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Whistleblower Protections in the Context of the Detained Immigrant Experience

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I. Introduction

In March of 2020, Alex Hernandez was detained in Etowah County Detention Center as an undocumented immigrant under the control of U.S. Immigration and Customs Enforcement (ICE).[1] At that same time, outside the walls of the Detention Center, the Covid-19 pandemic was rapidly spreading. Schools and businesses were immediately shuttered, office workers turned their dining tables into their desks, supermarket employees rang groceries from behind plastic curtains, and life was put on pause; inside the walls of Etowah County Detention Center, however, life continued as normal for the immigrant detainees. In the face of a novel and deadly pandemic, no personal protection equipment was provided, no social distancing was enforced, and detainees were not screened for risk factors. It was not until two detainees draped nooses around their necks and stepped onto the edge of a second-floor railing, in a cry for action and a threat of suicide, that ICE took any steps to protect the detainees from the virus.[2]

Across state lines, approximately five hours away, at Irwin County Detention Center, employee Dawn Wooten witnessed the same type of neglect. In the midst of a growing pandemic, Irwin County Detention Center neglected to follow any of the CDC guidelines in response to Covid-19, although strict adherence to these guidelines was administratively required by ICE.[3] In response, Dawn Wooten filed one of the most groundbreaking whistleblower complaints of the decade, in which she not only detailed neglect in response to Covid-19, but also various incidents of medical mistreatment, including the astonishing accusation that

[1] *Fraihat v. U.S. Immigration & Customs Enf't*, 445 F.Supp.3d 709, 728 (C.D. Cal. 2020).
[2] *Id* at 729.
[3] *Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center*, Project South (Sep. 14, 2020) https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf.

detained women at Irwin were given hysterectomies against their will and without proper informed consent.[4]

These instances of misconduct and medical mishandling of detainees are not isolated to Etowah and Irwin Detention Centers. In recent years, there have been various complaints regarding the medical mistreatment of immigrant detainees in ICE facilities. These complaints have been brought to light through whistleblowers, or people who inform on a person or organization engaged in an illicit activity.[5] Both detainees as well as the federal employees who work in these facilities, such as Ms. Wooten, have operated as whistleblowers to bring this information to public knowledge and to the desks of Congressional representatives. However, although there are federal protections in place designed to shield whistleblowers from backlash for raising complaints, such as the Whistleblower Protection Act (WPA), these Acts have not sufficiently protected these individuals after voicing their concerns.[6]

Retaliation against whistleblowers is strictly prohibited under the WPA, but federal employees under various sectors of government have nonetheless experienced retribution without protection for bringing federal wrongdoing to light. In the case of Dawn Wooten, she was essentially terminated from her positions with ICE, while detainees have been deported for exposing the wrongdoings happening behind the closed doors of detention facilities. Further protections and guarantees must be implemented to ensure medical safety for detainees, and true legal protection for those who choose to expose wrongdoings. This is a concern that not only affects those involved with ICE, but all potential federal whistleblowers across government agencies.

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[4] *Id*.
[5] *Whistleblower*, Merriam-Webster (11th ed. 2003).
[6] 5 U.S.C. §1201 (2006).

Despite the mistreatment of federal whistleblowers under existing protections, the United States has historically accepted and appreciated whistleblowers and the oversight that they bring to government operations. Officials as notable as former President Barack Obama have commented on the topic:

> "Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance."[7]

While in office, President Obama did in fact work to further protect whistleblowers by expanding the WPA with the Whistleblower Protection Enhancement Act. This regard for whistleblowers also reaches across party lines. In 2018, Republican Senator Chuck Grassley announced his plan to create a Senate Whistleblower Protection Caucus to raise further awareness of the need to adequate protections for whistleblowers. When announcing the caucus, Grassley stated, "No matter the source of the wrongdoing, the whistleblowers who 'give the earliest information' about it 'to Congress or other proper authority' deserve our profound gratitude."[8] It is evident that individuals who come forward in sharing abuse in government agencies should be protected under the law.

II. Structural Overview of ICE-Run Facilities

[7] *Obama "Protect Whistleblowers" View Should Aid Bill Passage, Encourage Reporting of Wrongdoing*, Government Accountability Project (Dec. 11, 2008) https://whistleblower.org/general/whistleblowers/obama-protect-whistleblowers-view-should-aid-bill-passage-encourage-reporting-of-wrongdoing/.
[8] *Grassley: Whistleblowers Deserve Our Profound Gratitude*, Chuck Grassley (Jul. 30, 2018) https://www.grassley.senate.gov/news/news-releases/grassley-whistleblowers-deserve-our-profound-gratitude.

To understand the impact of the mistreatment of individuals in Immigration and Custody Enforcement (ICE) detention centers, it is important to consider the true span of these facilities. ICE operates a total of 213 detention centers in the United States; 44 which are dedicated solely to housing undocumented immigrants, and 169 non-dedicated facilities, which are usually local or county jails who contract with ICE to allow individuals in ICE custody to be detained there.[9] On any given day there are approximately 34,000 people in ICE custody, and approximately 400,000 people are detained throughout the system over the span of one year.[10]

To oversee these facilities, ICE either independently operates them, or contracts with local governments who either directly oversee the operations or subcontract the operation of the facility to private prison companies.[11] For facilities that are overseen by local or private companies, ICE Enforcement and Removal Operations (ERO) Detention Monitoring Program conducts regular inspections of the premises, following the guidance of ICE's National Detention Standards.[12] These standards ensure that detainees in ICE custody reside in "safe, secure and humane environments and under appropriate conditions of confinement."[13] However, because of the large amount of facilities that are currently operating, and the large number of detainees within each facility, ICE also contracts with private companies to conduct these inspections, and allows smaller facilities to submit Organizational Review Self-Assessments (ORSAs). [14] The issue with this system is that facilities receive advance notice of inspections, which allows them to temporarily modify their practices in order to pass the inspection. The

[9] *Authorized Dedicated Facility List*, ERO Custody Management Division (May 3, 2021) https://www.ice.gov/doclib/facilityInspections/dedicatedNonDedicatedFacilityList.xlsx.
[10] *Id*.
[11] *2019 National Detention Standards for Non-Dedicated Facilities*, U.S. Immigr. & Customs Enforcement (Mar. 11, 2021) https://www.ice.gov/detain/detention-management/2019.
[12] *Id*.
[13] *Id*.
[14] *Immigration Detention Oversight and Accountability*, Nat'l Immigrant Just. Ctr. (May 22, 2019) https://immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability.

inspections do not provide true insight into how a facility operates on a daily basis. Also, there are integrity concerns for smaller facilities that are allowed to submit their own self-assessments; there is no cross-check to determine if these facilities are truthful in their reporting. These flawed reporting systems further strengthen the need for whistleblowers to bring forth claims of wrongdoing and illuminate what is not regularly seen within the perimeters of the detention centers.

In addition to organizing oversight of detention facilities for undocumented immigrants, ICE is also responsible for providing medical care to detainees. ICE Health Service Corps (IHSC) either directly provides medical, dental, and mental healthcare to detainees or provides oversight and authorization of off-site healthcare for detainees.[15] In the IHSC Annual Report for Fiscal Year 2020, a yearly journal provided by ICE, details are published about the specific healthcare services given to detainees in order to provide transparency to the public about what occurs in detention centers.[16] Included in the 2020 report were procedures implemented to prevent the spread of Covid-19; procedures which, with the help of whistleblowers, are known to have not been implemented in a timely nor sufficient manner. ICE also exhaustively accounts for any deaths that occur in their detention centers through a detainee death reporting site; in 2020, of the 21 deaths that occurred under ICE supervision, eight were due to Covid-19.[17]

III. Medical Abuses in ICE Facilities

In the past few years, various examples of the medical mistreatment of detainees have

[15] *Id*.
[16] U.S. Immigration & Custody Enf't, *Health Service Corps Annual Report* (2020) https://www.ice.gov/doclib/about/offices/ihsc/pdf/IHSCFY20AnnualReport.pdf.
[17] *Detainee Death Reporting*, U.S. Immigr. & Customs Enforcement (May 10, 2021) https://www.ice.gov/detain/detainee-death-reporting

been submitted to Congress and brought to public knowledge by both employee whistleblowers and the reports of undocumented detainees. Without the accounts of these individuals, the circumstances described in their complaints would likely still be occurring behind closed doors.

Perhaps the most viral of complaints was brought forth by Dawn Wooten, the aforementioned nurse employed by Irwin County Detention Center (ICDC), a non-dedicated ICE facility located in Irwin County, Georgia.[18] Although the center is operated by a private prison company, LaSalle Corrections, ICE is still responsible for monitoring that the facility and its operators follow the National Detention Standards.[19] In her complaint, Ms. Wooten detailed a number of accusations, including that the administrators at ICDC did not follow CDC guidelines for the prevention of Covid-19 in the facility, which is required by ICE's National Detention Standards.[20] She specifically explained a lack of Covid-19 testing and reporting in the facility (a direct violation of the standards), the allowance of transfers in and out of the facility without considering the spread of Covid-19, as well as a general lack of medical care and unsafe working and living conditions.[21] She detailed situations ranging from the withholding of detainees' medications, to the serving of spoiled food crawling with cockroaches, to dirty examination rooms littered with overflowing waste bins in dire need of cleaning.[22]

Perhaps the most shocking detail in Ms. Wooten's complaint was that multiple immigrant women at ICDC were given hysterectomies against their will and without proper informed consent.[23] Ms. Wooten describes in detail that the rate at which hysterectomies were occurring in

[18] *Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center*, Project South (Sep.14, 2020) https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.

the center was a red flag, and that the women who underwent the procedure seemed confused about why they had a hysterectomy at all.[24] One detainee even stated that hearing of all the hysterectomies made her feel as if she were in "an experimental concentration camp," and that the doctor who performed the procedures was referred to as "the uterus collector".[25]

These jarring allegations were confirmed by U.S. Representative Pramila Jayapal, who met with some of the women who had been subject to the invasive procedures outlined in Ms. Wooten's complaint. Through her meetings, Representative Jayapal learned that at least 17 women had undergone a hysterectomy by that particular doctor at ICDC with "the clear intention of sterilization".[26] A lawyer for one of the women explained that,

> "while … it is impossible to know the doctor's intention, the system, and a lack of oversight, 'creates space for someone to have bad intentions. It also creates space for other people who may have bad intentions to enable or to be willfully blind to the actions of one person . . . [the system] is built to allow things like this to happen and women especially are vulnerable for this kind of victimization.'"[27]

Representative Jayapal further stated that there may have been even more additional cases of unsolicited hysterectomies on women who have since been deported or are unable to

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[24] *Id*.
[25] *Id*.
[26] Pramila Jayapal, *Jayapal Statement on New Details Regarding Forced Unnecessary Medical Procedures—Including Hysterectomies—Being Performed on At Least 17 Immigrant Women in Irwin County, Georgia*, (Sep. 16, 2020) https://jayapal.house.gov/2020/09/16/new-details-regarding-forced-medical-procedures-on-immigrant-women/.
[27] Miranda Bryant, *Allegations of unwanted Ice hysterectomies Recall Grim Time in US History*, The Guardian (Sep. 21, 2020, 3:00 PM) https://www.theguardian.com/us-news/2020/sep/21/unwanted-hysterectomy-allegations-ice-georgia-immigration

access legal representation.[28] This pattern of conduct may have never been addressed by Congress if it were not for Ms. Wooten's whistleblower complaint. Also, as a result of the complaint, Representative Jayapal launched a Congressional investigation into medical abuses and poor obstetrics care in ICE custody.[29]

In July of 2020, another whistleblower complaint was filed concerning the handling of Covid-19 in a LaSalle-run ICE detention center.[30] Current and former detention officers from Richwood Correctional Center in Richwood, Louisiana disclosed the gross mismanagement of Covid-19 protocols in the facility. [31] As of the date of filing, at least 15 officers and 72 detainees had contracted Covid-19, and at least two officers had died as a result of contracting the virus. Specific instances of misconduct cited in the complaint included Richwood management prohibiting staff from wearing facemasks until the virus had already significantly spread within the facility, quotations from Richwood's Health Service Administrator stating that Covid-19 was "no worse than the flu", and policies which did not allow sick staff to stay home from work in order to protect others.[32] The officers also claim that they suffered retaliation after raising these concerns to management, and that because of this they were either fired or forced to quit.[33] Ten of the officers claim that they were fired for not passing a "new" background check, which they believe was a fabrication.[34]

These whistleblower reports of Covid-19 mismanagement have also been supported by a number of cases brought in court on behalf of detainees. In *Fraihat v. U.S. Immigration and*

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[28] Jayapal, *supra* note 26.
[29] *Id*.
[30] Samantha Feinstein, Dana L. Gold & John Whitty, *Whistleblower Disclosures on COVID-19*, Government Accountability Project (Jul. 10, 2020) https://whistleblower.org/wp-content/uploads/2020/07/071020-letter-to-Congress-from-GovAcctProj-re-whistleblowers-ICE-Detention-COVID-FINAL-Submitted.pdf
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.

Customs Enforcement, plaintiffs illustrated instances of noncompliance with CDC and IHSC guidelines within ICE facilities. Irwin County Detention Center, the same center identified by Ms. Wooten, was specifically described:

> "One detainee at Irwin reported … that there were confirmed cases of COVID-19 in the facility … a detainee caller reported that neither ICE nor guards had given information about COVID-19, and that at least one person in his housing had a worsening cough, but had not been removed from the unit.[35]

This account is a direct violation of the National Detention Standards, which state that detainees who show symptoms of respiratory illness should be quarantined.[36] The case offers dozens of other examples of severe violations to Covid-19 protocol, including the instance in Etowah County Detention Center that drove Alex Hernandez's peers to threaten suicide as a demand for action.[37] Plaintiffs' motions in the case were affirmed, through which ICE was required to: train staff on how to appropriately handle detainees with Covid-19 risk factors, submit to the court a performance standard to their Pandemic Response Requirements, and monitor and enforce facility-wide compliance with the standards.[38] This injunctive relief would not have been possible without each of the plaintiffs stepping forward to tell their stories of mistreatment in ICE facilities across the country.

There have been various other whistleblower complaints regarding ICE's mishandling of detainee's healthcare apart from concerns raised by Covid-19. One such example is a

[35] *Fraihat v. U.S. Immigration & Customs Enf't*, 445 F.Supp.3d 709, 732 (C.D. Cal. 2020).
[36] U.S. Immigration & Custody Enf't, *supra* note 16.
[37] *Fraihat v. U.S. Immigration & Customs Enf't*, 445 F.Supp.3d 709, 729 (C.D. Cal. 2020).
[38] *Id* at 751.

whistleblower report submitted to the Office of the Inspector General (OIG) in 2019, which detailed instances of ICE officials neglecting to conform to standards for medical and mental health care of detainees.[39] Specific claims cited in the report included inadequate treatment and monitoring of detainees who were in severe withdrawal from alcohol or substance abuse, a lack of psychiatric monitoring leading to mental health deterioration, forcible injections of medication as a means of behavior control, misdiagnosis of medical and mental health conditions, serious errors in the administration of medication, and severely inadequate care and oversight of four specific detainees who ultimately died in custody.[40] These horrific accounts prompted the Department of Homeland Security to initiate an investigation into ICE and their policies and procedures surrounding the medical and mental care of immigrants in detention.[41] Once again, this investigation would not have occurred without the whistleblower's decision to bring this information forward.

IV. Whistleblower Protections in the United States

Throughout the history of the United States, the government has worked to provide protections for individuals who raise complaints regarding the misconduct of private parties or of the government. The government recognizes the importance of the protection of whistleblowers, and how necessary it is that they feel comfortable alerting the government of wrongdoing within its own offices. The protection of whistleblowers is also important to ensure a smooth operation of the federal government and the assurance that adequate services are being provided to all individuals.

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[39] Cameron P. Quinn & Marc Pachon, *ICE Health Service Corps Medical/Mental Health Care and Oversight*, U.S. Dep't of Homeland Security (Mar. 20, 2019) https://www.documentcloud.org/documents/6575024-ICE-Whistleblower-Report.html.
[40] *Id*.
[41] *Id*.

The most rudimentary evidence for Congress holding authority to control whistleblower protection can be traced to the Spending Power of Article 1, Section 8 of the Constitution, which provides that Congress has the power to provide for the general welfare of the United States.[42] Whistleblower complaints allow Congress to adequately exercise oversight of the welfare of its constituents, as whistleblowers work as an extra pair of eyes and ears in overseeing the execution of government resources and funds.[43] Therefore, the work of whistleblowers is not at odds with the foundation of Congress's goals.

The first evidence of a statute protecting whistleblowers emerged in the 1777 Continental Congress. During the Revolutionary War, ten marines reported to Congress that their commander was acting abusively toward their platoon as well as their British prisoners of war.[44] Specifically, the marines reported that the commander frequently cursed at them and referred to them as "a pack of damned fools", and treated their prisoners "inhumanely", which was a strict violation of orders from the Continental Congress.[45] In response to this event, Continental Congress passed a law protecting whistleblowers making disclosures against government officials, and extended that protection to future whistleblowers. Congress stated:

> "It is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge"[46]

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[42] U.S. Const. art. I § 8
[43] Liz Hempowicz, *The State of Whistleblower Protections and Ideas for Reform*, POGO (Jan. 28, 2020) https://www.pogo.org/testimony/2020/01/the-state-of-whistleblower-protections-and-ideas-for-reform/.
[44] Christopher Klein, *US Whistleblowers First Government Protection in 1777*, History (Sep. 26, 2019) https://www.history.com/news/whistleblowers-law-founding-fathers.
[45] *Id*.
[46] 11 U.S. Cont'l Congress, *Journals of the Continental Congress 1774-1778* 732 (1908).

Protections for whistleblowers were further strengthened during the Civil War. During this time, the Union found itself being defrauded by private contractors who were selling troops deteriorating goods and weapons to use in the war. In an effort to combat this, President Lincoln passed the False Claims Act, which permitted citizens to file lawsuits on behalf of the government against companies they suspected had defrauded the government.[47] In these types of lawsuits, known now as qui tam suits, the "relator", or the individual bringing the action, is entitled to receive a percentage of the amount recovered by the government through the suit.[48] This usage of whistleblowers benefitted both the whistleblowers themselves and also the federal government in its oversight of the general welfare of the country, as they had assistance in finding wrongdoing and also saved money in not needing to police all transactions with private companies.

These statutes and sentiments to encourage whistleblowers to come forward ultimately led to the passage of the Whistleblower Protection Act (WPA) in 1989.[49] While the qui tam provision of the False Claims Act concerns government dealings with private companies, the purpose of the WPA is to strengthen the rights of government employees and also eliminate wrongdoing from within the government.[50] The WPA allows federal employees to make disclosures that support public interest and eliminate "fraud, waste, abuse, and unnecessary Government expenditures" in the very government agencies in which they work.[51] The WPA also seeks to ensure that employees who disclose these wrongdoings will be protected from

[47] Klein, *supra* note 44.
[48] 31 U.S.C. §§3729-3733.
[49] 5 U.S.C. §1201
[50] *Id*.
[51] *Id*.

reprisal.[52] The Act further established the Office of Special Counsel (OSC), whose primary role is to protect employees who come forward as whistleblowers and ensure that they do not suffer any prohibited personnel practices, such as employment discrimination and retaliation.[53]

In 2012, Congress expanded the WPA by passing the Whistleblower Protection Enhancement Act (WPEA), which added provisions such as the requirement that nondisclosure policies signed by government employees include a statement informing employees that any whistleblower protections will control and supersede the nondisclosure agreement.[54] In other words, government agencies cannot contract around WPA protections. The WPEA also created the role of a whistleblower protection ombudsman for each agency, who is responsible for educating employees on whistleblower protections and their rights in relation to protected disclosures.[55] The ombudsman also works as the point of contact for employees who have questions regarding details on the protections or are seeking assistance in filing a complaint.[56] These provisions were enacted with the intention of making the process of filing complaints more accessible and easier to understand for employees, a fact which shows the federal government values employee disclosures.

V. Current Treatment of Whistleblowers

The statutory history outlined above gives credence to the belief that whistleblowers are highly esteemed by the federal government. Whether whistleblowers are bringing claims against private companies or the government itself, there are significant protections in place seeking to ensure that whistleblowers are protected after coming forward. However, this has unfortunately

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[52] *Id*.
[53] *Id*.
[54] *Whistleblower Protection Enhancement Act of 2012*, Millenium Challenge Corporation https://www.mcc.gov/resources/whistleblower-protection (last visited May 10, 2021).
[55] *Id*.
[56] *Fraud, Waste & Abuse*, Soloman Law Firm, PLLC (Feb. 20, 2013) https://www.fedemploylaw.com/blog/2013/february/fraud-waste-abuse-wpea/.

not been the reality for many federal whistleblowers who have filed complaints in the past few years.

In the case of Dawn Wooten, she claims she was retaliated against after filing her whistleblower complaint that regarded the treatment of immigrant detainees at ICDC. Ms. Wooten claims that, after her complaint was filed, her work hours were severely reduced and that her schedule as a nurse at ICDC was changed without explanation or justification.[57] When tying this treatment to her whistleblower complaint, she states:

> "You put two and two together. I'm asking for these things and I'm speaking for these detainees. I'm a problem. I'm being seen and I'm not supposed to be seen or heard. It makes it look like you're not doing your job... It [ICDC] has driven away so many people who work there whenever they go to speak out and they go to do what's right."[58]

In addition to her own mistreatment, Ms. Wooten also alleged that she witnessed a captain at the facility be fired for challenging ICDC's handling of CDC rules.[59] It is clear that the directors at ICDC neglected to follow WPA standards related to whistleblowers. Also, in the second whistleblower complaint resulting from Richwood Detention Center, correctional officers who raised concerns were fired or forced to quit.[60]

Although the detained immigrants who brought forth claims of wrongdoing are not protected by the WPA as federal employees, many still face retaliation for speaking out about

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[57] *Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center*, Project South (Sep. 14, 2020) https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf.
[58] *Id*.
[59] *Id*.
[60] *Immigration Detention Oversight and Accountability*, Nat'l Immigrant Just. Ctr. (May 22, 2019) https://immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability.

their treatment in ICE facilities. Most commonly, immigrants may be deported for raising red flags or speaking out about their treatment in detention.[61] For example, six of the women who received the unwanted hysterectomies detailed in Ms. Wooten's complaint have been deported, and seven other women who raised the alarm about these actions were deported as well.[62] Other forms of retaliation reported by detained immigrants have included surveillance, criminal prosecution, excessive fines, raids in sanctuary cities, and detention center retaliation.[63] In recent years, there have been over 1,015 reported incidents of retaliation against immigrant and advocate whistleblowers by ICE and other federal agencies.[64] Many of these immigrants faced no criminal wrongdoing prior to their complaint, and thus their treatment was a direct result of their decision to speak out.[65]

These reactions towards both federal employee and immigrant whistleblowers are antithetical to the nation's historical acceptance and appreciation of whistleblowers. It is also expected that if federal whistleblowers who speak out against ICE are treated in this manner, then whistleblowers who have brought complaints towards other government agencies, departments, sectors and entities are also likely receiving the same unacceptable, and illegal, treatment.

VI. Ideas for Reform

a. Reform for Federal Employees

[61] Sofia Jarrin, *A Culture of Retaliation,* Nonprofit Quarterly (Nov. 18, 2020) https://nonprofitquarterly.org/a-culture-of-retaliation-whistleblower-deportations-reveal-moral-rot-at-ice/.
[62] *Id.*
[63] *Id.*
[64] *Immigrants Rights Voices*, NYU Immigrant Rights Clinic https://www.immigrantrightsvoices.org/#/ (last visited May 10, 202).
[65] Jarrin, *supra* note 61.

The reformation of whistleblower protections in the United States is a bipartisan issue that has caught the attention of various government officials in both major political parties. Several officials have spoken out on the issue in the past few years, including Liz Hempowicz, the Director of Public Policy at the Project on Government Oversight.[66] In a testimony she gave before the House Committee on Oversight and Reform's Subcommittee on Government Operations, Ms. Hempowicz detailed the "disastrous" situation faced by federal whistleblowers who have experienced retaliation after filing claims concerning their agency employer.[67] Ms. Hempowicz further emphasized the issue that the Merit Systems Protection Board (MSPB), formulated by OIG under the WPA, has not had enough members since 2017 to establish a quorum, leaving it unable to function.[68] The MSPB is an independent agency under the federal government meant to adjudicate individual employee appeals against prohibited personnel practices that come after the filing of a whistleblower complaint.[69] Therefore, the MSPB is the agency designed to review claims of government retaliation that may occur after a whistleblower complaint is filed, such as that of Ms. Wooten.[70] If the MSPB does not hold a quorum and therefore is not functioning, there is no road to relief for federal whistleblowers who have experienced retaliation. Reinstating and effectively using the MSPB is the first and most significant step for reform.

The suspension of the MSPB has led to no oversight for addressing prohibited personnel practices that arise directly from whistleblower complaints. This leaves whistleblowers without any access to relief while their cases are pending. For people like Dawn Wooten, whose hours as

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[66] Hempowicz, *supra* note 43.
[67] *Id*.
[68] *Id*.
[69] *About MSPB*, U.S. Merit Systems Protection Board, https://www.mspb.gov/About/about.htm (last visited May 10, 2021).
[70] *Id*.

a nurse in an ICE detention facility were severely cut because of her decision to file her complaint, there is no method to seek reinstatement or back-pay while awaiting relief. Due to the fact that the MSPB is still currently defunct, and has not functioned for the past four years, there are currently 774 whistleblower retaliation cases that are waiting to be heard.[71] This means that 773 other individuals, in addition to Ms. Wooten, are likely suffering without pay because of their choice to bring awareness to issues occurring within a government agency. This high number of pending cases is a testament to the fact that this issue reaches far beyond the medical malpractice and neglect occurring within ICE detention facilities, and has affected whistleblowers from other federal agencies as well.

In response to this issue, in February, 2021, Representative Gerard Connolly of Virginia introduced a bill to reinstate the MSPB, titled the Merit Systems Protection Board Empowerment Act of 2021.[72] The bill proposes reauthorizing the MSPB through 2026 and, if passed, would require that judges and MSPB officials undergo whistleblower engagement training to prepare them to adequately address whistleblower complaints. The bill also gives the MSPB more power in the form of conducting surveys of federal employees to ensure that the Board understands relevant concerns and the current climate within government agencies, which, in turn, will better protect all current and future whistleblowers.[73]

While Representative Connolly's bill, and the reintroduction of the MSPB, are necessary to ensure more adequate oversight of WPA retaliation claims, additional measures for reform are also necessary. In her testimony, Ms. Hempowicz states that "federal whistleblowers are the only

[71] Hempowicz, *supra* note 43.
[72] Geoff Schweller, *Representative Connolly Introduces Bill to Reauthorize MSPB,* Whistleblower Network News (Feb. 23, 2021), https://whistleblowersblog.org/2021/02/articles/government-whistleblowers/breaking-representative-connolly-introduces-bill-to-reauthorize-mspb/.
[73] *Id*.

major sector of the labor force that does not have the right to have their cases tried before a jury."[74] If federal whistleblowers were permitted to bring their claims of retaliation to court to be heard before a jury, then the inactivity of the MSPB would not have been so devastating to whistleblowers such as Ms. Wooten. More specifically, there would not be a four-year backlog on all whistleblower retaliation claims under the WPA if some complainants were able to seek relief elsewhere. For this reason, whistleblowers should have the option to bring their retaliation claims to court in the same manner as most other complaints.

If the MSPB were to be reinstated pursuant to Merit Systems Protection Board Empowerment Act of 2021, an exhaustion principle could be introduced that would require complainants to exhaust a filing with the MSPB before pursuing a jury trial. If their complaint were denied by the MSPB, or if the MSPB did not address the complaint within a specified timeframe, then the complaint could be filed in court. Moreover, as circumstances now stand, in the absence of a functioning MSPB, retaliation complaints from whistleblowers should be permitted to be filed and heard immediately before a court.

In addition to expediting the hearing of retaliation claims, it is also important that the process for federal employees to report these claims is an easy one. A system, such as an online reporting system, should be established through which employees can file their complaints to the MSPB in an organized and quick manner. A robust internal control system should also be put into place, where every complaint must be documented, reviewed, and signed off by the proper hierarchy in the MSPB in a certain amount of time. This timeframe will also aid in the execution of the exhaustion rule that will govern the process of hearing claims. A system of this sort should also be audited annually by an external auditor to validate compliance. This system, paired with

[74] Hempowicz, *supra* note 43.

the exhaustion requirement, will ensure that complaints are not backlogged to the point that they have been these past four years, and that they will each be properly addressed in a timely manner. The need for timeliness is crucial, as the retaliation faced by many whistleblowers, such as the loss of employment and income, poses an immediate and serious threat to their lives.

Oversight systems, such as that proposed, already operate in various other government agencies. One example is seen in the Equal Employment Opportunity Commission (EEOC).[75] The EEOC was created under Title VII of the Civil Rights Act of 1965, which illegalized discrimination in the context of employment against any individual on behalf of their race, color, religion, sex, or national origin.[76] As it now operates, Title VII prohibits retaliation against any employee who asserts their rights under the statute.[77] When an employee believes that they have been discriminated against by their employer for any of the specified reasons, they may file a charge with the EEOC.[78] The EEOC makes this process simple for claimants; information on how to file charges is easily accessible, and filings are permitted either in person, by mail, or by telephone.[79] These charges must be filed within 180 days of the discriminatory act, although, depending on the state, it may be required that they first be filed and exhausted through any similar state court remedy before reaching the EEOC.[80] Once the EEOC, or an equivalent state agency, receives notice of a charge, the employer is notified of the action and an investigation will be initiated.[81] However, unlike the MSPB, the EEOC does not hold the authority to adjudicate these claims; if the Commission finds "reasonable cause" to assume a claim is true, they may "endeavor to eliminate [the] alleged unlawful employment practice by informal

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[75] *Filing a Charge*, U.S. Equal Emp't Opportunity Comm'n https://www.eeoc.gov/fact-sheet/filing-charge
[76] https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited May 10, 2021)
[77] *Fort Bend Cnty v. Davis*, 139 S. Ct. 1843, 1845 (2019)
[78] *Filing a Charge*, *supra* note 75
[79] *Id*.
[80] *Id*.
[81] *Fort Bend Cnty v. Davis*, 139 S. Ct. 1843, 1847 (2019)

methods of conference, conciliation, and persuasion."[82] If these informal methods do not resolve the conflict, the EEOC may bring a civil action against the employer in court.[83] If, on the other hand, the EEOC does not find that there is reasonable cause to believe the charge is true, the charge will be dismissed and the complainant may begin their own civil action against the employer.[84]

In addition to this course of action, quite importantly, there exists no exhaustion principle barring employment discrimination claimants from electing to pursue their claims in federal court instead of through the EEOC.[85] This is dissimilar from WPA complaints, in which whistleblowers currently do not have the right to have their cases tried before a jury; the MSPB is their only source for relief.[86] In 2019, the Supreme Court held in *Fort Bend County v. Davis* that federal courts are able to hear Title VII discrimination claims even if they are not first brought to the EEOC or an equivalent state agency.[87] In this case, a county employee commenced a civil action in federal court, alleging discrimination in the workplace due to religion and sexual harassment.[88] However, in her original EEOC complaint, she only specified a claim for sexual harassment.[89] After years of litigation, the municipality asserted for the first time that the Court lacked jurisdiction to adjudicate the religion-based discrimination claim because the plaintiff had not specified it in her EEOC charge.[90] When the case reached the Supreme Court, the issue to be assessed was whether Title VII's charge-filing requirement was

[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id* at 1846.
[86] Hempowicz, *supra* note 43.
[87] *Fort Bend Cnty v. Davis*, 139 S. Ct. 1843, 1847 (2019)
[88] *Id*
[89] *Id*.
[90] *Id*.

jurisdictional.[91] The Court held that the claim-processing rule of the EEOC, which asks that parties take certain procedural steps at specified times (here, filing a specific EEOC complaint), merely seeks to "promote the orderly progress of litigation."[92] It is only mandatory in the sense that a court can enforce the rule if a party properly raises it as a defense, however, it is not a complete jurisdictional bar to filing a claim in court.[93] When drafting the law, Congress did not specify the claim processing rule as jurisdictional or not, and therefore Supreme Court held that it shall be treated as non-jurisdictional by courts.[94] As a result, employees are free to file a Title VII claim in court against their employer without first filing a complaint with the EEOC. If the defendant does not raise a timely objection, there is nothing to bar the case from proceeding.[95]

The defendant municipality in *Fort Bend County v. Davis* attempted to discredit this holding by illuminating other statutory schemes, such as the MSPB, that channel certain claims to administrative agency adjudication first, followed by judicial review in a federal court.[96] Specifically, in *Elgin v. Department of Treasury*, the Court held that "claims earmarked for initial adjudication by the Merit Systems Protection Board, then reviewed in the Court of Appeals for the Federal Circuit, may not proceed instead in federal district court."[97] The Court's response to this argument was that, in *Elgin*, the Court did not consider the specific question of whether a mandatory claim-processing rule is a precondition to suit or a jurisdictional prescription.[98] Therefore, it could potentially be held that WPA claims are permitted in court without prior approval from the MSPB.

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[91] *Id* at 1848.
[92] *Id* at 1849.
[93] *Id* at 1850.
[94] *Id*.
[95] *Id*.
[96] *Id* at 1851.
[97] *Id*.
[98] *Id*.

In addition to the structure outlined above, the EEOC also holds the powers to perform educational and promotional activities for both individuals who historically have been victims of employment discrimination and have not been equitably served by the EEOC, as well as individuals who the EEOC has authority to enforce employment laws against.[99] These promotional capacities work as both prevention for potential Title VII claims as well as important educational tools to ensure that aggrieved employees will know how to seek relief, if ever needed. These powers are not dissimilar from those proposed by Representative Connolly for the MSPB in the Merit Systems Protection Board Empowerment Act.[100]

If the system utilized under the EEOC was executed for the MSPB, the claims of whistleblowers would be much more adequately processed. Specifically, if claimants were to be permitted to choose whether to file their claims in court as opposed to through the commission, their grievances would be heard much more quickly. If the EEOC were to lose quorum and become defunct, as did the MSPB in recent years, employees would still have a clear and attainable path to relief. Since these processes function properly in other government agencies, there is little reason why they cannot be implemented for whistleblower retaliation complaints under the WPA.

b. Reform for Detained Immigrants

The above solutions are solely for federal employees, and, for this reason, will not assist undocumented detainees in making their own reports. Although retaliation issues faced by detained immigrants are a separate issue from federal employee whistleblower complaints under the WPA, it is still important to ensure that they can raise complaints without fear of retaliation

[99] 42 U.S.C. §2000e-4.
[100] Schweller, *supra* note 72.

in the form of surveillance, criminal prosecution, fines, or even deportation. While the ease of reporting wrongdoings in ICE detention centers is paramount, it is also necessary to explore how to diminish medical abuse and neglect in these facilities altogether.

Many of the complaints raised by detained immigrants stem from actions that occur within privatized detention centers. As described above, of the 213 operating ICE detention centers, 169 are non-dedicated facilities that are currently run by private prison companies. ICE primarily began using private prison companies to oversee their detention facilities after the September 11, 2001, terrorist attacks, when a heightened fear of undocumented immigrants, albeit wrongfully, gripped the nation.[101] The use of these privatized companies then "exploded" in 2008 after the recession, when states began to move away from contracting with private companies to oversee state prisons due to the cost; the federal government, however, was still willing to pay and thus created a desirable market for the companies.[102] There are currently five companies that operate the majority of ICE facilities in the United States, one of them being LaSalle Corrections which operates Irwin County Detention Center and Richwood Correctional Center, the facilities where two of the most recent employee whistleblower complaints resulted from. Another of the five companies, CoreCivic, operates Etowah County Detention Center, the facility described in Alex Hernandez's account.[103] More than half of all ICE detainees are housed in prisons operated by CoreCivic or its direct competitor, GEO Group.[104]

Advocates for immigrant rights argue that undocumented immigrants should not be held in these prison-like environments, and instead should be provided more appropriate

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[101] Monsey Alvarado et al., *These People are Profitable*, USA Today News (Dec. 19, 2019 9:40 PM) https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/.
[102] *Id*.
[103] *Fraihat v. U.S. Immigration & Customs Enf't*, 445 F.Supp.3d 709, 728 (C.D. Cal. 2020).
[104] Alvarado, *supra* note 101.

accommodations for shorter periods of time.[105] Unfortunately, however, trends for detention centers have only moved towards using prison facilities and not away from them. Under the Trump Administration, these detention centers became overly crowded and thus more difficult to manage; non-criminal detainees were held for over twice as long as they had been under past administrations.[106] This fact, paired with the reality that there is little effective oversight of privately-run detention centers, has led to unbearable conditions for detainees, including the neglect of pandemic protocols and other medical necessities.[107] Although this is a very large issue to face, the first step to preventing these tragedies would be to de-privatize ICE detention centers, or, at the very least, require more frequent surveillance of what occurs within these facilities. Not only will these changes assist the livelihood of the detainees in creating more humane and sustainable circumstances for housing, but it will also likely relieve some of the burden on government employees to control and report unacceptable conditions.

Even if these issues are addressed, detainees will still require a safe and reliable method of reporting complaints that occur within detention facilities. Detained immigrants should have the option to file their concerns anonymously and independently. As the system now stands, detainee concerns are really only brought to light if they are able to obtain a lawyer and file suit, if a family member is able to bring a story to the media, or if an employee files a whistleblower complaint regarding their situation. This is an issue because many detainees do not have access to legal representation, for reasons spanning from being unable to afford counsel to not knowing

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[105] *Id*.
[106] *Id*.
[107] Abigail Hauslohner, *The Trump Administration's Immigration Jails are Packed, but Deportations are Lower than in Obama era*, The Wash. Post (Nov. 17, 2019 6:09 PM) https://www.washingtonpost.com/immigration/the-trump-administrations-immigration-jails-are-packed-but-deportations-are-lower-than-in-obama-era/2019/11/17/27ad0e44-f057-11e9-89eb-ec56cd414732_story.html.

how to obtain representation. Detainees and their families also face language and cultural barriers that prevent them from exploring these avenues.

However, there are solutions to this problem. Complaints can be reported from within the walls of a detention center through a variety of means: an anonymous portal can be created on a library computer, access can be provided to a counselor who visits the site and regularly meets with the detainees, or even a simple multilingual hotline can be created that detainees may call using the facility's telephones. It is important that detainees have some method of expressing their concerns to the appropriate authorities that is easily accessible for all detainees, not just those who are able to obtain legal counsel and other important resources.

These suggestions should adequately address and prevent the reports of medical mistreatment that have leaked from ICE detention centers. Although the WPA cannot be applied to immigrant detainees, and there are no similar Congressional statutes designed to protect them, and therefore better oversight and streamlined reporting systems should be guaranteed to help. Also, fixing the reporting issues and backlog in retaliation claims for federal employees will be of immense assistance to the immigrants as well, as it is evident that federal employees are interested in protecting and speaking out on behalf of detainees. Unlike with qui tam claims, where relators are financially benefitted for bringing their whistleblowing complaints forward, federal whistleblowers are speaking up solely because they care. Dawn Wooten, and countless other federal employees such as herself, are not personally benefitting from filing their complaints. While it must have personally pained Ms. Wooten to work in an environment that neglected Covid-19 protocols and showed so little care for human life, the most significant impetus for her to move forward with the complaint was likely her concern for the detainees

whose lives were so direly affected by the mistreatment of the directors at Irwin County Detention Center, specifically the women who were forced into unwanted hysterectomies.

VII. Conclusion

Federal employees who bring forward claims under the Whistleblower Protection Act are doing so for reasons incredibly fundamental to the constitution: *to provide for the general welfare of the United States.*[108] For years, whistleblowers have been voluntarily placing their careers and reputations in jeopardy in order to fight against mistreatment by the federal government. It is essential that reforms are enacted to ensure that whistleblower complaints are not only received and processed by the government, but also that whistleblowers are treated without reprisal in the process. This can be done through adherence to pre-existing statutes, the allowance of reprisal claims to be filed in court and brought before a jury, and a more streamlined reporting system.

For the past four years, various important protections required by the Whistleblower Protection Act, such as the disallowance of prohibited personnel practices, have been neglected, and it is paramount that the essential elements of the Act are followed once again. Not only will this benefit federal employees and immigrant detainees in ICE detention centers, but also all federal employees who experience or witness "fraud, waste, abuse, and unnecessary Government expenditures."[109] Since 1777, it has been documented that federal employees are willing to speak out against wrongdoing within the government, a feat so important it was penned a "duty" by the Continental Congress.[110] For these reasons, whistleblower complaints must be properly

[108] U.S. Const. art. I § 8
[109] 41 U.S.C. § 4712
[110] 11 U.S. Cont'l Congress, *Journals of the Continental Congress 1774-1778* 732 (1908).

addressed in order to ensure appropriate oversight within the government, and a guarantee of general welfare among the population.