving Project Success” [see note 140].

¹⁴⁷ Dr. Nigel Packham, Manager, Flight Safety Office, Johnson Space Center, NASA, “Virtual Project Management Challenge,” June 22, 2016, 1:29:00. <https://mediaex-server.larc.nasa.gov/Academy/Play/2d872c3cc5b342028438fdb98050113c1d>

NASA has, however, surveyed employees about their awareness of and attitudes towards the dissent process, Packham wrote to POGO. Those surveys resulted in efforts to further streamline the process and better educate the workforce about their responsibility to voice their concerns and disagreements.¹⁴⁸

The agency does prohibit retaliation against those who use this dissent process, but its policy fails to describe any specific penalties or enforcement mechanisms.¹⁴⁹ Despite the lack of policy language, the NASA inspector general—as with other agency inspectors general—is generally empowered to investigate allegations of violations of agency policy. However, like other inspectors general, it is not required to investigate, and even when it does, it can only make recommendations for corrective action.

In addition to the dissent process created after the 2003 Columbia tragedy, the agency also has a separate, more centralized reporting process limited to safety-related issues, which it created in 1987 after the Challenger disaster. Initially, the reporting system was limited to the space shuttle program, but the agency later expanded it to cover “any safety concern or hazard presented by a NASA activity that can affect the public, the NASA workforce or NASA assets.”¹⁵⁰ Named the NASA Safety Reporting System, this system provides employees and contractors with anonymous access to senior safety officials, who can then initiate an investigation into the issue.¹⁵¹ The system has been used at least 808 times since its creation 33 years ago, an average of almost 25 times a year. As of July 2020, the website showed four open cases.¹⁵²

For non-critical issues, NASA said in 2014 that it usually takes between nine and 18 months to close out a case using this system, while critical cases should receive daily attention until fully resolved.¹⁵³ The longer timeframe, as compared to the broader dissent process, reflects the incorporation of an investigation to verify the safety concerns and identify potential solutions, as well the fact that these cases are only closed when all corrective actions have been taken, instead of when the decision is made.

The safety reporting system does not explicitly prohibit retaliation against those who use it. Instead, it relies on the process’s anonymity to protect users. Individuals physically mail complaints to a contractor who removes identifying information before passing it on to NASA safety officials, and investigators are forbidden from attempting to identify the submitter. If investigators do so

¹⁴⁸ Email from NASA Public Affairs Officer J.D. Harrington to POGO Investigator Daniel Van Schooten about the dissenting opinions process, February 6, 2020.

¹⁴⁹ NASA, “NASA Procedural Requirements 7120.5E,” 51 [see note 142]; NASA, “NASA Policy Directive 1000.0C,” 33 [see note 141]; APPEL News, “The Role of Dissent in Driving Project Success” [see note 140].

¹⁵⁰ NASA Office of Safety and Mission Assurance, “NASA Safety Reporting System.” <https://sma.nasa.gov/sma-disciplines/nsrs>

¹⁵¹ NASA, *NASA Safety Reporting System*, HOWI 8700-GB17 Revision F (April 29, 2019). https://nodis3.gsfc.nasa.gov/HQDQMS_Docs/QMS/HQ_OWI_8710_GD000_017_F_.pdf

¹⁵² NASA Office of Safety and Mission Assurance, “NSRS Status.” <https://sma.nasa.gov/sma-disciplines/nsrs> (accessed July 20, 2020)

¹⁵³ NASA Office of Safety and Mission Assurance, “NSRS Allows Anonymous Reporting of Hazards and Safety Concerns,” September 26, 2014. <https://sma.nasa.gov/news/articles/newsitem/2014/09/26/nsrs-allows-anonymous-reporting-of-hazards-and-safety-concerns>

inadvertently, agency policy requires them to recuse themselves from the rest of the process.¹⁵⁴ Special processing is arranged on a case-by-case basis for complaints where identifying information cannot be separated from the submission.

Some NASA facilities have taken additional steps to encourage dissent. The Goddard Space Flight Center in Maryland, for example, had a process for handling dissent decades before the agency-wide policy was implemented in 2003, according Peter Spidaliere, a mission systems engineer at Goddard.¹⁵⁵

And NASA's Engineering and Technology Directorate reserves its highest award, the Thomas J. Budney Award, for those who dissent in order to protect engineering integrity. It includes a cash award, and unlike the dissent awards commonly associated with the State Department, it is an official NASA award (albeit not agency-wide) rather than one run by an employee association.¹⁵⁶

¹⁵⁴ NASA, *NASA Safety Reporting System*, 13 [see note 151].

¹⁵⁵ APPEL News, "The Role of Dissent in Driving Project Success" [see note 140].

¹⁵⁶ APPEL News, "The Role of Dissent in Driving Project Success" [see note 140]; NASA, "Debbie Parks Receives Budney Award," *Inside Wallops*, Vol. 08, No. 24, July 7, 2008, 1. https://www.nasa.gov/centers/wallops/pdf/257837main_w070708.pdf; Goddard Space Flight Center, "Employee Spotlight: AETD Thomas J. Budney Award Presented by Orlando Figueroa, Director of Applied Engineering and Technology, GSFC," *Goddard View*, Vol. 2, Issue 8, May 2006, 12. https://www.nasa.gov/centers/goddard/pdf/148605main_GV2_8_Web.pdf

Food and Drug Administration’s Center for Drug Evaluation and Research

Center for Drug Evaluation and Research: The Basics

<i>Official name of dissent channel</i>	Differing Professional Opinion process
<i>Who can dissent</i>	Direct-hire employees
<i>Scope of allowed dissent</i>	Initial: Scientific or regulatory issues; Panel review: Significantly negative public health impact
<i>Who receives the dissent</i>	Initial: Next highest management official; Panel review: Center director
<i>Response obligations</i>	Ombudsman determines if dissent is serious enough in five days, after which a final decision is issued within 47 days
<i>Right to appeal</i>	Yes, to FDA level
<i>Publicly available usage data</i>	No, some information made available upon request.
<i>Does agency policy identify a mechanism for filing a retaliation complaint for using the channel?</i>	Yes; chain of command
<i>Link to official dissent channel policy</i>	https://www.fda.gov/media/71614/download

The Food and Drug Administration’s (FDA) Center for Drug Evaluation and Research has a hybrid dissent resolution system for its over 5,000 employees.¹⁵⁷ Dissenting employees begin with a process that is similar to NASA’s system of repeated elevation, but once the dissent reaches the center’s director, the resolution process then utilizes an advisory panel similar to those used in the Department of Energy’s and Nuclear Regulatory Commission’s Differing Professional Opinion processes.¹⁵⁸

¹⁵⁷ Food and Drug Administration, “Fiscal Year 2020: Justification of Estimates for Appropriations Committees,” 343. <https://www.fda.gov/media/121408/download>

¹⁵⁸ Center for Drug Evaluation and Research, “Manual of Policies and Procedures 4151.1 Rev 1: Scientific / Regulatory Dispute Resolution for Individuals Within a Management Chain,” September 16, 2010, 3-5.

Particularly urgent issues can skip straight to the panel system, provided they are approved by the ombudsman who manages the panel creation process. The center's director then reviews the panel's recommendations and serves as the final decision-maker. Appeals can be sent above the center's director, to the FDA, but only if the dissenter believes the process was not followed correctly.¹⁵⁹

The process was established in 2004. It was revised in 2010 after a congressional investigation revealed that FDA political appointees had changed policies and blocked individuals from being able to use state laws to file lawsuits against companies selling allegedly unsafe drugs. In that case, the appointees disregarded "the objections of key career officials" who wrote that the policy change and accompanying language was "based on a 'false assumption,' 'naïve to what actually occurs in practice,' relied on 'gross overstatement,' and made 'false and misleading' assertions."¹⁶⁰

The center's ombudsman has only received two Differing Professional Opinion submissions in the past nine years, neither of which proceeded to panel review.¹⁶¹ The ombudsman rejected the submissions because they did not meet the necessary criteria, and is not aware of any allegations of retaliation for use of either stage of the dissent process, the agency told POGO in an email.¹⁶² The ombudsman did not provide POGO with usage data for the NASA-like escalation mechanism, as the ombudsman is not automatically notified when that occurs.

Agency policy states that managers are expected to protect employees from even the appearance of retaliation, but the policy does not describe any specific enforcement mechanisms available to potential victims. The center told POGO that someone who alleges retaliation for using the process could go to a higher-level supervisor, use the FDA's informal conflict resolution program, go to their union, or, if applicable, file a case with the Equal Employment Opportunity Commission.¹⁶³

<https://www.fda.gov/media/71608/download>

¹⁵⁹ Center for Drug Evaluation and Research, "Manual of Policies and Procedures 4151.2 Rev 1: Resolution of Differing Professional Opinions: Review by Ad Hoc Panel and CDER Director," September 16, 2010, 5-7. <https://www.fda.gov/media/71614/download>

¹⁶⁰ House of Representatives Committee on Oversight and Government Reform, *FDA Career Staff Objected to Agency Preemption Policies* (October 2008), i. <http://psychrights.org/Issues/Preemption/Oct08HouseRptFDAonPreemption.pdf>

¹⁶¹ According to a 2013 review, the most recent submission was two and a half years prior. Email from CDER Public Health Analyst Freeda Moore to POGO Investigator Daniel Van Schooten about CDER's DPO process, May 22, 2019; LinkVisum Consulting Group, "Safety Culture Continuous Learning and Improvement Services: Task Order 3: Differing Views Processing Benchmarking," (NRC-HQ-11-C-37-0073), March 13, 2013. <https://www.documentcloud.org/documents/4577015-NRC-Dissent-Benchmarking-Study.html>; Center for Drug Evaluation and Research, "Resolution of Differing Professional Opinions: Review by Ad Hoc Panel and CDER Director," September 16, 2010.

<https://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ManualofPoliciesProcedures/ucm073558.pdf>

¹⁶² Email from Moore to Van Schooten about CDER's DPO process [see note 161].

¹⁶³ Email from Moore to Van Schooten about CDER's DPO process [see note 161].

Recommendations

Empowering federal employees to dissent is valuable for the policymaking process. It shouldn't take another preventable disaster to relearn the lesson that experts within federal agencies should be able to—without fear of reprisal—raise concerns about policies that could lead to or exacerbate a crisis, or to propose policy changes that could avert tragedies. While there is scope to conduct further examination of dissent channels, it is clear even now that there is significant room for improvement to the channels.

- All agencies with dissent channels need to:
 - Empower all employees—including contractors—to formally and anonymously dissent regarding the agency's core substantive policies as it pertains to the employee's professional expertise;
 - Have a specified office that will receive and initially assess the policy dissent with sufficient independence from the agency's leadership;
 - Include access to the agency's leadership that enables dissenters to rapidly communicate concerns;
 - Include a formal means for the person who filed the dissent to appeal management's response, and the organization or person assessing the appeal should be independent of the organization or individual who made the initial assessment;
 - Provide clear information on agency websites about where to file and address complaints of retaliation;
 - Track and provide to the public, on an annual basis at a minimum, reporting on how often each dissent channel is used, a publicly releasable summary of the concern and its resolution, and statistics on claims of retaliation for using the dissent channel and for expressing dissent in other ways and the resolution of those claims;¹⁶⁴ and
 - Award employees for constructive dissent.
- Because policy changes improving dissent channels are not sufficient on their own, all agency leaders must commit to embracing creativity and dissent at an institutional level—

¹⁶⁴ One possible model is the Defense Department's Office of Inspector General, which provides department-wide data on retaliation claims—even for claims that are not made to that inspector general office (non-statutory inspectors general exist elsewhere in the department, in the military services and in department components). The Defense Department Office of Inspector General makes this information available twice a year in semi-annual reports. Inspectors general may be an ideal venue to produce this information because they have independence from agency leadership, and they can investigate claims from agency employees that they faced retaliation for using the agency's dissent channel. *Semiannual Report to the Congress October 1, 2019 through March 31, 2020*, Department of Defense Office of Inspector General (2020), 60-75. <https://media.defense.gov/2020/Jun/01/2002308342/-1/-1/1/DOD%20OIG%20SEMIANNUAL%20REPORT%20TO%20THE%20CONGRESS%20OCTOBER%201,%202019%20TO%20MARCH%2031,%202020.PDF>

not only tolerating constructive dissent but also incentivizing it—before a broad culture shift can occur.

- The White House needs to pick appointees with track records that demonstrate they embrace dissent, to vocally support agency leaders that create environments conducive to speaking up, and take disciplinary action against political appointees who retaliate.
- The White House needs to embrace constructive dissent by its own political appointees as well.
- The Office of Personnel Management should institutionally spearhead efforts to push agency leaders to embrace dissent. OPM should train all members of the senior executive service and high-level political appointees on the best practices for encouraging the federal workforce to express concerns.¹⁶⁵
- The OPM’s annual Federal Employee Viewpoint Survey should include a question about agency leadership’s receptiveness to concerns raised by employees about policies and federal agencies should be required to post more agency-specific results from the survey.¹⁶⁶ Government agencies with dissent channels should better train and educate their staff about the avenues available for policy dissent.
- Congress should take several actions to strengthen dissent channels in the executive branch, its oversight of these channels, and protections for those who use dissent channels and for those who dissent in other ways, including for communicating to Congress.
 - Congress should statutorily ensure that it regularly has access to the substance of the dissent communications, management responses, and appeals at all agencies that have dissent channels.

¹⁶⁵ Such an agenda fits well within OPM’s Center for Leadership Development. Its Federal Executive Institute works to “improve the performance of government agencies by working with federal executives who are exceptional leaders, understand their constitutional role, possess a broad corporate view, and take pride in serving the American people.” “Federal Executive Institute,” Office of Personnel Management. <https://www.opm.gov/services-for-agencies/center-for-leadership-development/federal-executive-institute/>

¹⁶⁶ This survey seeks responses to topics that are related, but are distinct, such as “Prohibited Personnel Practices are not tolerated;” “Creativity and innovation are rewarded;” “I can disclose a suspected violation of any law, rule or regulation without fear of reprisal;” “How satisfied are you with your involvement in decisions that affect your work?;” and “How satisfied are you with the policies and practices of your senior leaders?”. *Governmentwide Management Report*, Office of Personnel Management (2019). <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2019/2019-governmentwide-management-report.pdf>; [Federal agencies should also do more to publicly release Federal Employee Viewpoint Survey responses. While the Office of Personnel Management releases large data files, they require the use of spreadsheet or database programs to parse and are not easily accessible to the public or to most federal employees.](https://www.opm.gov/fevs/public-data-file/) <https://www.opm.gov/fevs/public-data-file/>; The non-profit Partnership for Public Service does use the Federal Employee Viewpoint Survey dataset to assess federal agencies, but the partnership’s presentation does not allow the public to look at responses to individual survey questions. <https://bestplacestowork.org/about/methodology/>; For federal agencies, OPM creates what are called Agency Trend Reports, with that agency’s answers to individual survey questions compared to prior years, but OPM does not publicly release these reports and agencies do not consistently release these reports.

- Congress should clarify the law to remove any doubt that use of these channels is a protected activity under 5 U.S.C. 2302(b)(9).¹⁶⁷ By making it clear that retaliation for use of these channels is a prohibited personnel practice under this statute, the Merit Systems Protection Board can enforce these protections. If protections are only to be found in agency policy as is the status quo, there is no mechanism that can compel an agency to address retaliation, even if an agency inspector general substantiates a whistleblower’s claim.
- Congress should widen the scope of protections for policy-related communication that is not made through a formal dissent channel under 5 U.S.C. 2302(b)(8). Doing so would strengthen protections for policy dissent that is communicated to Congress as well as to coworkers, supervisors, and others.¹⁶⁸ More clearly covering policy dissent under 5 U.S.C. 2302(b)(8) and (b)(9) will ensure that officials who are found to have retaliated against federal employees who communicate professional disagreements or propose policy changes will be subject to mandatory discipline under the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017.¹⁶⁹ (As noted earlier, federal employees are obligated to obey lawful orders—even if they disagree with them.)
- Congress should pursue other legislative reforms to improve retaliation protections for federal employees engaging in protected speech and activity, such as giving

¹⁶⁷ A recent decision by an administrative judge threatens a plain reading of the scope of 5 U.S.C. 2302(b)(9)’s coverage of use of dissent channels (and other internal complaint channels within agencies). Brief of the U.S. Office of Special Counsel as Amicus Curiae Supporting Petitioner, Timothy Mohler v. Department of Homeland Security [see note 36]; The Whistleblower Protection Enhancement Act of 2012 clarified other administrative judge-created carveouts to protections under Title 5. Senate Committee on Homeland Security and Governmental Affairs, S. Rep. 112-155, (2012), 4. <https://www.congress.gov/112/crpt/srpt155/CRPT-112srpt155.pdf>; Beth Daley, “Homeland and National Security Whistleblower Protections: The Unfinished Agenda,” Project On Government Oversight, April 28, 2005. <https://www.pogo.org/report/2005/04/homeland-and-national-security-whistleblower-protections-unfinished-agenda/>; Recommendations regarding Title 5 of the U.S. Code affect federal employees in the civil service; the majority of the more than 2 million federal executive branch civilians are governed by this legal employment authority. Kathryn A. Francis and Ramona J. Diaz, “Defense Primer: DOD Appropriated Fund Civilians, Congressional Research Service,” March 12, 2019 <https://fas.org/sgp/crs/natsec/IF11131.pdf>; Julia Jennings and Jared C. Nagel, *Federal Workforce Statistics Sources*, Congressional Research Service, October 24, 2019. <https://fas.org/sgp/crs/misc/R43590.pdf>; Parallel changes could also be made to the legal authorities that govern the workforces in the foreign service (Title 22), the armed services (Title 10), the Federal Bureau of Investigation (Title 28), the intelligence community (Title 50), and the Federal Reserve System (Title 12).

¹⁶⁸ “The issue emerged during the hearing on” a precursor to the Whistleblower Protection Enhancement Act “in 2003 during the 108th Congress. At the hearing, the Senior Executives Association expressed concern that, if the scope of protected disclosures were completely unrestricted, the WPA could be construed to protect employees who disclose disagreements with their supervisors’ or managers’ lawful policy decisions, and the Association recommended that the bill be clarified to deny protection of disclosures relating to policy disagreements. Put another way, an employee who discloses general philosophical or policy disagreements with agency decisions or actions should not be protected as a whistleblower.” Senate Committee on Homeland Security and Governmental Affairs, S. Rep. 112-155, 7 [see note 167].

¹⁶⁹ Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. Law No. 115-73 (2017). <https://www.congress.gov/bill/115th-congress/senate-bill/585/text?overview=closed>

federal employees access to jury trials when they believe they are retaliated against.¹⁷⁰

- Congress should task the Government Accountability Office with evaluating federal dissent channels, including surveying users of the channels, to determine further best practices for dissent channels and additional policy and legislative improvements.

¹⁷⁰ Liz Hempowicz, "The State of Whistleblower Protections and Ideas for Reform," Project On Government Oversight, January 28, 2020. <https://www.pogo.org/testimony/2020/01/the-state-of-whistleblower-protections-and-ideas-for-reform/>; The Office of Special Counsel testified in 2017 that "a number of benefits may flow from granting federal district court jurisdiction over certain whistleblower retaliation claims." Five Years Later: A Review of the Whistleblower Protection Enhancement Act: Hearing before the House Committee on Oversight and Government Reform, 115th Cong. 10 (February 1, 2017) (Testimony of Eric Bachman, Deputy Special Counsel, the U.S. Office of Special Counsel.) <https://osc.gov/Documents/Resources/Congressional%20Matters/Congressional%20Testimony%20and%20Transcripts/Testimony%20of%20Deputy%20Special%20Counsel%20Eric%20Bachman%20on%20%20%E2%80%9CFive%20Years%20Later-%20A%20Review%20of%20the%20Whistleblower%20Protection%20Enhancement%20Act.%E2%80%9D%20February%201.%202017.pdf>