



August 17, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
SH-135 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley:

In almost every annual federal appropriation since 1988, Congress has included a provision known as the Grassley anti-gag rule to protect both federal whistleblowers and the integrity of the government's operations.¹ This important accountability provision, which you have championed over the years, bars the executive branch from concealing wrongdoing by imposing confidentiality policies or agreements on its personnel without including prescribed language to advise them of their right — and duty — to disclose information to members of Congress and other government watchdogs.² You have actively reminded executive branch officials, including White House Counsel Donald F. McGahn II, of this requirement.³

Recent reporting indicates that White House staffers have been required to sign nondisclosure agreements.⁴ White House Designated Agency Ethics Official Stefan Passantino is reportedly the official who administered these nondisclosure agreements and required his colleagues to sign them.⁵ Unfortunately, there is reason to believe that they lack the requisite notice.

¹ See Letter from Project on Gov't Oversight *et al.*, to Harold Rogers, Chairman, Comm. on Appropriations, U.S. House of Representatives *et al.* (June 24, 2014), <https://bit.ly/2KZEGGy>; Niels Lesniewski, *Grassley Pitches Trump on Whistleblowers*, ROLL CALL (Feb. 6, 2017), <https://bit.ly/2L3VkvY>.

² See Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135, 389 (2017); see also 5 U.S.C. § 2302(b)(13).

³ See, e.g., Letter from Hon. Charles E. Grassley, Chairman, Senate Comm. on the Judiciary *et al.*, to Donald F. McGahn II, Counsel to the President (Feb. 1, 2017), <https://bit.ly/2MlpxEX>; Letter from Hon. Charles E. Grassley, Chairman, Senate Comm. on the Judiciary *et al.*, to Thomas E. Price, Sec'y, Dep't of Health & Human Servs. (May 4, 2017), <https://bit.ly/2przaS9>; Press Release, Office of Hon. Charles E. Grassley, Grassley: Federal Agencies Failing to Implement Anti-Gag Provision of Whistleblower Law (Apr. 02, 2014), <https://bit.ly/2OHtggt> (last viewed Aug. 16, 2018).

⁴ Maggie Haberman, *Trump Appears to Admit White House Aides Signed Nondisclosure Agreements*, N.Y. TIMES (Aug. 13, 2018), <https://nyti.ms/2vHvqlA>.

⁵ See Alice B. Lloyd, *Former White House Staffer: NDA "Snuck in With" Other New Employee Paperwork*, WEEKLY STANDARD (Aug. 14, 2018), <https://tws.io/2P6Jg90>.

The U.S. Office of Special Counsel has advised executive branch officials that they must include a notice of rights in any type of policy or agreement on confidentiality.⁶ Consistent with the Special Counsel's guidance, the Consolidated Appropriations Act of 2017 provides:

SEC. 744. (a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."⁷

The Consolidated Appropriations Act of 2017 funded the White House, which means the above-quoted provision applied to White House personnel.⁸ As a Deputy Assistant to the President, Mr. Passantino was paid from that appropriation. Therefore, he had a duty not to implement or enforce any nondisclosure agreement lacking the requisite notice.⁹

The *Washington Post* has reported that a person familiar with these nondisclosure agreements said they "were meant to be very similar to the ones . . . signed during the campaign and during the transition."¹⁰ Notably, the nondisclosure agreements used during the campaign did not include a notice of rights.¹¹ Additionally, a well-known attorney who represents federal employees, Mark Zaid, has publicly indicated that he reviewed one of the White House nondisclosure agreements and found it lacking the required notice.¹²

⁶ Memorandum for Executive Departments & Agencies from Henry J. Kerner, Special Counsel, U.S. Office of Special Counsel (Feb. 1, 2018), <https://bit.ly/2P98ALE>.

⁷ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 389 (2017). The 2016 and 2018 consolidated appropriations acts contain the same requirement. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2485, § 744 (2015); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 599, § 744(a) (2018).

⁸ See 131 Stat. 337 (Title II Executive Office of the President and Funds Appropriated to the President).

⁹ See Press Release, White House, President Donald J. Trump Announces White House Compliance Team (Jan. 25, 2017), <https://bit.ly/2P6THcG>; see also 3 U.S.C. § 105.

¹⁰ Ruth Marcus, Opinion, *Trump Had Senior Staff Sign Nondisclosure Agreements*, WASH. POST (Mar. 18, 2018), <https://wapo.st/2w7pQYY>.

¹¹ READ: 2016 Trump Campaign Nondisclosure Agreement, CNN (Aug. 14, 2018), <https://cnn.it/2KVFk7G>.

¹² Mark S. Zaid, *The Constitution Won't Let Trump Silence White House Aides*, WASH. POST (Aug. 14, 2018), <https://wapo.st/2w84QS2>.

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
Page 3

As Designated Agency Ethics Official for the White House, Mr. Passantino should have appreciated the importance of including a notice of rights in the nondisclosure agreements. White House personnel relied on his guidance in making choices that would guard the public's trust in government. Mr. Passantino did a disservice to them, the Office of the President, and the American people if he sought to prevent the disclosure of wrongdoing, obstruct Congress in accessing information needed for effective oversight, and suppress free speech.

The Campaign Legal Center respectfully requests that you use your oversight authority to ascertain whether these nondisclosure agreements complied with the Grassley anti-gag rule and, if not, obtain assurances from the White House that it will not seek to enforce them.

Sincerely,

A handwritten signature in black ink, reading "Walter M. Shaub, Jr." with a stylized flourish at the end.

Walter M. Shaub, Jr.
Senior Director, Ethics