

Project On Government Oversight

Homeland and National Security Whistleblower Protections: The Unfinished Agenda

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Executive Summary

Since the September 11th terrorist attacks, whistleblowers have felt compelled to come forward in greater numbers to address our nation's security weaknesses – in fact almost 50% more have sought protection annually.¹ Since 9/11, whistleblower-support organizations have heard a common theme from whistleblowers, many of whom have observed security weaknesses for years: That they could no longer stand by knowing that people's lives were at risk.

However, patriotic truth-tellers across a variety of agencies have no protection against retaliation from the agencies they seek to reform. Today, the federal government's policies support and reinforce wrongdoers who would seek to silence whistleblowers.

Whistleblowers at key government agencies tasked with protecting the U.S. (including the FBI, CIA, Defense Intelligence Agency, Transportation Security Administration, and National Security Agency) have been excluded from the meager protections afforded the rest of the federal workforce. Employees at other agencies such as the Department of Homeland Security must seek protection under the defunct Whistleblower Protection Act, a law rendered useless by a crippling series of judicial interpretations from a court with a monopoly on reviewing whistleblower cases.

The agenda for protecting homeland security whistleblowers is unfinished. Congress must act to implement laws that will provide meaningful protections for whistleblowers including reasonable standards for qualifying for protection, the right to seek remedies in the courts, prompt resolution of their cases, and an end to retaliation when it occurs.

¹ Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. <http://www.gao.gov/new.items/d0436.pdf>. Retrieved April 27, 2005.

Introduction

“[D]emocracy’s best oversight mechanism: public disclosure” 9-11 Commission Report

In May 2002, a memo written by FBI Special Agent Coleen Rowley to FBI Director Robert Mueller brought unprecedented public attention to the government’s shortcomings in investigating the terrorists suspected in the September 11th attacks. This attention and the work of the 9/11 families helped give birth to the independent 9/11 Commission tasked with investigating the devastating terrorist attacks. It also prompted *Time Magazine* to recognize Rowley as one of three *Time* Persons of the Year in 2002.²

Since 9/11, whistleblowers have felt compelled to come forward in greater numbers to address our nation’s security weaknesses – in fact almost 50% more annually have sought protection against retaliation. Officials at the federal government’s whistleblower protection agency, the U.S. Office of Special Counsel, noted that the increase “was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns.”³ (Appendix A)

Whistleblowers like Coleen Rowley make our nation safer. They inform authorities about such dangers as security vulnerabilities in our intelligence-gathering capabilities, at nuclear power plants and weapons facilities, in airports, and at our nation’s borders and ports. They are modern-day Paul Reveres who warn about threats to the public’s well-being *before* avoidable crimes or disasters occur. The 9/11 Commission itself recognized that “democracy’s best oversight mechanism” is “public disclosure.”⁴ Whistleblowers provide that oversight, and they risk their jobs to do so.

But the federal government has failed to protect them.

Instead of being rewarded for their patriotism, national and homeland security whistleblowers face harassment, job-loss, demotion, loss of their security clearance (which effectively ends their career) and other retaliation. Many of them are not even given the right to have their day in court to challenge harassment.

² Ripley, Amanda and Maggie Sieger, “Time Persons of the Year 2002: The Special Agent,” *Time Magazine*, December 22, 2002. <http://www.time.com/time/personoftheyear/2002/poyrowley.html>. Retrieved April 27, 2005.

³ Government Accountability Office, “U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress,” March 2004. <http://www.gao.gov/new.items/d0436.pdf>. Retrieved April 27, 2005.

⁴ *The 9/11 Commission Panel Report*. p. 103, July 2004.

Their disclosures are even more important in light of the fact that national and homeland security agencies have an almost unlimited ability to hide behind the government's dramatically expanding framework of secrecy rules. As Senator Charles Grassley (R-IA) testified:

“Since September 11th, government agencies have placed a greater emphasis on secrecy and restricted information for security reasons. This is understandably so in some cases. But, with these restrictions come a greater danger of stopping the legitimate disclosure of wrongdoing and mismanagement, especially about public safety and security. Bureaucracies have an instinct to cover up their misdeeds and mistakes, and that temptation is even greater when a potential security issue can be used as an excuse. Whistleblowers serve as a check against this instinct and temptation.”⁵

The broken whistleblower-protection system and increased secrecy have emboldened wrongdoers to retaliate against or silence those who expose their abuses of power. When U.S. Park Police Chief Theresa Chambers warned that September 11th-related cuts meant fewer cops on the beat, she was fired. When Transportation Security Administration Red Team members found guns still getting through airport checkpoints, they were silenced and demoted. Department of Energy employees were punished for disclosing security failures at nuclear weapons facilities. FBI whistleblowers who exposed the agency's failure to conduct investigations into terrorists were demoted, fired or driven out of their jobs.

In July 2002, Congress, with the passage of the Sarbanes-Oxley Act, recognized the importance of whistleblowers to the nation's economy and its investors by providing state-of-the-art protections for whistleblowers at publicly traded companies. In August 2004, when the Bush Administration announced its new procedures for corporate whistleblower protections, Secretary of Labor Elaine L. Chao stated: “Whistleblower protection is an important part of the Sarbanes-Oxley Act, which this Administration has promoted to ensure corporate responsibility, enhance public disclosure and improve the quality and transparency of financial reporting and auditing. The whistleblower protection provision of Sarbanes-Oxley will protect courageous workers who speak out against corporate abuse and fraud.” Today, corporate whistleblowers are much better protected from retaliation than their counterparts in the public sector, even though the consequences of corruption in government are equally, if not more, far-reaching.

⁵ Statement of Senator Charles Grassley to the Senate Committee on Governmental Affairs, “S. 1358, the Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act,” November 12, 2003. http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=129&WitnessID=452. Retrieved April 27, 2005.

Yet neither Congress nor the Executive Branch have seen fit to provide homeland security personnel with protections equal to those employees of Enron and MCI/Worldcom. The best that some whistleblowers can hope for is to seek refuge under the defunct Whistleblower Protection Act, a law that has been decimated by the courts. That Act covers employees of agencies including:

- ◆ Department of Homeland Security (except airport baggage screeners), which protects the nation's borders and coasts;
- ◆ Department of Energy and the Nuclear Regulatory Commission, which protect nuclear power plants and facilities against radiological sabotage;
- ◆ Environmental Protection Agency, which protects the nation's water supply;
- ◆ Department of Agriculture, which protects the food supply;
- ◆ Department of Defense (civilian, non-intelligence), which fights terrorism and protects national security.

Not Covered By
Whistleblower Protection Act
Airport Baggage Screeners
Armed Forces (uniformed military)
Central Intelligence Agency
Defense Intelligence Agency
Defense Mapping Agency
Federal Bureau of Investigation
Government Accountability Office
Government Contractors
National Security Agency

However, whistleblowers at other homeland security agencies are not even given the meager and inadequate protections afforded under the Whistleblower Protection Act. These agencies include:

- ◆ Central Intelligence Agency and the Federal Bureau of Investigation, which investigate and pursue counter-terrorism measures;
- ◆ Other intelligence agencies inside the Department of Defense such as the Defense Intelligence Agency;
- ◆ Airport baggage screeners, who are at the front lines of protecting commercial aircraft; and
- ◆ National Security Agency, which protects intelligence communications.

At these agencies, there is no third-party review of whistleblower cases. As a result, the institution that is retaliating against the whistleblower acts as the judge and jury of its own alleged harassment. It also decides whether those who retaliate against whistleblowers are disciplined, something that, by all accounts, rarely happens.

The Unfinished Agenda

Retaliation Against Whistleblowers: Limited Recourse

One person challenging the bureaucracy of an entire government agency is a David-versus-Goliath struggle. In terms of raw power, the agency holds all the cards. Time and again, employers have abused this power to silence whistleblowers.

Over the years, Congress has authorized, in a piecemeal fashion, a variety of whistleblower “protection” programs throughout the federal government including for national and homeland security employees. However, many of these provisions only authorize investigations to determine whether a whistleblower’s allegations are true or not. They do not create sustainable mechanisms for overturning retaliation against whistleblowers or for disciplining managers who have sought to silence truth-tellers. The clear message sent to government employees is that wrongdoers in positions of power are unassailable and whistleblowing is quixotic at best.

This view was confirmed in a 1993 study by the federal Merit Systems Protection Board, the government agency which hears Whistleblower Protection Act (WPA) claims. That study was the most recent by the agency to assess what motivates employees to blow the whistle. In response to the question about “why observers chose not to report illegal or wasteful activities,” three of the top four reasons concerned fear of retaliation. (Appendix B)

In more recent studies, the Merit Systems Protection Board has found that retaliation against federal employees has remained a significant problem. In the Board’s most recent survey in 2000, seven percent (or one out of 14) of all federal employees responded that they had been retaliated against in the previous two years for “Making a disclosure concerning health and safety dangers, unlawful behavior, and/or fraud, waste, and abuse.” According to the survey, retaliation rates quickly escalate when formal disclosures are made. Fully 44% of survey respondents who made a formal disclosure experienced retaliation, compared to just 4% who had not made a formal disclosure. (Appendix C)

The recourse for whistleblowers experiencing retaliation is severely limited. For example, many of the investigations authorized by Congress are conducted by the agency under investigation, which institutionally has little incentive to acknowledge whistleblower complaints. Inspectors General (IG) within each agency are most often called upon to conduct these investigations. *The Art of Anonymous Activism*, a how-to book for whistleblowers, outlines the shortcomings of IGs:

“While the IG touts itself as independent, that is not really the case. At small agencies, the agency head appoints the IG. For larger agencies, the IG is nominated by the President and confirmed by the Senate. The IG reports to the head of the agency and serves at the pleasure of the President. In other words, if an IG is upsetting the Administration’s apple cart, he or she can be instantly removed.

The IG’s performance appraisal comes from the agency head, who also controls issuance of awards and financial bonuses to the IG. As a consequence, many IG offices are quite political in the selection of cases for investigation and the manner in which its findings are cast.”⁶

In addition, it is not unusual for the employee who has reported misconduct to be exposed and to even become the target of an investigation conducted by an IG or other agency official. In some cases, management starts an investigation in order to discredit and harass employees who are deemed troublesome.

More importantly, such investigations fail to provide whistleblowers with a hearing by a truly independent court or administrative body that can hold agencies accountable for retaliation. Time and again, whistleblower attorneys and advocates have found that verifying a whistleblower’s allegations is not enough: Managers who retaliate against whistleblowers may continue to do so unless ordered to stop.

Typical Forms of Retaliation

- ◆ **Take away job duties** so that the employee is marginalized.
- ◆ **Take away an employee’s national security clearance** so that he or she is effectively fired.
- ◆ **Blacklist an employee** so that he or she is unable to find gainful employment.
- ◆ **Conduct retaliatory investigations** in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
- ◆ **Question a whistleblower’s mental health, professional competence, or honesty.**
- ◆ **Set the whistleblower up** by giving impossible assignments or seeking to entrap him or her.
- ◆ **Reassign an employee geographically** so he or she is unable to do the job.

⁶ *The Art of Anonymous Activism*, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002, p. 20.
<http://www.pogo.org/p/government/ga-021101-whistleblower.html>.

Broken: The Whistleblower Protection Act

The most significant statute aimed at protecting federal whistleblowers is the Whistleblower Protection Act (WPA). The WPA covers civil service employees, but does not apply to uniformed military, employees at intelligence agencies, the Federal Bureau of Investigation, government contractors, or airport baggage screeners.

Originally passed in 1989, the Whistleblower Protection Act is the most important free speech law for federal employees. Unlike many other whistleblower provisions, it allows employees to seek intervention by an outside independent agency, the Office of Special Counsel; access to an administrative legal proceeding to hear their case at the Merit Systems Protection Board; and, ultimately, access to the court to hear appeals to the case.

Despite the rights the Act provides on paper, it has suffered from a series of crippling judicial rulings that are inconsistent with Congressional intent and the clear language of the Act. These rulings have rendered the Act useless, producing a dismal record of failure for whistleblowers and making the law a black hole.

According to the Government Accountability Project, only two out of 30 whistleblowers have

Congress has Repaired Whistleblower Protection Act Repeatedly

- 1978 Congress includes language in the Civil Service Reform Act protecting employees from retaliation for making disclosures of information regarding misconduct.
- 1989 After the courts and government agencies create loopholes that limit who is protected, Congress unanimously passes Whistleblower Protection Act (WPA).
- 1994 Because the courts and agencies continue to create exceptions for who is protected, Congress passes amendments to strengthen the WPA. The amendments are approved unanimously by Congress.
- 2004 A series of hostile judicial rulings since 1994 have once again crippled the Whistleblower Protection Act. Congress considers the Federal Employees Protection of Disclosures Act (S. 2628) and the Whistleblower Protection Enhancement Act (H.R. 3281).

prevailed on the merits in cases decided since 1999 at the Merit Systems Protection Board, the government agency which hears WPA claims. Even worse, at the Federal Circuit Court of Appeals, which has exclusive jurisdiction over WPA appeals of administrative rulings, only one whistleblower claimant out of 96 has prevailed on the merits in the past 10 years.

A number of rulings have made it virtually impossible for whistleblowers to defend themselves. In addition, serious questions have been raised about the effectiveness of the Office of Special Counsel and its ability to handle whistleblower cases in a proper and timely way.

Unreasonable Standards of Proof. The Federal Circuit Court has repeatedly disregarded congressional intent to extend protections broadly to whistleblowers and has issued a number of hostile rulings. For example, in 1999 in the case of *Lachance v. White*, the court decreed that the law only shields those charging government misconduct when that charge is supported by “irrefragable proof”⁷ (defined by the dictionary as “undeniable, uncontestable, incontrovertible or incapable of being overthrown”⁸). This standard never appears in the statute, reports by Congress on the language of the WPA, or any decision by the Merit Systems Protection Board involving whistleblower claims. Amendments to the statute approved by Congress in 1994 only require that the “employee reasonably believe his or her disclosure evidences” misconduct. Congress set this standard to provide protections to whistleblowers who might be “wrong” about their allegations, as well as those who were right.

The unreasonable standard set by the court makes it virtually impossible for a whistleblower to prevail unless the wrongdoer confesses, in which case there is no need for a whistleblower. A recent Senate report commented that: “This imposes an impossible evidentiary burden on whistleblowers, and there is nothing in the law or legislative history that even suggests such a standard under the WPA.”⁹ According to the Government Accountability Project, in the three years prior to *Lachance*, whistleblowers had a 36% success rate for decisions on the merits at the Merit Systems Protection Board. Since *Lachance*, that success rate has plummeted to 7%.

<p><u>Whistleblower Protection Act Loopholes – Employees are NOT Covered if They:</u></p> <ul style="list-style-type: none">◆ Report wrongdoing to their boss or in the chain of command.◆ Tell co-workers or those suspected of wrongdoing.◆ Challenge policies.◆ Have job duties to find or point out wrongdoing.◆ Are the not the first to raise the problem.

Unreasonable Limitations on How Disclosures are Made. A myriad of additional loopholes defies logic. The Court has decreed that protections should be withheld from whistleblowers who make their disclosures to co-workers, supervisors or others in the chain of command, or the person suspected of wrongdoing. However, any reasonable person would expect an employee to approach their supervisor or higher-ups to resolve a problem before blowing the whistle to the media or to Congress.

⁷ U.S. Federal Circuit Court of Appeals, *Lachance v. White* 98-3249, May 14, 1999. <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=fed&navby=case&no=983249>. Retrieved April 27, 2005.

⁸ Congressional Testimony of Thomas Devine, Legal Director, Government Accountability Project, before the Senate Governmental Affairs Committee on S. 1358, November 12, 2003. http://hsgac.senate.gov/_files/111203devine.pdf. Retrieved April 27, 2005.

⁹ Senate Committee on Governmental Affairs Report 107-349, “To authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes, to accompany S. 3070,” November 19, 2002. http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

Whistleblowers are also not protected when disclosures are made in the course of doing their job's duties, as is the case for employees who conduct audits or investigations into wrongdoing such as Inspector General offices. Elaine Kaplan, the former head of the U.S. Office of Special Counsel, recently described this loophole in testimony before the Senate:

“Suppose that a security screener at National Airport who works for the Transportation Security Administration notices that the X-ray machines are malfunctioning on a regular basis. He suspects that, because of these malfunctions, a number of passengers may have been permitted to board airlines without being screened. It is part of his job to report such malfunctions to his supervisor. The screener goes to his supervisor and tells him about the malfunctioning machines. The supervisor tells the employee not to write up a report but to go back to work – he does not want to do the paperwork and does not want it to get out that the X-ray machines at National Airport don't work properly. He tells him, don't worry, we will get the problem fixed.

One week later, the employee returns and the problem has not been fixed. This time, he tells his supervisor, if nothing is done, he will report the supervisor's inaction up the chain of command, or perhaps to the IG [Inspector General]. The supervisor fires the employee.

Under current law, this employee has no recourse. Because he made his disclosure as part of his regular job duties, he is not protected by the anti-retaliation provisions of the Whistleblower Protection Act. In fact, as a security screener at TSA, this employee does not even have the normal adverse action protections any other employee would have.

This same scenario could play out in any number of contexts: an inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a nuclear power plant's license be revoked for violating safety regulations, an auditor who is denied promotions because he found improprieties in a federal grant program, or an investigator in the Inspector General's office who is geographically reassigned because he has reported misconduct by a high level agency official.”¹⁰

¹⁰ Statement of Elaine Kaplan to the Senate Committee on Governmental Affairs, “S. 1358, the Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act,” November 12, 2003. NOTE: Since this testimony, Whistleblower Protection Act rights have been definitively stripped from airport baggage screeners. However, this description aptly illustrates the dilemma faced by employees blowing whistle during the course of their job duties.
http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=129&WitnessID=460. Retrieved April 27, 2005.

National Security Clearance Retaliation. Revocation of an employee’s national security clearance has become the weapon of choice for those managers who retaliate. As Tom Devine, the legal director of the Government Accountability Project, recently testified: “The Court rejected Congress’ policy choice in 1994 amendments to cover security clearance retaliation under the WPA.”¹¹ The result is that an employee whose security clearance is yanked can be fired without recourse. The story of whistleblower Linda Lewis from 2002 illustrates how unaccountable and unfair the process for addressing security clearance retaliation has become. According to the Government Accountability Project:

“Lewis is not allowed to appear before the judges who will make a decision on her clearance. A single USDA official will decide how much, if any, of her defense is to be allowed into the official record for review by the unidentified judges. Rounding out this Kafkaesque scenario, Lewis is required to present her defense in writing before she learns the details of the charges – if they are ever revealed to her.”¹²

The Department of Defense Inspector General deserves credit for a new initiative launched in January of 2005 that recognizes the problem of national security clearance retaliation. The initiative allows the IG to investigate this kind of retaliation and make recommendations to the Department of Defense Secretary.¹³

Federal Circuit Monopoly on Cases. The Whistleblower Protection Act can only be reviewed by one court – the Federal Circuit Court of Appeals: They are not reviewed in other circuit courts. If there is an unfair decision, a whistleblower’s only recourse is the Supreme Court which takes few cases where there is no split in opinion among the circuits. As a result, anti-whistleblower rulings are allowed to stand. Multiple circuits review was the structure originally provided under the Civil Service Reform Act of 1978, until the creation of the Federal Circuit in 1982 in the Federal Courts Improvement Act. The Federal Circuit’s stranglehold on WPA cases since then is inconsistent with all circuits review afforded under other federal whistleblower protection statutes, particularly for employees at publicly-traded companies. It is also inconsistent with the normal appellate option available to employees alleging other forms of discrimination.

¹¹ Congressional Testimony of Thomas Devine, Legal Director, Government Accountability Project, before the Senate Governmental Affairs Committee on S. 1358, November 12, 2003. http://govt-aff.senate.gov/_files/111203devine.pdf. Retrieved April 27, 2005.

¹² Andersen, Martin Edwin, “Rally for USDA National Security Whistleblower Linda Lewis,” Government Accountability Project, June 18, 2002. <http://www.whistleblower.org/article.php?did=207&scid=80>. Retrieved April 27, 2005.

¹³ Miles, Donna, “DoD Expands Existing Whistleblower Protections,” American Forces Informative Service, April 18, 2005. http://www.defenselink.mil/news/Apr2005/20050418_649.html. Retrieved April 27, 2005.

Judicial Defiance of Congressional Intent. Because of the Federal Circuit Court’s hostile rulings, and because there is not an all circuits review which would allow a more vigorous judicial debate on interpretation of the law, Congress has repeatedly had to instruct the Court of its intent. Congress has already passed legislation twice in order to repair damage done by the Court, and is now forced to weigh in a third time because of the rulings that have rendered the Whistleblower Protection Act useless.

The first time was in 1989 with the passage of the WPA, crafted to repair loopholes created in whistleblower protection provisions of the Civil Service Reform Act of 1978. In the Senate Committee Report in 1988 on the WPA, Congress instructed:

“The Committee intends that disclosures be encouraged. The OSC [Office of Special Counsel], the [Merit Systems Protection] Board, and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.”¹⁴

Just five years later, in 1994, Congress was forced once again to make its intent clear. The legislative history summarizing the composite House-Senate compromise noted:

“The plain language of the Whistleblower Protection Act extends to retaliation for ‘any disclosure,’ regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.”¹⁵

Despite the clear legislative history and instructions to the contrary, the Federal Circuit Court has once again carved out exceptions to the Whistleblower Protection Act. As a result, Senator Charles Grassley (R-IA), one of the deans of whistleblower protection in Congress, called for an end to the judicial nightmare when he helped introduce legislation, saying: “This is also three strikes for the Federal Circuit’s monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome.”¹⁶ Unfortunately, in 2004, the House Government Reform Committee Chairman Tom Davis (R-VA) failed to recognize the problem of the Federal Circuit’s monopoly. Legislation to repair the WPA excluded a provision to return whistleblower cases to all circuits review. Although that legislation failed in 2004, it will likely be taken up again.

¹⁴ Senate Committee on Governmental Affairs Report 107-349, “To authorize appropriations for the Merit Systems Protection Board and the Office of Social Counsel, and for other purposes, to accompany S. 3070,” November 19, 2002.
http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

¹⁵ Statement of Senator Akaka, Congressional Record: June 7, 2001.
<http://www.fas.org/sgp/congress/2001/s060701.html>. Retrieved April 27, 2005.

¹⁶ “Senators Try to Curb Federal Circuit,” *Legal Times*, September 3, 2001, p. 6.

A Dysfunctional Office of Special Counsel. There have been problems with the Office of Special Counsel’s ability to handle its mission of protecting whistleblowers since its creation. Recently, things have been getting even worse. A March, 2004 Government Accountability Office report noted that the agency had accumulated a significant backlog of cases that were not being handled within the time limits required by Congress. According to the report, the Office of Special Counsel “met the 15-day statutory limit for whistleblower disclosure cases about 26 percent of the time,” adding, “The percentage of whistleblower cases in backlog was always extremely high—95 to 97 percent.”¹⁷

In April 2004, controversy engulfed the Office of Special Counsel after its head, Scott Bloch, sent an email to his staff that amounted to an illegal order to prevent staff from communicating with the public. This act raised concern in Congress and among whistleblower advocates given that the Office of Special Counsel is the federal government’s protector of free speech rights for whistleblowers. The controversy centered on whether the agency would continue to protect workers from discrimination based on sexual orientation. After complaining in media interviews about “leakers” within his own agency being responsible for the controversy, Bloch issued the following to all agency staff:

“[The] Special Counsel has directed that any official comment on or discussion of...sensitive internal agency matters with anyone outside OSC must be approved in advance ...”¹⁸

The order forbade employees from discussing the policy with outsiders, including other federal agencies asking for guidance, and instead ordered that they “simply refer them to the press release on our web site as a complete and definitive statement of OSC’s policy.”¹⁹ The White house ultimately overruled Bloch’s interpretation of the policy and asserted that the Office of Special Counsel was indeed responsible for investigating and handling sexual orientation discrimination cases.

¹⁷ Government Accountability Office, “U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress,” March 2004. <http://www.gao.gov/new.items/d0436.pdf>. Retrieved April 27, 2005.

¹⁸ Government Accountability Project, Project On Government Oversight, and Public Employees for Environmental Responsibility, Letter to U.S. Special Counsel Scott Bloch, April 15, 2004. <http://pogo.org/p/government/gl-040402-osc.html>.

¹⁹ Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight Press Release, “U.S. Special Counsel Issues Gag Order to His Own Employees,” April 15, 2004. <http://www.pogo.org/p/government/ga-040401-osc.html>.

In 2005, more controversy surrounded the Office of Special Counsel. In conjunction with anonymous employees at the agency, three leading whistleblower assistance organizations – Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight – filed a complaint with a lengthy list of allegations about improper activities at the agency and mishandling of whistleblower cases. Among the more disturbing allegations made was that the Office of Special Counsel, in an effort to make its backlog of cases disappear, was no longer giving the same level of attention to the investigation of whistleblower disclosures. The complaint noted that: “As a result of this new policy, the Disclosure Unit appears to have closed over 600 cases in only a few months, without referring any of them for investigation.”²⁰

In response, the Senate Homeland Security and Government Affairs Committee promised to have hearings on the Office of Special Counsel. At the writing of this report, the Senate is investigating the agency but has not yet scheduled the hearings.²¹ In addition, the President’s Council on Integrity and Efficiency is investigating the complaint filed by the anonymous employees and the groups.²²

The controversy surrounding the Office of Special Counsel already adds weight to a growing body of evidence showing that, even under the best leadership and circumstances, very few whistleblowers get the kind of assistance and support from the agency that was originally envisioned by the Congress.

Under Assault: Transparency in Government

Since the terrorist attacks on September 11, 2001, government agencies have gone to great lengths to create new and greatly expanded categories of information that can be kept secret from the public under the guise of protecting homeland security. At the same time, the government has attempted to push the boundaries of the secrecy rules already at its disposal.²³ Expanding secrecy creates two problems of note for this discussion.

²⁰ Complaint of Prohibited Personnel Practices of Scott Bloch, March 24, 2005. <http://www.pogo.org/m/gp/gp-OSCcomplaint-03032005.pdf>.

²¹ Barr, Steve, “Agency’s Reorganization Results in Accusations, Employees Leaving,” *Washington Post*, March 18, 2005. <http://www.washingtonpost.com/wp-dyn/articles/A45169-2005Mar17.html>. Retrieved April 27, 2005.

²² Wilke, John, “Crying Foul at Whistle-Blower Protector: Some Staff From U.S. Office of Special Counsel Claim Wrongdoing by the Agency’s Chief,” *Wall Street Journal*, March 31, 2005.

²³ Aftergood, Steve, Federation of American Scientists, “The Age of Missing Information,” <http://slate.msn.com/id/2114963/>. Retrieved April 27, 2005.

First, it makes protection of whistleblowers even more imperative. If agencies have *carte blanche* to keep information from the public, one of the most important ways that wrongdoing can be exposed is through disclosures from government employees. Second, some government agencies have created new rules for punishing federal employees who disclose internal information. These rules cast a veil over the government's activities, ensuring that employees have even less reason to risk their careers to whistleblowing.

One of the most egregious examples was a directive issued by the Department of Homeland Security (DHS) for the handling of documents that may be marked "For Official Use Only" (FOUO). According to the directive, DHS employees should: "Be aware that divulging information without proper authority could result in administrative or disciplinary action." Contractors and consultants are still being required to sign non-disclosure agreements that say they "could be subjected to administrative, disciplinary, civil, or criminal action, as appropriate, under the laws, regulations, or directives applicable to the category of information involved." Ironically, the directive admits that information marked FOUO may still be disclosed under the landmark open government law, the Freedom of Information Act. It also creates exceptionally vague categories of information that should be kept from the public and encourages employees to err on the side of caution. The result: "In essence, DHS is silencing the nation's already muted federal workforce – the only people who can alert the public when the government is not doing its job."²⁴

Another example concerned the case of FBI whistleblower Sibel Edmonds. In June, 2004 the Project On Government Oversight (POGO) filed a lawsuit against then-Attorney General John Ashcroft and the U.S. Justice Department (DOJ) for retroactively classifying information related to whistleblower Edmonds' allegations of wrongdoing in an FBI translation unit. In February, 2005 the Justice Department backed down on the lawsuit, essentially affirming that it could not defend its position with regard to the illegal classification.²⁵

The suit alleged that the retroactive classification was unlawful and violated POGO's First Amendment right to free speech. The information at issue was presented by the FBI to the Senate Judiciary Committee during two unclassified briefings in 2002. The information was referenced in letters from U.S. Sens. Patrick Leahy (D-VT) and Charles Grassley (R-IA) to DOJ officials. The senators' letters were posted on their web sites but were removed after the FBI notified the Senate in May 2004 that the information had been retroactively classified. During a June 2004 Senate Judiciary Committee hearing, then-Attorney General Ashcroft defended the decision to retroactively classify the information, claiming that its further dissemination could seriously impair the national security interests of the United States, even though for more than two years the information was widely available to the public.

²⁴ Amey, Scott, "Letter to Homeland Security Secretary Tom Ridge on DHS's Management Directive on FOUO Information," Project On Government Oversight, January 25, 2005.
<http://www.pogo.org/p/government/gl-050101-dhs.html> Retrieved April 27, 2005.

²⁵ Project On Government Oversight, "Justice Department Caves In: Allows Publication of Retroactively Classified Information," February 22, 2005.
<http://www.pogo.org/p/government/ga-050202-classification.html>

Another area of particular concern has been the increased use of the state secrets privilege in cases involving whistleblowers. The state secrets privilege may be invoked by the Executive Branch in legal proceedings to assert that information must be protected for national security reasons. The American Civil Liberties Union and the Center for Constitutional Rights are both engaged in litigation concerning the abuse of the state secrets privilege to hide government wrongdoing.

Anecdotally, several national security whistleblower cases have been publicized in recent years which were essentially shut down by the government's invocation of the state secrets privilege. According to William G. Weaver and Robert M. Pallitto at the University of Texas at El Paso:

“Use of the state secrets privilege in courts has grown significantly over the last twenty-five years. In the twenty-three years between the decision in Reynolds and the election of Jimmy Carter, in 1976, there are four reported cases where the government invoked the privilege. Between 1977 and 2001, there are a total of fifty-one reported cases where courts ruled on invocation of the privilege.”²⁶

State secrets privilege abuses add to the list of tools the Executive Branch has at its disposal for silencing whistleblowers.

Under Assault: Communication with Congress

The free flow of information from government employees to Congress enables the Congress to fulfill its duty of overseeing the Executive Branch. Congress' right to information from the Executive Branch is recognized as “clear and unassailable.”²⁷ As the Congressional Research Service noted: “The Supreme Court has on numerous occasions expressly recognized Congress' inherent right to receive information from executive agencies in legislative oversight or investigations, so as to gather knowledge and information ‘concerning the administration of existing laws as well as proposed or possibly needed statutes,’ a process deemed to be essential to the legislative function.”²⁸

In order to assert its unassailable right to oversee the government, Congress has, since 1988, approved provisions in annual appropriations bills that prohibit managers from silencing government whistleblowers. Known as “anti-gag statutes,” the provisions prohibit government agencies from spending funds to prevent employees from public communication, including with Congress. For example, agencies are not allowed to spend funds to force employees to sign nondisclosure agreements, unless those agreements include information on employee free speech rights. These free speech rights are protected under both the Whistleblower Protection Act and the Lloyd-La Follette Act

²⁶ Weaver, William G. and Robert M. Pallitto, “State Secrets and Executive Power,” University of Texas at El Paso.

²⁷ Congressional Research Service, Memorandum, “Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress,” April 26, 2004.

²⁸ Congressional Research Service, “Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress,” April 26, 2004.

of 1912. The Lloyd-La Follette Act was originally embraced by Congress in response to executive order “gag rules” from Presidents Theodore Roosevelt and Howard Taft.

Despite the clarity of the law and the courts’ interpretation of congressional powers, several extraordinary abuses have taken place in recent years. One example concerned investigations by Senator Grassley into a Department of Energy program to compensate nuclear workers who became ill as a result of the production and testing of nuclear weapons. According to Al Kamen’s February 6, 2004, “In the Loop” column in the *Washington Post*, Beverly Cook, an assistant secretary in the Department, issued an email to employees which stated:

“No information is to be given to OMB, the press or to congressional offices without my direct approval regardless of the subject matter.”²⁹

This email clearly illegally violated the free speech rights of employees to communicate with Congress and the public.

A more highly publicized event concerned the silencing of the Centers for Medicare and Medicaid Services Chief Actuary Richard S. Foster on the cost of the Medicare prescription drug plan. According to the Government Accountability Office, Thomas A. Scully, the former Administrator of the Centers for Medicare and Medicaid Services, threatened “to terminate his [Foster’s] employment if Mr. Foster provided various cost estimates of the then-pending prescription drug legislation to members of Congress and their staff.” Both the Congressional Research Service and the Government Accountability Office issued legal opinions finding that the effort to silence Foster was unlawful.³⁰ (Appendix D)

Unfortunately, the “anti-gag statute” is subject to annual approval by the Congress. Whistleblower advocates have warned that the statute’s year-to-year existence makes the protections it provides fleeting. In the 108th Congress, reformers proposed making the anti-gag statute permanent in the Federal Employees Protection of Disclosures Act (S. 2628) and the Whistleblower Protection Enhancement Act (H.R. 3281), which were unanimously approved by the Senate Governmental Affairs Committee and the House Government Reform Committee. (Appendix E) However, neither the Senate nor the House scheduled votes on the legislation. In 2005, the Federal Employees Disclosure Act was reintroduced in the Senate as bill number S. 494.³¹

²⁹ Kamen, Al, “Buck Slips,” *Washington Post*, February 6, 2004. p A23.

³⁰ Government Accountability Office, “Department of Health and Human Services – Chief Actuary’s Communications with Congress B-302911,” September 7, 2004. <http://www.gao.gov/decisions/appro/302911.htm>. Retrieved October 6, 2004; and Congressional Research Service, “Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress,” April 26, 2004.

³¹ Information about the Federal Employee Protection of Disclosures via Govexec.com’s Bill Tracker <http://capwiz.com/govexec/issues/bills/?bill=7409391&size=full>. Retrieved April 26, 2005.

Separate but Unequal: Federal Bureau of Investigation

Since the creation of whistleblower protections in the 1978 Civil Service Reform Act, the Federal Bureau of Investigation (FBI) has operated under a situation which can only be called separate and unequal. The Bureau persuaded the Congress to exempt it from protections extended to all other civil service employees. However, Congress did require the Attorney General “to prescribe regulations to ensure that such [whistleblower] reprisal not be taken,” and required the President of the United States to enforce those regulations.³² Congress also mandated that FBI whistleblower protections be “consistent with the applicable provisions of” the Whistleblower Protection Act.³³

The FBI managed to disregard Congress’ order until 1997. In April 1997, because of the highly-publicized case of FBI crime-lab whistleblower Dr. Frederic Whitehurst, President Bill Clinton issued a “Memorandum for the Attorney General” which directed that the Attorney General “establish appropriate processes” to implement the Whistleblower Protection Act for FBI employees.³⁴

However, the regulations, which were finalized in 1999, failed to meet the standards provided under the Whistleblower Protection Act. FBI whistleblowers were afforded the right to have their alleged reprisals investigated by the FBI Office of Professional Responsibility and they could also appeal their reprisal cases to the Deputy Attorney General.³⁵ But they were not given the right other civil service employees have for an independent third party such as the Merit Systems Protection Board or the courts to hear and adjudicate their appeal, or even for the Office of Special Counsel to investigate and prosecute.³⁶ They also were not afforded the right to have their cases investigated by the Department of Justice’s Inspector General (DOJ IG), unless the Deputy Attorney General or Attorney General approved.³⁷

³² 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
<http://www.fas.org/sgp/news/1999/11/fbiwhist.html>. Retrieved April 27, 2005.

³³ Title 5 U.S. Code Section 2303, “Prohibited Personnel Practices in the Federal Bureau of Investigation”
<http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+180+0++%28%29%20%20AND%20%28%285%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282303%29%29%3ACITE%20%20%20%20%20%20%20%20%20%20>. Retrieved April 27, 2005.

³⁴ Testimony of Stephen M. Kohn, attorney for Dr. Frederick Whitehurst before the Senate Judiciary Committee, May 12, 1997. http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm Retrieved April 26, 2005.

³⁵ 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
<http://www.fas.org/sgp/news/1999/11/fbiwhist.html>. Retrieved April 27, 2005.

³⁶ Statement of Michael R. Bromwich, Inspector General, U.S. Department of Justice before the House Permanent Select Committee on Intelligence concerning H.R. 3829: The Intelligence Community Whistleblower Protection Act of 1998, June 10, 1998. http://www.fas.org/irp/congress/1998_hr/ts061098.htm. Retrieved April 27, 2005.

³⁷ Department of Justice Inspector General Special Report, “A Review of the FBI’s Response to John Roberts’ Statements on 60 Minutes ,” February 2003. <http://www.usdoj.gov/oig/special/0302/index.htm>. Retrieved October 1, 2004.

The memo from President Clinton also directed the FBI to report on its whistleblower cases annually:

“Not later than March 1 of each year, the Attorney General shall provide a report to the President stating the number of allegations of reprisal received during the preceding calendar year, the disposition of each allegation resolved during the preceding calendar year, and the number of unresolved allegations pending as of the end of the calendar year.”³⁸

Repeated attempts by the National Whistleblower Center to acquire this memo under the Freedom of Information Act (FOIA) have failed, indicating that the memo likely does not exist. Most recently, in 2003, the Bureau responded to the Center’s FOIA request with a “no records responsive” answer.

In 2001, after a series of oversight hearings on the FBI, Senators Charles Grassley (R-IA) and Patrick Leahy (D-VT) were no longer content to allow the FBI to “police themselves,” and introduced legislation giving the Department of Justice Inspector General expanded jurisdiction over FBI whistleblower cases. In response, then-Attorney General Ashcroft agreed to institute the policy.³⁹

In 2002, Senators Grassley and Leahy introduced the FBI Reform Act, which sought, among other things, to give the Merit Systems Protection Board and the Office of Special Counsel jurisdiction to investigate and hear FBI cases, as it does for other agencies. Under the Act, FBI whistleblowers would, for the first time, have access to an independent arbiter to hear their case, and to the courts. Although it was unanimously approved by the Judiciary Committee, the FBI Reform Act never reached the Floor of the Senate because it was subjected to an anonymous hold by another Senator.⁴⁰ The legislative history of the bill provided context to the Committee’s sentiment that more accountability was needed:

“The FBI’s critical and growing responsibilities make it all the more necessary to confront the serious weaknesses in the Bureau’s management and operations that have come to light in recent years. In the 1990s the tragic violent confrontations at Ruby Ridge and Waco, and subsequent flawed internal investigations, led to further inquiries, including an independent investigation of Waco events by former Senator John Danforth, that exposed failures of FBI officials to be candid in admitting errors.

³⁸ Title 5 U.S. Code Section 2303, “Prohibited Personnel Practices in the Federal Bureau of Investigation” <http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+180+0++%28%29%20%20AND%20%28%285%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282303%29%29%3ACITE%20%20%20%20%20%20%20%20%20%20>. Retrieved April 27, 2005.

³⁹ “Leahy, Grassley, Applaud Justice Department Move on FBI Oversight,” July 11, 2001. <http://leahy.senate.gov/press/200107/010711.html>. Retrieved April 27, 2005.

⁴⁰ Statement of Senator Patrick Leahy, “Reaction Of Sen. Patrick Leahy (D-Vt.), Ranking Member, Senate Judiciary Committee, To The DOJ Inspector General’s Report On The Double-Standard Of Discipline Within The FBI,” November 13, 2003. <http://leahy.senate.gov/press/200311/111303.html>. Retrieved April 27, 2005. NOTE: In the Senate a member may secretly prevent legislation from coming up for a vote.

Highly publicized investigative mistakes in the Atlanta Olympics bombing case and the Wen Ho Lee espionage investigation raised questions about the competence and judgment of FBI officials.

This bill stems from the lessons learned during a series of Committee hearings on oversight of the FBI from June 2001, through April 2002, including hearings on the Webster Commission review of FBI security in the wake of the Hanssen espionage case and the Justice Department Inspector General's report on the belated FBI disclosure of documents in the Oklahoma City bombing case."⁴¹

In 2003, the FBI Reform Act was re-introduced in the House and the Senate, but did not pass.⁴² As recently as July 2004, Senators Grassley and Leahy expressed concern that the FBI launches a retaliatory "probe every time an agent speaks publicly about problems within the FBI."⁴³

Left Behind: Intelligence Agencies

Employees working at intelligence agencies have been excluded from protections under the Whistleblower Protection Act, including "the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President."⁴⁴

The case of Navy whistleblower Carol Czarkowski illustrates how intelligence agency exclusions can be abused. After Czarkowski filed her Whistleblower Protection Act complaint and the Navy failed to get her case dismissed, it retroactively declared her ineligible for protection under the law because her office was designated an "intelligence agency."⁴⁵ Members of the Senate have observed that the ability to invoke the intelligence agency exemption *ex post facto* is problematic, noting that the Navy sought the exemption "over a year into whistleblower litigation" and only "after

⁴¹ Senate Judiciary Committee Report 107-148 "The Federal Bureau of Investigation Reform Act of 2002," May 10, 2002. http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=sr148.107&sel=TOC_6205&. Retrieved April 27, 2005.

⁴² Federal Bureau of Investigation Reform Act of 2003, H.R. 2867/S. 1440.

⁴³ Senator Chuck Grassley Press Release "Senators Concerned about More Alleged Problems at FBI's Office of Professional Responsibility," July 14, 2004. http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=15&Month=7&Year=2004. Retrieved April 27, 2005.

⁴⁴ Office of Special Counsel, "The Role of the U.S. Office of Special Counsel," <http://www.osc.gov/documents/pubs/oscrole.pdf> Retrieved April 27, 2005.

⁴⁵ U.S. Merit Systems Protection Board Opinion and Order, *Czarkowski v. Department of Navy*, July 7, 2003. http://www.mspb.gov/decisions/2003/czarkowski_dc990547b1.html. Retrieved April 27, 2005.

the [Merit Systems Protection] Board rejected an earlier effort to avoid litigation on a different basis.”⁴⁶ Czarkowski appealed the attempt to retroactively exempt her from whistleblower protections under the intelligence agency exemption. She won that appeal in the Federal Circuit Court in 2004. Five years after being fired and filing her initial complaint with the Office of Special Counsel, Czarkowski is only now headed toward legal proceedings that will deal with the merits of her case.

Through the Intelligence Community Whistleblower Protection Act of 1998, Congress asserted that it had the right to receive classified information from whistleblowers working for intelligence agencies in the case of “serious or flagrant” problems. However, Congress failed to provide a legal remedy for the whistleblower. The Act allows an Inspector General to investigate whistleblower retaliation. This option was already available prior to the Act and, as a result, the protections are an empty promise at best. According to one official, in the past ten years, only a dozen whistleblowers at the Pentagon ever invoked protection under the Intelligence Community Whistleblower Protection Act.

Left Behind: Baggage Screeners

Also left behind are 45,000 Transportation Security Administration (TSA) airport baggage screeners, comprising one-fourth of the Department of Homeland Security’s total personnel. Post-9/11, the public and Congress were justifiably concerned about the quality of our baggage screeners who are on the front lines of our nation’s airports. When TSA was moved into the Department of Homeland Security, leaders in Congress believed that the screeners it employs would receive protections under the Whistleblower Protection Act.⁴⁷

However, due to an unforeseen loophole, the full promise of these protections has not yet been met. Prior to moving into the Department of Homeland Security, TSA reached an agreement that allows for an independent investigation and report of findings to be conducted by the U.S. Office of Special Counsel (OSC).⁴⁸ This agreement allows the OSC to make non-binding recommendations to the TSA for ending retaliation. This agreement is hollow. Unlike under the Whistleblower Protection Act, neither the OSC nor the screeners are able to go to the Merit Systems Protection Board or the court to have the investigative findings enforced.

⁴⁶ Senate Report 107-349 “To authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes, to accompany S. 3070,” November 19, 2002. http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

⁴⁷ Peckenpaugh, Jason, “Homeland Security employees will retain whistleblower rights,” Govexec.com, November 20, 2002. <http://www.govexec.com/dailyfed/1102/112002p1.htm>. Retrieved April 27, 2005.

⁴⁸ “Memorandum of Understanding Between the U. S. Office of Special Counsel (OSC) and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners,” May 28, 2002. http://www.osc.gov/documents/tsa/tsa_mou.htm. Retrieved April 27, 2005.

On May 6, 2004, the OSC urged the Merit Systems Protection Board to extend Whistleblower Protection Act protections to airport screeners, arguing that the 2002 Homeland Security Act was the controlling legal authority rather than the 2001 law creating the Transportation Security Administration. Special Counsel Scott Bloch stated: “When Congress created the Department of Homeland Security, they made it clear that whistleblower protection is an integral part of protecting homeland security. Providing full whistleblower protections to screeners will help ensure that Congress’s goals in establishing DHS are realized.”⁴⁹ The Board disagreed in an August 2004 ruling, saying that “Board jurisdiction over Screeners’... is not found in the HSA [Homeland Security Act].”⁵⁰ As a result, only Congress can take action to extend to screeners the same protections that all other Department of Homeland Security employees enjoy.

Left Behind: Private Sector Whistleblowers

A 2002 White House report on the creation of the Department of Homeland Security underscored the fact that the private sector plays a significant role in protecting the public from terrorist attacks. The report notes that “terrorists are capable of causing enormous damage to our country by attacking our critical infrastructure – those assets, systems, and functions vital to our national security, governance, public health and safety, economy, and national morale.” It went on to say that “approximately 85 percent of our nation’s critical infrastructure” is owned by the private sector.⁵¹ In addition, since 9/11, the federal government has entered an unprecedented era of privatization. Private companies are doing more and more of the government’s work.

In several instances, Congress has noted the need to protect whistleblowers in the private sector who expose legitimate public safety and security concerns. The most significant legislation was the Sarbanes-Oxley Act which provided protections for whistleblowers at publicly-traded companies concerning issues that might affect the value of companies stocks. This legislation is a model that should be applied across the board to all private companies for all disclosures of misconduct. Unfortunately, whistleblower protection programs for private sector workers are the exception to the rule. Legislation proposed in Congress, called the Paul Revere Freedom to Warn Act, would have extended protections to all private sector workers (as well as federal employees) who communicate homeland security weaknesses to Congress, but the legislation failed to pass.⁵²

⁴⁹ U.S. Office of Special Counsel, “Office of Special Counsel Files Friend of Court Brief Supporting Full Whistleblower Protections for Transportation Security Administration Screeners,” May 24, 2004. http://www.osc.gov/documents/press/2004/pr04_08.htm. Retrieved October 1, 2004.

⁵⁰ Merit Systems Protection Board ruling, *Schott, Jiggetts, Younger v. Department of Homeland Security*, August 12, 2004. http://www.mspb.gov/decisions/2004/schott_dc030807w1.html. Retrieved April 27, 2005.

⁵¹ Department of Homeland Security, The White House, “Information Analysis and Infrastructure Protection,” June 2002. <http://www.whitehouse.gov/deptofhomeland/sect6.html>. Retrieved October, 1, 2004.

⁵² The Paul Revere Freedom to Warn Act, H.R. 3806, 107th Congress, February 27, 2002.

Nuclear Contractors & Licensees. Under Section 211 of the Energy Reorganization Act (ERA), private sector nuclear workers can file a complaint with the Department of Labor to investigate their whistleblower allegations. Employees working for licensees, applicants for licenses, contractors or subcontractors of the Nuclear Regulatory Commission are covered. Also covered are contractors or subcontractors of the Department of Energy that are “indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.”⁵³ The provision does not cover government employees who work for the Nuclear Regulatory Commission or the Department of Energy.

According to the Senate report on the law: “The Secretary of Labor would investigate such charges and issue findings and a decision which would be subject to judicial review. If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress.”

However, the appeal process for ERA whistleblower cases leads into administrative proceedings at the Department of Labor where cases can languish for months and even years. (For example, Hanford whistleblower Casey Ruud’s case has taken 14 years and is still ongoing.) This situation makes it difficult for whistleblowers to obtain timely relief. As a result, there is enormous pressure on most ERA whistleblowers to settle their cases, rather than fight to the end.

Compounding this problem is the fact that the Department of Energy has been paying hundreds of millions of dollars to contractors for their litigation costs in whistleblower cases. As a result, contractors have a strong incentive to drag out legal proceedings and refuse to settle since their legal bills are paid by the government. One of the most egregious cases of this occurred in March 2005 when a California jury awarded Lawrence Livermore National Laboratory whistleblower Dee Kotla \$2.1 million. She was reportedly fired primarily for making a \$4.30 personal phone call “because she was going to be a witness in a sexual-harassment case against the nuclear weapons lab” which is run by University of California. This was the second time the Lab had lost on the case, yet it announced it would be appealing the case a third time after this verdict. According to one report, the Kotla case was estimated to cost the taxpayers \$9 million.⁵⁴

⁵³ Energy Reorganization Act, 42 U.S.C. § 5851 Employee Protection.
<http://www.oalj.dol.gov/public/wblower/refrnc/42u5851.htm>. Retrieved October 1, 2004.

⁵⁴ Hoffman, Ian, “Jury awards whistleblower \$2.1 million: Lab operators express disappointment in verdict, claiming actions were merited,” *Tri-Valley Herald* and other news outlets, March 24, 2005.
http://www.insidebayarea.com/trivalleyherald/localnews/ci_2620321 Retrieved April 26, 2005.

The Kotla case and other cases have drawn attention to the University of California which uses its taxpayer-funded war chest to challenge virtually every verdict and award for whistleblowers. In 2005, Representative Ed Markey (D-MA) prevailed in convincing the House of Representatives to include language in the energy bill that would deny reimbursements to contractors for legal costs when they lose on the merits of the case.

Congress recently recognized the problem of the Department of Labor case backlog when it passed whistleblower protections for corporate workers under the Sarbanes-Oxley Act. Under that law, whistleblowers can proceed to court for a jury trial if the Department of Labor fails to rule on their case in 180 days. A similar fix on the ERA would make it a much more functional source of protection for nuclear workers.

Problems and Solutions

Congress has frequently considered whistleblower protection policy reforms. However, many of those reforms only create a process for the whistleblower to report wrongdoing internally at their agency. Internal reporting and investigations frequently result in the government correcting whatever problems or corruption have occurred. However, they fail to provide meaningful results for whistleblowers who, in many cases, have had their careers destroyed. Those who retaliate against whistleblowers are rarely held accountable for their actions. Even when a whistleblower was right, they are rarely compensated for the loss of their job, income or security clearance. The following problems and solutions are aimed at creating legal processes and remedies that make the whistleblower's life whole again. This list of problems and solutions is not comprehensive but designed to draw attention to some of the most important gaps in the whistleblower patchwork of protections.

PROBLEM: The Whistleblower Protection Act (WPA) is Broken. The Federal Circuit Court, which has a monopoly over judicial review of WPA cases, has defied Congressional intent to protect whistleblowers through its rulings. This court has played the lead role in unraveling the WPA three times, forcing Congress to repair the act in 1989, 1994, and today. The WPA limits whistleblower appeals to this one Court, which has had a history of hostility towards whistleblowers. Since Congress strengthened the WPA ten years ago, the Court has ruled on the merits in favor of whistleblowers only once out of 96 cases. Moreover, the judicial review afforded WPA cases is inconsistent with other government and corporate whistleblower protection statutes. Finally, whistleblower cases can get trapped for years at the Office of Special Counsel which is tasked with intervening on behalf of whistleblowers. In recent years, OSC has been notoriously overdue on handling cases.

"Real" Whistleblower Protections

- ◆ Normal access to courts including trial by jury.
- ◆ Protection for any lawful disclosure challenging misconduct betraying the public trust.
- ◆ Prompt resolution of the case.
- ◆ Interim relief while the case is pending.
- ◆ Protection for those who reasonably believe that wrongdoing has occurred.
- ◆ Reasonable requirements for qualifying for protection.
- ◆ Genuine victories that stop retaliation and make the whistleblower "whole."
- ◆ Findings that retaliation is illegal and accountability for those who engage in it.
- ◆ Effective resolution of the problem the whistleblower has brought to light.

SOLUTION: All Circuits Review. By giving WPA cases normal appellate court review, Congress will be allowing whistleblowers to appeal to courts in places in which they live. Congress will also be allowing courts across the country to interpret the law, which could prevent it from being undermined in the future.

SOLUTION: Close Loopholes. Through legislation, Congress must repeat its intent that employees are covered when they report wrongdoing in any context, including: 1) To their boss or in the chain of command; 2) To co-workers or those suspected of wrongdoing; 3) That challenges policies; 4) As a part of their job duties; and 5) After someone else has reported it.

SOLUTION: Create A Free Market of Legal Options. If a whistleblower's case is not handled in a timely way by the Office of Special Counsel, the whistleblower should be allowed the option of taking his or her case to the courts for a trial by jury. This ensures that if for some unforeseen reason the Office of Special Counsel is unable to process cases, the whistleblowers have other legal options. Congress subscribed to this principle in the last piece of major whistleblower legislation that it passed in the Sarbanes-Oxley Act which allows whistleblowers to go to court if the Department of Labor fails to handle their claim in 180 days. Representative Edward Markey has authored legislation that will be introduced in 2005 that will enable this option.

PROBLEM: National Security Clearance Retaliation is Not Covered. Taking away an employee's security clearance has become the weapon of choice for wrongdoers who retaliate. When a security clearance is revoked, the employee is effectively fired since they are unable to do their job or pursue other job opportunities in their area of expertise. Currently, the employee is unable to appeal to an independent body to challenge the retaliation. Internal hearings are Kafkaesque: Whistleblowers are not told the charges against them, and not allowed to dispute those charges.

SOLUTION: Independent Review. Give employees the opportunity to have a fair hearing by an impartial body that can rule on whether the security clearance revocation is retaliatory, and require its restoration. Pending legislation in the Senate, the Federal Employees Disclosure Act (S. 494) would accomplish this goal.⁵⁵ Inspectors General at intelligence agencies outside the Pentagon should consider implementing the model the Defense Department Inspector General has created for investigating security clearance retaliation.

PROBLEM: The Office of Special Counsel is Dysfunctional. The Office of Special Counsel has been engulfed in controversy for the past year. Government Accountability Office data from 2004 show that only 1/4 of whistleblowers seeking help from the agency even had their cases processed in the timelines set by Congress.

SOLUTION: Congressional Oversight Hearings and Legal Alternatives. The Senate Homeland Security and Governmental Affairs Committee has pledged to have hearings in 2005 on the Office of Special Counsel. Congress should conduct a top to bottom review of the Office of Special Counsel's handling of whistleblower cases. Both the Senate and the House should pledge to have hearings at least annually, if not more, to oversee the Office of Special Counsel and make sure that it is truly fulfilling its mission of protecting whistleblowers in a timely way. In addition, Congress should create legal alternatives for whistleblowers so that their cases do not become trapped at the agency (see above under "Create A Free Market of Legal Options").

⁵⁵ Information about the Federal Employee Protection of Disclosures via Govexec.com's Bill Tracker <http://capwiz.com/govexec/issues/bills/?bill=7409391&size=full>. Retrieved April 26, 2005.

PROBLEM: Communication with Congress under Assault. Congress' ability to receive information from federal employees is crucial to its legislative and oversight responsibilities. However, government agencies continually attempt to stem the flow of information to Congress primarily by requiring government employees to sign non-disclosure forms. Since 1988, Congress has annually passed legislation attached to appropriations bills known as "anti-gag statutes" which prevent agencies from paying salaries of managers who attempt to prevent subordinates from communicating with Congress. Despite this, employees who communicate with Congress and are retaliated against have no way to challenge that retaliation or enforce their right to provide information to Congress.

SOLUTION: Make Anti-Gag Statutes Permanent. The principle of unfettered communication from the Executive Branch should not be vulnerable to an annual and unpredictable decision. Pending legislation in the Senate, the Federal Employees Disclosure Act (S. 494) would accomplish this goal for civil service employees covered under the Whistleblower Protection Act.

SOLUTION: Provide Remedies for Whistleblowers and Criminalize Retaliation. Allow federal employees who are retaliated against for communicating with Congress to have their fair day in court. They should be allowed to have a jury trial and potential emergency relief from being fired or otherwise retaliated against. In addition, Congress should create criminal or civil penalties for those who defy the right of whistleblowers to communicate with Congress.

PROBLEM: The FBI and Intelligence Agencies Left Behind. Despite Congress mandating that the FBI institute whistleblower protections "consistent" with the Whistleblower Protection Act, the FBI has failed to do so. Today, there is no independent administrative or judicial review of FBI cases. In 1998, Congress asserted that it had the right to receive classified information from whistleblowers at intelligence agencies in the case of "serious or flagrant" problems under the Intelligence Community Whistleblower Protection Act. However, Congress failed to provide a remedy for whistleblowers who are retaliated against, making any Congressional "right" and employee protection meaningless.

SOLUTION: Apply Meaningful Whistleblower Protections to the FBI and Intelligence Agencies. These whistleblowers should be allowed the right to an independent review outside the agency as is afforded other civil service employees. Making these whistleblowers eligible for protection under the Whistleblower Protection Act would be one way to accomplish this goal. Classified information can remain protected in legal proceedings through redactions and excisions.

PROBLEM: TSA Airport Baggage Screeners Left Behind. Through a glitch, airport baggage screeners, who comprise 1/4 of the total employees of the Department of Homeland Security, were excluded from the Whistleblower Protection Act rights afforded all other employees of the Department.

SOLUTION: Apply the Whistleblower Protection Act to TSA Airport Baggage Screeners. There is no reason why these employees should be treated any differently than other civil service employees.

PROBLEM: Private Sector Whistleblowers Left Behind. Approximately 85% of the nation's critical infrastructure needing homeland security protection is owned by the private sector. More and more of the government's work is being privatized and done by contractors. The vast majority of private sector national and homeland security whistleblowers are not protected.

SOLUTION: Apply Sarbanes-Oxley Protections Across Private Sector. Allow homeland and national security whistleblowers at all private sector companies to have the same protections as financial misconduct whistleblowers at publicly-traded companies. Whistleblowers should have access to the courts to seek legal remedies.

SOLUTION: Stop Reimbursing Contractor Legal Fees in Whistleblower Cases. Congress should change the Department of Energy's policy of reimbursing contractors for legal fees in fighting whistleblower cases. This policy has encouraged frivolous litigation against whistleblowers.