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National Security Whistleblowers

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National Security Whistleblowers

Summary

To discharge its constitutional duties, Congress depends on information obtained from the executive branch. Domestic and national security information is provided through agency reports and direct communications from department heads, but lawmakers also receive information directly from employees within the agencies. They take the initiative in notifying Congress, its committees, and Members of Congress about alleged agency illegalities, corruption, and waste within the agency. This type of information comes from a group known as whistleblowers.

Through such techniques as "gag orders" and nondisclosure agreements, Presidents have attempted to block agency employees from coming directly to Congress. In response, Congress has enacted legislation in an effort to assure the uninterrupted flow of domestic and national security information to lawmakers and their staffs. Members of Congress have made it clear they do not want to depend solely on information provided by agency heads. Overall, the issue has been how to protect employees who are willing to alert Congress about agency wrongdoing.

The first procedures enacted to protect agency whistleblowers appeared in the Civil Service Reform of 1978. It also contained language that excluded protections to whistleblowers who work in federal agencies involved in intelligence and counterintelligence. In 1989, Congress passed the Whistleblower Protection Act in an effort to strengthen statutory protections for federal employees who assist in the elimination of fraud, waste, abuse, illegality, and corruption. That statute continued the exemption for national security information. It did not authorize the disclosure of any information by an agency or any person that is (1) specifically prohibited from disclosure by any other provision of law, or (2) "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."

Several statutes apply expressly to national security information. Congress has passed a series of laws known collectively as the Military Whistleblowers Protection Act, under which members of the military may give information to Members of Congress. It also passed the Intelligence Community Whistleblower Protection Act of 1998 to encourage the reporting to Congress of wrongdoing within the intelligence agencies. In crafting this legislation, Congress has sought to balance its need for information with national security requirements, giving intelligence community whistleblowers access to Congress only through the intelligence committees. For legal analysis see CRS Report 97-787 A, *Whistleblower Protections for Federal Employees*, by L. Paige Whitaker and Michael Schmerling.

This report will be updated as events warrant.

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National Security Whistleblowers

Congress and the President have often collided over access to information within the executive branch. Although executive officials recognize that they have a duty to keep Congress informed and to share agency documents, domestic as well as national security, on some occasions the executive branch will invoke different types of privileges to block congressional access. Congressional committees can issue subpoenas and either house may hold executive officials in contempt for refusing to release documents or to testify. However, those measures are extreme and are taken only after customary efforts to find a compromise have collapsed. In the midst of some of these confrontations, Presidents have issued orders to executive agencies to limit information to Congress, particularly to prevent agency employees from going directly to Congress. Congress has responded with statutes to keep the lanes of information open.

In cases involving the reporting of sensitive information related to national security, Congress has balanced the competing interests of keeping lawmakers informed while safeguarding secrets. For example, the Intelligence Community Whistleblower Protection Act of 1998 encourages employees of the Intelligence Community to contact Congress but only through the Intelligence Committees.

Introduction

Agency whistleblowers operate within a system of mixed messages. On the one hand, the Code of Ethics adopted by Congress in 1958 directs all government employees to "expose corruption wherever discovered."[1] Over the years, agency employees have received credit for revealing problems of defense cost overruns, unsafe nuclear power plant conditions, questionable drugs approved for marketing, contract illegalities and improprieties, and regulatory corruption.[2] On the other hand, exposing corruption can result in their being fired, transferred, reprimanded, denied promotion, or harassed. In 1978, a Senate panel found that the fear of reprisal "renders intra-agency communications a sham, and compromises not only the employee, management, and the Code of Ethics, but also the Constitutional function of congressional oversight itself."[3]

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[1] 72 Stat. B12 (1958) (H. Con. Res. 175).

[2] The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption, prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2nd sess. 1 (Comm. Print, Feb. 1978).

[3] Id. at 49.

Enacting statutory rights for whistleblowers and establishing new executive agencies to protect those rights has not produced the protections that some expected. As explained in this report, the Office of Special Counsel, the Merit Systems Protection Board, and the Federal Circuit——the agencies created by Congress to safeguard the rights of whistleblowers——have not in many cases provided the anticipated protections to federal employees. National security whistleblowers were exempted from the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989. Some protections are available in statutes passed in recent years, including the Intelligence Community Whistleblower Protection Act of 1998. Individual Members and congressional committees have attempted to provide long-term protections to whistleblowers, enabling them to provide the kinds of agency information that Congress wants without costs and injuries to their government careers.

The purpose of this report is to explore the statutory and political protections available to national security whistleblowers. First, an examination of the Civil Service Reform Act and the Whistleblower Protection Act will explain why national security whistleblowers were excluded from the protections provided in those statutes. Second, to the extent that those statutes are considered models to protect national security whistleblowers, the experience of the Office of Special Counsel, the Merit Systems Protection Board, and the Federal Circuit is relevant in evaluating protections for national security whistleblowers.

Whistleblower activity is often viewed as a struggle between the executive and legislative branches. Presidents may decide to centralize control of agency information by requiring the agency head to approve the release of any information. Members of Congress regularly express a need to obtain information from employees within the agency, without seeking the approval of the agency head. This conflict between the branches is seen in the issuance of executive orders by Presidents Theodore Roosevelt and William Howard Taft in 1902 and 1909 and the resulting legislation——the Lloyd-LaFollette Act of 1912——adopted by Congress to maintain access to agency information. The constitutionality of the Lloyd-LaFollette Act continues to be challenged today by the Justice Department.

"Gag Orders" and Lloyd-LaFollette

Both Presidents Theodore Roosevelt and William Howard Taft threatened to fire agency employees who attempted to contact Congress. Employees were ordered to communicate only through the head of their agency. Congress responded by passing legislation intended to nullify that policy and allow employees to contact lawmakers, committees, and legislative staff.

The "Gag Orders"

President Theodore Roosevelt issued an order in 1902 to prohibit employees of executive departments from seeking to influence legislation "individually or through associations" except through the heads of the departments. Failure to abide by this presidential order could result in dismissal from federal service. The order read:

> All officers and employees of the United States of every description, serving in or under any of the executive departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service.[4]

In 1909, President William Howard Taft prepared a similar order, this one forbidding any bureau chief or any subordinate in an agency from going directly to Congress concerning legislation, appropriations, or congressional action of any kind without the consent and knowledge of the department head. Here is the language:

> It is hereby ordered that no bureau, office, or division chief, or subordinate in any department of the Government, and no officer of the Army or Navy or Marine Corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to any Member of Congress, for legislation, or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.[5]

Lloyd-LaFollette Act

Through language added to an appropriations bill in 1912, Congress rejected these presidential orders. Congressional debate emphasized the concerns of lawmakers that the orders, left unchecked, would put congressional committees in the position of hearing "only one side of a case": the views of Cabinet officials. Lawmakers wanted to hear from the rank-and-file members of a department, who could disclose what departments did not want communicated. Some Members of Congress argued that they would not place the welfare of citizens "in the hands and at the mercy of the whims of any single individual, whether he is a Cabinet officer or anyone else."[6] They insisted on access to agency employees and their complaints and observations about the conduct of their supervisors.[7] Legislative language was drafted to ensure that agency employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.[8]

During House debate, some legislators objected to the presidential orders as an effort by Presidents to prevent Congress "from learning the actual conditions that

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[4] 48 Cong. Rec. 4513 (1912).

[5] Id.

[6] Id. at 4657 (statement of Rep. Reilly).

[7] Id.

[8] Id. at 5201 (statement of Rep. Prouty).

surrounded the employees of the service."[9] If agency employees were required to speak only through the heads of the departments, "there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth or to conceal their official acts it is within their power to do so."[10] If no agency employee was allowed to speak directly to Congress and could communicate only through the department and eventually the Cabinet officer, "then this is an aristocratic Government, dominated completely by the official family of the President."[11] Another legislator remarked: "The vast army of Government employees have signed no agreement upon entering the service of the Government to give up the boasted liberty of the American citizens."[12]

Those themes also emerged during Senate debate. One Senator said "it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States."[13] The language used to counter the presidential orders was added as Section 6 to the Postal Service Appropriations Act of 1912.[14] Section 6, known as the Lloyd-LaFollette Act, provides for procedural safeguards to protect agency officials from arbitrary dismissals when they attempt to communicate with Congress. The final sentence of Section 6 reads: "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

Section 6 was later carried forward and supplemented by the Civil Service Reform Act of 1978 and is codified as permanent law.[15] The conference report on the 1978 statute explained why Congress depends on agency employees to disclose information directly to the legislative branch. The Civil Service Reform Act placed limitations on the kinds of information an employee may publicly disclose without suffering reprisal, but the conference report stated that there was "no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress." Nothing in the statute was to be construed "as limiting in any way the rights of employees to communicate with or testify before Congress."[16]

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[9] Id. at 5235 (statement of Rep. Buchanan).

[10] Id. at 5634 (statement of Rep. Lloyd).

[11] Id.

[12] Id. at 5637 (statement of Rep. Wilson).

[13] Id. at 10674 (statement of Sen. Reed).

[14] 37 Stat. 555, § 6 (1912).

[15] 5 U.S.C. § 7211 (2000).

[16] S.Rept. No. 95-1272, 95th Cong., 2nd sess. 132 (1978).

The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative Process in the U.S. Congress

Richard A. Arenberg

Foreword by Alan S. Frumin

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As codified in 1978, the "right of employees, individually or collectively," to petition Congress becomes an enforceable right, and other prohibited personnel practices are identified.[17] The U.S. Code now provides that various qualifications to the provision on prohibited personnel practices "shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[18]

Civil Service Reform Act of 1978

Congress passed legislation in 1978 to abolish the Civil Service Commission and create such new institutions as the Office of Personnel Management (OPM), the Merits Systems Protection Board (MSPB), and the Office of Special Counsel (OSC). The statute was the first to establish procedural protections for whistleblowers, but also recognized an exception for the national security area. Because of conflicting values in the legislation, however, whistleblowers never received the anticipated protections, and Congress took note of that a decade later when it passed the Whistleblower Protection Act of 1989.[19] This record is examined in subsequent sections on "Whistleblower Protections in Practice" and "Congressional Action, 1986-88." As explained in this report, the statutory safeguards in the Whistleblower Protection Act did not meet the expectations of some lawmakers, agency employees, and private organizations.

Whistleblowers

The Civil Service Reform Act included the following as one of nine merit systems principles: "Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[20]

The Senate Committee on Governmental Affairs, in reporting the bill, remarked that "Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss." Protecting these employees who disclose government illegality, waste, and corruption "is a major step toward a more effective civil service. . . . What is needed is a means to assure them that they

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[17] 92 Stat. 1216-17, § 703(a)(2) (1978). The section on prohibited personnel practices provides: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress." Id. at 1117.

[18] 5 U.S.C. § 2302(b) (sentence following para. 12) (2000).

[19] 103 Stat. 16, § 2 (1989).

[20] 92 Stat. 1114, § 2301(b)(9) (1978).

will not suffer if they help uncover and correct administrative abuses."[21] The House Committee on Post Office and Civil Service, in its report, said that the bill "prohibits reprisals against employees who divulge information to the press or the public (generally known as "whistleblowers") regarding violations of law, agency mismanagement, or dangers to the public's health and safety."[22] The House committee therefore anticipated that the whistleblower could report on wrongdoing not only through agency channels but also to the press and the public. In supplemental views in this committee report, Representative Pat Schroeder linked whistleblower protection to the needs of legislative oversight: "If we in Congress are going to act as effective checks on excesses in the executive branch, we have to hear about such matters."[23]

During floor debate, Senator Jim Sasser stated that "patriotic employees who bring examples of official wrongdoing to the public's attention have, in the past, enjoyed no meaningful protection against reprisals by their supervisors." He referred to "too many" examples of federal employees finding themselves "fired, transferred, or deprived of meaningful work simply because they were brave enough to place the public interest ahead of their own personal career interest." He saw no reason why an employee "should have to risk his career and his family's financial stability for performing a public service."[24]

Special Counsel

In recommending the Civil Service Reform Act, President Jimmy Carter proposed an Office of Special Counsel "to investigate merit violations and to protect the so-called whistleblowers who expose gross management errors and abuses."[25] At a news conference, he looked to the Special Counsel to protect "those who are legitimate whistleblowers and who do point out violations of ethics, or those who through serious error hurt our country."[26] The House Committee on Post Office and Civil Service, in reporting the bill, said that the Special Counsel "will have broad authority to investigate, particularly 'whistleblower' cases."[27]

The statute looked to the Special Counsel to protect the interests of whistleblowers. The Special Counsel, appointed to a term of five years with the advice and consent of the Senate, was directed to "investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful

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[21] S.Rept. No. 95-969, 95th Cong., 2nd sess. 8 (1978).

[22] H.Rept. No. 95-1403, 95th Cong., 2nd sess. 4 (1978).

[23] Id. at 387.

[24] 124 Cong. Rec. 27548 (1978).

[25] Public Papers of the Presidents, 1978, I, at 437.

[26] Id. at 441.

[27] H.Rept. No. 95-1403, 95th Cong., 2nd sess. 4-5 (1978).

disclosure of certain information and may file complaints against agency officials and employees who engage in such conduct."[28]

National Security Exception

As the Senate Committee on Governmental Affairs explained in reporting the Civil Service Reform Act, it was not intended to protect whistleblowers "who disclose information which is classified or prohibited by statute from disclosure."[29] It was the committee's understanding that "section 102(d)(3) of the National Security Act of 1947, which authorizes protection of national intelligence sources and methods, has been held to be such a statute."[30]

The section on prohibited personnel practices in the Civil Service Reform Act covered all executive agencies but did not include "the Federal Bureau of Investigation [FBI], the Central Intelligence Agency [CIA], the Defense Intelligence Agency [DIA], the National Security Agency [NSA], and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities."[31]

Prohibited personnel practices in the FBI were treated in another section of the statute.[32] During House debate, Representative Pat Schroeder argued that the FBI whistleblower protections were "necessitated, in part, by the woeful history of this agency in terms of eliminating internal wrongdoing." She stated that an FBI employee "is guaranteed protection if he or she follows the procedures set out." If the employee decided to make public disclosures of the wrongdoing, "this statute does not serve as authorization for the Bureau to take reprisals. The general policy of protecting whistleblowers runs to all Government instrumentalities."[33]

Such intelligence agencies as the CIA and the DIA were not specifically covered by the Civil Service Reform Act. Moreover, a subsection on actions to be taken by

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[28] 92 Stat. 1112, § 3(4).

[29] S.Rept. No. 95-969, 95th Cong., 2nd sess. 8 (1978).

[30] Id. at 21-22. Section 102(d)(3) of the National Security Act of 1947 provides: "For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the [Central Intelligence] Agency, under the direction of the National Security Council . . . to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpena [sic], law-enforcement powers, or internal-security functions: *Provided further*, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 61 Stat. 498.

[31] 92 Stat. 1115, § 2302(a)(2)(C)(ii) (1978).

[32] Id. at 1117, § 2302.

[33] 124 Cong. Rec. 34100 (1978).

authorized supervisory employees referred to the special category of confidential or secret information. Supervisors were prohibited from taking or failing to take a personnel action with respect to any employee or applicant for employment as a reprisal for a disclosure of information by an employee or applicant which they reasonably believed evidences (1) a violation of any law, rule, or regulation, or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety "if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."[34] The language recognized the President's authority to designate certain information as confidential or secret, excluding national security whistleblowers from automatic protection. However, Representative Schroeder argued that the Civil Service Reform Act "applies the merit system principles to all units of the Federal Government," and that "while specific enforcement provisions are not mandated for agencies like CIA and GAO, the legislation makes it clear that whistleblowers should be protected in these agencies."[35]

In the event the Special Counsel received from an agency employee foreign intelligence or counterintelligence information, "the disclosure of which is specifically prohibited by law or by Executive order," the statute directed the Special Counsel to transmit that information to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.[36] The Special Counsel was directed to make available to the public a list of noncriminal matters referred to agency heads, but "shall take steps to ensure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs."[37]

Communications with Congress

The Senate Committee on Governmental Affairs added to the bill a provision to ensure that nothing in the section on prohibited personnel practices "will authorize the withholding of any information from Congress, or will sanction any personnel action against an employee who discloses any information to a Member of Congress or its staff, either in public session or through private communications." Moreover, nothing in the bill was to be construed "as limiting in any way the rights of employees to communicate with or testify before Congress, such as is provided in 5 U.S.C. 7102 (right to furnish information protected), or in 18 U.S.C. 1505 (right to testify protected)."[38]

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[34] 92 Stat. 1116, § 2302(b)(8).

[35] 124 Cong. Rec. 34100 (1978).

[36] 92 Stat. 1127, § 1206(b)(9).

[37] 92 Stat. 1128, § 1206(d).

[38] S.Rept. No. 95-969, 95th Cong., 2nd sess. 23 (1978).

The conference report, in adopting the Senate provision, explained that it "is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress." As further explanation:

> For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.[39]

As enacted, the subsection of prohibited personnel practices states that it "shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[40]

Inspectors General

In the same year that Congress passed the Civil Service Reform Act, it completed action on legislation to establish offices of inspectors general in twelve executive agencies. More inspectors general would be created in subsequent statutes. The purpose was to create independent offices "to conduct and supervise audits and investigations relating to programs and operations" in these agencies.[41] These offices were expected "to prevent and detect fraud and abuse in, such programs and operations."[42]

inspectors general were authorized to receive and investigate complaints or information received from agency employees concerning the "possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."[43] Supervisors were prohibited from taking or threatening to take "any action against any employee as a reprisal for making a complaint or disclosing information to an inspector general, unless the complaint was made or the

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[39] S.Rept. No. 95-1273, 95th Cong., 2nd sess. 132 (1978). The same language appears in H.Rept. No. 95-1717, 95th Cong., 2nd sess. 132 (1978) (conference report).

[40] 92 Stat. 1117 (1978).

[41] 92 Stat. 1101, § 2(1) (1978).

[42] Id. at § 2(2)(b).

[43] Id. at § 7(a).

information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity."[44]

In reporting the section on employee complaints, the Senate Committee on Governmental Affairs remarked: "Because of the employee's position within the agency, employee complaints carry with them a high likelihood of reliability." Given the difficulty of "blowing the whistle" on one's supervisors or colleagues, "the situation may often be serious." The committee believed that "most employees would much prefer an effective channel inside the agency to pursue complaints rather than seeking recourse or publicity outside the agency. This preference should be encouraged."[45]

The legislative history of the Civil Service Reform Act anticipated that federal agency whistleblowers would report wrongdoing not only to their supervisors but to Congress, the public, and the press. In contrast, the inspectors general statute of 1978 authorized a set of procedures that were entirely in-house. The IGs were directed to keep Congress "fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action."[46] Inspectors general would furnish semiannual reports to agency heads, who would transmit the reports without change to appropriate committees and subcommittees of Congress.[47]

Defense Department IG

In 1982, Congress created an inspector general in the Defense Department, authorized to direct audits and investigations that require access to information concerning (1) sensitive operational plans, (2) intelligence matters, (3) counterintelligence matters, (4) ongoing criminal investigations by other administrative units of the Defense Department related to national security, and (5) "other matters the disclosure of which would constitute a serious threat to national security."[48] The IG would serve as the principal adviser to the Secretary of Defense "for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department."[49]

The IG statute provided that nothing in the section "shall be construed to authorize the public disclosure of information which is (A) specifically prohibited from disclosure by any other provision of law; (B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or (C) a part of an ongoing criminal investigation." However, nothing in that section or in any other provision of the

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[44] Id. at § 7(c).

[45] S.Rept. No. 95-1071, 95th Cong., 2nd sess. 35-36 (1978).

[46] 92 Stat. 1101, at § 2(3).

[47] Id. at 1103, § 5(b).

[48] 96 Stat. 751, § 8(b)(1) (1982).

[49] Id., § 8 (c)(1).

statute "shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof."[50]

A Statutory IG for the CIA

The Central Intelligence Agency had an Office of Inspector General, but it was not statutory. Beginning in 1952, the CIA administratively established the position of IG.[51] The limitations of that office were underscored by the Iran-Contra affair, which became public in November 1986 and highlighted the extent to which the CIA and other executive agencies had failed to comply with statutory restrictions and had not testified fully and accurately to congressional committees about covert operations.[52] One of the recommendations by the House and Senate Iran-Contra Committees in November 1987 was the creation of an independent statutory IG confirmed by the Senate. The committees concluded that the existing Office of Inspector General in the CIA "appears not to have had the manpower, resources or tenacity to acquire key facts uncovered by other investigations."[53]

During hearings on March 1, 1988, by the Senate Intelligence Committee, Senator Arlen Specter reviewed some of the misleading testimony that Congress had received about the Iran-Contra affair, including testimony from the CIA.[54] The next year, Congress established an inspector general for the CIA, "appropriately accountable to Congress" and designed to "promote economy, efficiency, and effectiveness in the administration of such programs and operations, and detect fraud and abuse in such programs and operations."[55] The IG would provide a means of keeping the Director of the CIA "fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, and the necessity for and the progress of corrective action," and would ensure that the House and Senate Intelligence Committees "are kept similarly informed of significant problems and deficiencies as well as the necessity for and the progress of corrective actions."[56]

The IG reports directly to and is under the general supervision of the director, who may prohibit the IG "from initiating, carrying out, or completing any audit, inspection, or investigation if the Director determines that such prohibition is necessary to protect vital national security interests of the United States." In exercising that power, the director shall submit "an appropriately classified statement

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[50] Id. at 752-53.

[51] CRS Report 89-129 GOV, *Office of Inspector General in the Central Intelligence Agency: Development and Proposals*, by Frederick M. Kaiser, February 27, 1989.

[52] Report of the Congressional Committee Investigating the Iran-Contra Affair, H.Rept. No. 100-433 and S.Rept. No. 100-216, 100th Cong., 2nd sess. (1987).

[53] Id. at 425.

[54] "S. 1818——To Establish an Independent Inspector General," Hearings before the Senate Select Committee on Intelligence, 100th Cong., 2nd sess. 53-54 (1988).

[55] 103 Stat. 1711, § 801 (1989).

[56] Id. at 1711-12.

of the reasons for the exercise of such power within seven days to the intelligence committees."[57]

The creation of the IG also included a whistleblower provision. The IG would receive and investigate "complaints or information from an employee of the Agency concerning the existence of an activity constituting a violation of laws, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety." No action constituting a reprisal, or threat of reprisal, for making such complaint may be taken by any Agency employee in a position to take such actions, "unless the complaint was made or the information was disclosed with the knowledge that it was false or with willful disregard for its truth or falsity."[58] Additional procedures for CIA whistleblowing would be enacted in 1998, discussed later in the report.

Creating the Federal Circuit

Under the Civil Service Reform Act, any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the MSPB could obtain judicial review in any of the federal appellate courts.[59] In 1982, Congress created a new appellate court by consolidating the existing U.S. Court of Customs and Patent Appeals with the appellate division of the existing U.S. Court of Claims. Congress gave the new U.S. Court of Appeals for the Federal Circuit exclusive jurisdiction over any final order or final decision of the MSPB.[60]

Whistleblower Protections in Practice

For a number of reasons, the whistleblower protections promised in the Civil Service Reform Act failed to materialize. In signing the bill, President Carter said that "it prevents discouraging or punishing [federal employees] for the wrong reasons, for whistleblowing or for personal whim in violation of basic employee rights."[61] At the signing ceremony, Representative Morris Udall, who managed the bill on the House side, cautioned that "reform has consequences that you don't like sometimes, but the best reforms aren't going to work unless people make them work."[62]

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[57] Id. at 1712 (paragraphs (b)(3) and (4)).

[58] Id. at 1714 (paragraph (e)(3)).

[59] 92 Stat. 1143, § 7703(b) (1978).

[60] 96 Stat. 38, § 127(a)(9) (1982).

[61] Public Papers of the Presidents, 1978, I, at 1761.

[62] Id. at 1762.

Competing Priorities

Part of the gap between promise and practice with regard to whistleblower protections resulted from the complex and in some ways conflicting values placed in the statute. Although it expressly stated its intention to protect whistleblowers, a dominant purpose behind the statute was to make it easier to hold federal employees accountable for their performance. In announcing the Administration's civil service reform proposals, President Carter noted "a widespread criticism of Federal Government performance. The public suspects that there are too many Government workers, that they are underworked, overpaid, and insulated from the consequences of incompetence."[63] Although he immediately dismissed such "sweeping criticisms" as "unfair," much of the impetus behind civil service reform was driven by the belief that managers needed greater discretion in demoting and removing under-performing employees. In this same address, President Carter referred to the "sad fact" that it is "easier to promote and to transfer incompetent employees than it is to get rid of them."[64]

Making it Easier to Punish

In reporting the bill, the Senate Committee on Governmental Affairs referred to conditions in federal agencies that made them "too often . . . the refuge of the incompetent employee."[65] An employee "has no right to be incompetent."[66] One of the "central tasks" of the bill was "simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons."[67]

Senator Abraham Ribicoff, chairman of the committee that reported the bill, listed two purposes of the legislation without indicating any tension between them. The bill provided "new protection for whistleblowers who disclose illegal or improper Government conduct" while at the same time it "streamline[d] the processes for dismissing and disciplining Federal employees."[68] He explained that the bill "lowered the standard of evidence needed to uphold the dismissal of an employee who has been fired for poor performance." Instead of a supervisor proving by a "preponderance of evidence" that an employee's performance had not been "up to par," the conferees adopted the "substantial evidence" test to give supervisors greater deference in assessing the work of an employee.[69] Ironically, if a supervisor found a whistleblower's charges to reflect on poor management within the agency,

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[63] Public Papers of the Presidents, 1978, I, at 436.

[64] Id.

[65] S.Rept. No. 95-969, 95th Cong., 2nd sess. 3 (1978).

[66] Id. at 4.

[67] Id.

[68] 124 Cong. Rec. 33388-89 (1978).

[69] Id. For the "substantial evidence" test in the Civil Service Reform Act, see 92 Stat. 1138, § 7701 (c)(1)(A).

or if a whistleblower threatened to release information embarrassing to the supervisor, it might now be easier to sanction or remove the whistleblower.

1985 House Hearings

One of the early statements by President Ronald Reagan urged whistleblowers to come forward: "Federal employees or private citizens who wish to report incidents of illegal or wasteful activities are not only encouraged to do so but will be guaranteed confidentiality and protected against reprisals." The "vital element" in fighting fraud and waste "is the willingness of employees to come forward when they see this sort of activity." Employees "must be assured that when they 'blow the whistle' they will be protected and their information properly investigated." He wanted to make it clear that "this administration is providing that assurance to every potential whistleblower in the Federal Government."[70]

As presiding officer of House hearings on June 26, 1985, Representative Pat Schroeder heard contrary testimony from a variety of government officials, federal employees, and private organizations on the implementation of the whistleblower provisions in the Civil Service Reform Act. She concluded: "There is no dispute ——whistleblowers have no protection. We urge them to come forward, we hail them as the salvation of our budget trauma, and we promise them their place in heaven. But we let them be eaten alive."[71] Much of the focus of the hearings fell on the performance of the Special Counsel.

Office of the Special Counsel

K. William O'Connor, Special Counsel of the MSPB, testified that his office "has only one client; it is the enforcement of the merit systems and the laws that carry it into effect."[72] The commitment to protect "bona fide whistleblowers" would be done by "protection of the merit systems, the means designed by Congress to that end and the end that the OSC is charged with effecting."[73] Federal employees who bring charges of agency wrongdoing "are not the clients of this office; the system is."[74] Although some witnesses from the Schroeder subcommittee argued that the OSC was principally established to "protect whistleblowers," O'Connor testified that "protection of whistleblowers——even the word whistleblower——does not appear in the code at all. What is required by the statute is the protection of the Merit System . . . ."[75]

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[70] Public Papers of the Presidents, 1981, at 360.

[71] "Whistleblower Protection," hearings before the House Committee on Post Office and Civil Service, 99th Cong., 1st sess. 237 (1985).

[72] Id. at 238.

[73] Id. at 239.

[74] Id. at 240.

[75] Id. at 243.

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Amendments XI–XXVII

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Elsewhere O'Connor recognized the duties of his office with whistleblowers. In identifying the three primary statutory functions of the OSC, he listed this one first: "To provide a secure channel through which disclosures of waste, fraud, inefficiency or hazards to public health or safety may be received and referred while providing anonymity to the discloser."[76] He also described a number of recent improvements in the operations of OSC, including "[a]n effective outreach program . . . developed and maintained to apprise whistleblowers of the responsibilities of and protection afforded by this office."[77] He pledged to "continue to use the statutory powers of this office to protect bona fide whistleblowers from prohibited retaliation for their protected disclosures by enforcing the law. That is, by prosecuting anyone who takes reprisal against them because of their protected disclosures, and by invoking appropriate agency corrective actions."[78]

O'Connor described how he would handle an employee who had been sanctioned by an agency, even though the employee had been involved in protected whistleblower activities:

> If an agency sanction was proper because of an employee's incompetence or misconduct, even though the motivation of the deciding or proposing official was contaminated by a de minimus vindictiveness or desire for retaliation and reprisal for protected conduct, the sanction against the employee will probably stand. The reprisal oriented official, however, may be prosecuted by my office and may be disciplined by the Board if the improper motivation of the conduct is not de minimus. This, it seems to me, is a proper and worthy result.
>
> It is not in the public interest to employ, retain or cosset drones, incompetents, disruptors of the workplace, malefactors, or those whose conduct is in other unlawful ways inappropriate to the execution of the mission of the organization, even though the person is also an individual who has engaged in specifically protected conduct like whistleblowing. The public interest is, after all, the execution of the public business; it is not a maintenance program for the incompetent, nor is it in the public interest to foster internal dissidence, vituperation, backbiting and disaffection.[79]

Representative Schroeder referred to some 11,000 federal employees who had contacted the Office of Special Counsel for relief. O'Connor acknowledged that these individuals had a complaint and thought they had a case, but added: "there are many people who feel that they have complaints, and some of them are carrying bags and walking up and down Constitution Avenue right now, I have no doubt."[80] When Representative Schroeder pointed out that the women carrying bags up and down the avenue are not on the federal payroll, O'Connor agreed. The point he wanted to

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[76] Id.

[77] Id. at 244.

[78] Id. at 252.

[79] Id. at 250

[80] Id. at 253.

make, he said, was that few of the 11,000 complaints were within the scope of responsibilities handled by his office.[81]

Earlier O'Connor had offered his "firm belief" that most federal managers follow the law and have integrity, whereas "most whistleblowers are malcontents."[82] In a newspaper article published on July 17, 1984, O'Connor was asked what advice he would give, as a private attorney, to a potential whistleblower. His reply: "I'd say that unless you're in a position to retire or are independently wealthy, don't do it. Don't put your head up, because it will get blown off."[83]

Congressional Action, 1986-88

On February 20 and 21, 1986, a subcommittee of the House Post Office and Civil Service Committee held additional hearings on whistleblower protections. The testimony showed a wide gap between the perceptions of lawmakers and executive officials. As chair of the subcommittee, Representative Schroeder spoke of a "general consensus" that the whistleblower protections in the Civil Service Reform Act "must be changed if we are to treat Federal employees fairly and provide relief for victims of prohibited personnel practices."[84] Special Counsel O'Connor testified against the need to pass a bill, introduced in the House, designed to strengthen whistleblower protections: "The bill is flawed conceptually, as well, from inception, for it proceeds upon the false premise that proper law enforcement systems now in effect do not work to protect bona fide whistleblowers. The fact is that, *now*, the statutory protection works. I oppose the bill."[85] Stuart E. Schiffer, Deputy Assistant Attorney General, also testified against the bill. When asked whether he believed the existing statutory system was adequate, he replied: "Yes; I do." Asked again whether there was adequate protection for whistleblowers, he again answered: "Yes; I do."[86]

Proposed Legislation in 1986

The House Post Office and Civil Service Committee reported a whistleblower protection act on September 22, 1986. The purpose was to "strengthen and improve protections for the rights of Federal employees by clarifying the role of the Office of Special Counsel (OSC) and emphasizing that its primary responsibility is to represent individuals who are victims of prohibited personnel practices; by providing Federal employees with a private right of action as an alternative to pursuing cases through the OSC; by permitting the Special Counsel to seek judicial review of MSPB

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[81] Id. at 254.

[82] Id. at 259.

[83] Howard Kurtz, "Whistlin' the Blues," *Washington Post*, July 17, 1984, at A17.

[84] "Whistleblower Protection Act of 1986," hearings before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 99th Cong., 2nd sess. 1 (1986).

[85] Id. at 74 (emphasis in original).

[86] Id. at 99.

decisions to which the Special Counsel was a party; by protecting the identity of Federal employees who make disclosures; by lessening the standard of proof needed to prove reprisal in the case of whistleblower disclosures;" and other objectives.[87] The House Subcommittee on Civil Service had been "unable to find a single individual who has gone to the Office of Special Counsel since 1981 who has been satisfied with the investigation of his or her case."[88]

Action in 1988

Congress did not act on the 1986 legislation, but the House Committee on Post Office and Civil Service reported the bill again in the 100th Congress. The report referred to the results of a study by Dr. Donald R. Soeken who concluded that "most whistleblowers were not protected, and in fact, they suffered cruel and disastrous retaliation for their efforts. . . . It seems to me that the protection has also been a cruel hoax. We ask people to act out of conscience and then we ignore their cries for protection. We allow their careers to be destroyed and watch as the lives of the whistleblowers and their families suffer under the strain."[89] Mary Lawton, Special Counsel in 1987, testified that "to the extent that there may have been a lack of emphasis on the corrective action authority of the [OSC] office, I have called for an emphasis."[90]

The Senate Committee on Governmental Affairs reported whistleblower protection legislation on July 6, 1988.[91] The committee described the results of a 1984 report prepared by the MSPB, "Blowing the Whistle in the Federal Government." It estimated that a large percentage of federal employees (69-70 percent) knew of fraud, waste and abuse but chose not to report it. Moreover, the percentage of employees who did not report government wrongdoing because of fear of reprisal rose from an estimated 20 percent in 1980 to 37 percent in 1983.[92]

In reviewing the board's report, the committee agreed that "statutory protections, alone, cannot guarantee the elimination of reprisal among civil servants. Agency heads and supervisors must foster an environment where employees are encouraged to come forward with suggestions and report problems and are appropriately rewarded, rather than punished, for doing so." The statistics included in the board's report "show that Congress' specific statutory efforts to protect whistleblowers thus far have had no observable impact on encouraging federal employees to blow the whistle."[93]

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[87] H.Rept. No. 99-859, 99th Cong., 2nd sess. 13 (1986).

[88] Id. at 19.

[89] H.Rept. No. 100-274, 100th Cong., 1st sess. 19 (1987).

[90] Id. at 22.

[91] S.Rept. No. 100-413, 100th Cong., 2nd sess. (1988).

[92] Id. at 5.

[93] Id. at 6.

The *Mt. Healthy* Test

The committee explained why whistleblowers were vulnerable to reprisal. Even if an employee was successful in proving a connection between a whistleblowing activity and a reprisal, the agency had an opportunity to show that it would have taken the personnel action even if the employee had not engaged in protected conduct. This type of agency defense had been developed by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977) and later had been applied by the MSPB and the courts in reprisal cases. The committee found that the *Mt. Healthy* test allowed an agency "to search an employee's work record for conduct that can be cited as the reason for taking an adverse action. It has proved to be difficult for employees to refute the agency's contention that it would have taken the personnel action anyway."[94]

To overcome this problem, the committee proposed that the *Mt. Healthy* test be modified only for whistleblower reprisal cases. Once an employee had made a prima facie case of reprisal by showing that whistleblowing was a factor in a personnel action, the agency would be required to show by "clear and convincing evidence" that the whistleblowing was not a "material factor" in the personnel action. "Clear and convincing evidence" is less than the criminal standard of "beyond a reasonable doubt" but higher than "preponderance of the evidence," which was the current standard for this type of employee case.[95]

The Whistleblowing Protection Act of 1988 passed the Senate and the House. Section 2(b) of the Senate bill stated the "primary role" of the OSC was to "protect employees, especially whistleblowers, from prohibited personnel practices," and that the OSC "shall act in the interests of employees who seek assistance from the [OSC] and not contrary to such interests."[96] The bill passed the Senate by voice vote on August 2, 1988.[97] The House took up the Senate bill on October 3. Because the 100th Congress was about to end, the House skipped conference and worked out a compromise version of the bill with the Senate.[98] A letter of October 3 to Representative Schroeder from Joseph R. Wright, Jr., Deputy Director of the Office of Management and Budget, indicated that the two branches were in agreement on the bill. There was no threat of a veto.[99] The bill passed the House, 418 to zero.[100] The Senate agreed to the House changes on October 7.[101] Congress adjourned sine die on October 22.

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[94] Id. at 14.

[95] Id. at 15.

[96] 134 Cong. Rec. 19974 (1988).

[97] Id. at 19983.

[98] Id. at 27853.

[99] Id. at 27855.

[100] Id. at 28129.

[101] Id. at 29544.

Pocket Veto

President Reagan pocket vetoed the bill on October 26. He stated that reporting of "mismanagement and violations of the law, often called whistleblowing, contributes to efficient use of taxpayers' dollars and effective government. Such reporting is to be encouraged, and those who make the reports must be protected."[102] However, he also said it was necessary to "ensure that heads of departments and agencies can manage their personnel effectively." It was his concern that the bill would have changed the law "so that employees who are not genuine whistleblowers could manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions."[103] He objected particularly to the "clear and convincing evidence" test, holding that it "essentially rigs the Board's process against agency personnel managers in favor of employees. The interests of both employees and managers should be fully protected."[104]

The pocket veto memorandum also objected to restrictions placed on the power of the President to remove the Special Counsel.[105] The Civil Service Reform Act provided that the Special Counsel "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[106] Section 1211(b) of the bill passed by Congress in 1988 contained the same language.[107]

President Reagan also objected to a provision that authorized the Special Counsel to obtain judicial review of most MSPB decisions in proceedings to which the Special Counsel was a party. Implementation of that provision "would place two Executive branch agencies before a Federal court to resolve a dispute between them. The litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive power to the President, which includes the authority to supervise and resolve disputes between his subordinates."[108]

Whistleblower Protection Act of 1989

The vetoed whistleblower bill was modified in 1989 and passed the Senate on March 16 by a vote of 97 to zero.[109] The modified bill retained the language establishing that the "primary role" of the Special Counsel "is to protect employees, especially whistleblowers, from prohibited personnel practices," and provided that the OSC "shall act in the interests of employees who seek assistance" from the office.

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[102] Public Papers of the Presidents, 1988-89, II, at 1391.

[103] Id. at 1392.

[104] Id.

[105] Id.

[106] 92 Stat. 1122, § 1204 (1978).

[107] 134 Cong. Rec. 29537 (1988).

[108] Public Papers of the Presidents, 1988-89, II, at 1392.

[109] 135 Cong. Rec. 4535 (1989).

The limitations on the President's power to remove the Special Counsel were retained, but no authority was granted to the Special Counsel to seek judicial review of an MSPB decision.

The "clear and convincing evidence" test remained. The bill modified the *Mt. Healthy* test to state that, "in cases involving allegations of reprisal for whistleblowing, an individual must prove that whistleblowing was a contributing factor in the agency's decision to take the action."[110] The burden is then placed on the agency to prove by clear and convincing evidence that the same personnel action would have been taken in the absence of the protected disclosure. Also, for the first time, the bill gave whistleblowers the right to appeal their own cases to the MSPB if the Special Counsel failed or refused to do so.[111] The House passed the bill under suspension of the rules.[112]

In the Whistleblower Protection Act (WPA) of 1989, Congress found that federal employees who make protected disclosures "serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures."[113] Congress also found that protecting employees "who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." Moreover, the WPA stated that Congress, in passing the Civil Service Reform Act of 1978, "established the Office of Special Counsel to protect whistleblowers" who make protected disclosures.[114] The WPA incorporates the exemptions for national security information included in the 1978 statute.[115] In signing the WPA, President George H. W. Bush said that "a true whistleblower is a public servant of the highest order. . . . [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."[116]

WPA Amendments in 1994

Congress passed legislation in 1994 to amend the Whistleblower Protection Act. Legislation was needed to reauthorize the Office of Special Counsel and to ensure that it functioned "as intended, to protect federal employee whistleblowers from on-the-job harassment, negative job ratings, unfavorable transfers, denial of promotions and other retaliation for their efforts to uncover waste and mismanagement in their agencies."[117]

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[110] Id. at 5036 (statement of Rep. Horton).

[111] Id. at 4508 (statement of Senator Levin).

[112] Id. at 5040.

[113] 103 Stat. 16, § 2(a)(1) (1989).

[114] Id. at § 2(a)(2) and (3).

[115] Id. at 23.

[116] Public Papers of the Presidents, 1989, I, at 391.

[117] S.Rept. No. 103-358, 103d Cong., 2nd sess. 1 (1994).

In reporting the legislation, the Senate Committee on Governmental Affairs expressed concern "about the extent to which OSC is aggressively acting to protect whistleblowers from prohibited personnel practices."[118] On the House side, the Committee on Post Office and Civil Service stated that "while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them."[119] The House committee concluded that statutory mandates could easily be thwarted by a hostile agency climate: "There is little question that agency leadership is a far stronger factor than statutory provisions to establish a workplace environment of respect for the merit system."[120]

MSPB and Federal Circuit

The House committee also found that the statistical record indicated that the MSPB and the Federal Circuit of Appeals "have not been favorable to Federal whistleblowers." In the first two years after enactment of the WPA, whistleblowers won approximately 20% of MSPB decisions on the merits. From FY1991 to FY1994, that rate dropped to 5%; instead of providing a balance, the Federal Circuit "has been more hostile than the Board. Since its 1982 creation, in reported decisions employees have prevailed only twice on the merits with the whistleblower defense." The committee said it had received "extensive testimony at hearings that the MSPB and the Federal Circuit have lost credibility with the practicing bar for civil service cases."[121] In November 1993, GAO released a report indicating that 81 percent of federal employees who sought whistleblower reprisal protection from OSC gave the office a generally low to very low rating for overall effectiveness.[122]

A more recent study indicates that whistleblowers continue to fare poorly in the MSPB and Federal Circuit. According to the Government Accountability Project, a nonprofit, whistleblower advocacy group, only two out of 30 whistleblowers prevailed on the merits before the MSPB from 1999 to 2005, and only one whistleblower claim out of 96 prevailed on the merits before the Federal Circuit from 1995 to 2005.[123] Some, however, may view this as an indication that many whistleblowers present weak cases.

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[118] Id. at 3.

[119] H.Rept. No. 103-769, 103d Cong., 2nd sess. 12 (1994).

[120] Id. at 13.

[121] Id. at 17.

[122] S.Rept. No. 103-358, 103d Cong., 2nd sess. 3 (1994). General Accounting Office, "Reasons for Whistleblower Complainants' Dissatisfaction Need to be Explored," Nov. 1993, GAO/GGD-94-21.

[123] Project On Government Oversight, "Homeland and National Security Whistleblower Protections: The Unfinished Agenda," April 28, 2005, at 8.

The Amendments

The 1994 legislation provided for reasonable attorney fees in certain cases if the federal employee or applicant for a federal job is the prevailing party and the MSPB or administrative law judge determines that payment by the agency "is in the interest of justice."[124] The statute required the Special Counsel, ten days before terminating an investigation of a prohibited personnel practice, to provide a written status report to the whistleblower of the proposed findings of fact and legal conclusions.[125] The employee then has an opportunity to respond and provide additional supporting information. Through other provisions in the amendments, Congress attempted to even the field for legitimate whistleblowers.[126]

Military Whistleblowers

During debate on the WPA, Representative Barbara Boxer said that Members of Congress "learned when we passed the Military Whistleblower Protection Act that without whistleblowers, frankly, we really could not do our job, because . . . we need information and we need a free flow of information from Federal employees, be they military or civilian."[127] The Military Whistleblower Protection Act (10 U.S.C. § 1034) is not a single statute but rather an accumulation of several.

1956 Legislation

The first mention of Section 1034 was in 1956, with the codification of Title 10. Section 1034 provided: "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."[128] Congress adopted this language during a tense confrontation with the Eisenhower Administration over access to agency information. In 1954, President Eisenhower wrote a letter to Secretary of Defense Charles E. Wilson in which he prohibited testimony concerning certain conversations and communications between employees in the executive branch.[129] Attorney General Herbert Brownnell, Jr. released a legal memorandum stating that the courts had "uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest."[130] The Justice Department prepared a 102-page brief concluding that Congress "cannot, under the Constitution, compel heads of departments to make public what the President desires to keep secret in the public

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[124] 108 Stat. 4361, § 2 (1994).

[125] Id. at 4362.

[126] For floor debate, see 140 Cong. Rec. 27357-61, 28823-26 (1994).

[127] 135 Cong. Rec. 5037 (1989).

[128] 70A Stat. 80 (1956).

[129] CQ Almanac, 1956, at 737.

[130] Id.

interest."[131] Representative John Moss said the Justice Department analysis was a demand that Congress "rely upon spoon-fed information from the President."[132]

Whistleblower Protection

Congress had created an inspector general for the Defense Department in 1982. Legislation in 1988 added a section on "Safeguarding of Military Whisteblowers," including prohibitions on retaliatory personnel actions against a member of the armed services for making or preparing a protected communication with a Member of Congress or an inspector general. The IG was authorized to investigate allegations by a member of the armed services who claims that a prohibited personnel action has been taken or threatened to be taken.[133] The conference report explained:

> The conferees note that in the course of their duties, members of the Armed Forces may become aware of information evidencing wrongdoing or waste of funds. It is generally the duty of members of the Armed Forces to report such information through the chain of command. Members of the armed forces, however, have the right to communicate directly with Members of Congress and Inspectors General (except to the extent that a communication is unlawful under applicable law or regulation), and there may be circumstances in which service members believe it is necessary to disclose information directly to a Member of Congress or an Inspector General. When they make lawful disclosures, they should be protected from adverse personnel consequences (or threats of such consequences), and there should be prompt investigations and administrative review of claims of reprisals. When such a claim is found to be meritorious, the Secretary concerned should initiate appropriate corrective action, including disciplinary action when warranted.[134]

Other modifications of the Military Whistleblower Protection Act are found in legislation passed in 1989, 1994, 1998, and 2000.[135]

A current case of a military whistleblower concerns Bunnatine Greenhouse, who served as the chief of civilian contracting for the U.S. Army Corps of Engineers until she was demoted on August 27, 2005. She and the law firm representing her claim that she was demoted in retaliation for publicizing the concerns she had about no-bid contracts for work done in Iraq.[136] This case received wide notice, including a PBS documentary and a *Washington Post* article.[137]

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[131] Id. at 740.

[132] Id.

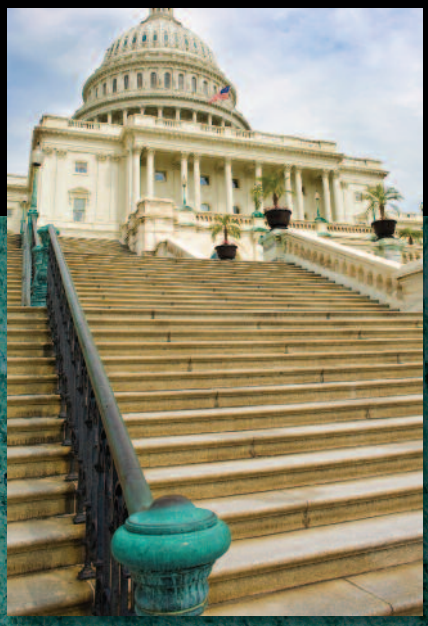
[133] 102 Stat. 2027, § 846 (1988).

[134] H.Rept. No. 100-989, 100th Cong., 2nd sess. 436-37 (1988). This language also appears at 134 Cong. Rec. 16977 (1988).

[135] 103 Stat. 1910, § 202 (1989); 108 Stat. 2756, § 531 (1994); 112 Stat. 2107, § 993 (1998); 114 Stat. 1654A-224, § 903 (2000).

[136] For more detail, see [http://www.whistleblowers.org].

[137] [http://www.pbs.org/now/politics.greenhouse.html]; Neely Tucker, "A Web of Truth: (continued...)



A Practical Guide to Preparing and Delivering Testimony Before Congress and Congressional Hearings for Agencies, Associations, Corporations, Military, NGOs, and State and Local Officials

By William N. LaForge

Testifying Before Congress

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Nondisclosure Agreements

In 1983, President Ronald Reagan directed that all federal employees with access to classified information sign "nondisclosure agreements" or risk the loss of their security clearance.[138] Congress, concerned about the vagueness of some of the terms in the Reagan order and the loss of access to information, passed legislation in 1987 to prohibit the use of appropriated funds to implement the Administration's nondisclosure policy.[139] The dispute was taken to court and in 1988 District Court Judge Oliver Gasch held that Congress lacked constitutional authority to interfere, by statute, with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information.[140] Judge Gasch quoted from the Supreme Court's decision in *Egan*, issued in early 1988: "The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."[141]

Department of the Navy v. Egan

Egan had been decided on statutory, not constitutional, grounds. The dispute involved the Navy's denial of a security clearance to Thomas Egan, who worked on the Trident submarine. He was subsequently removed. Egan sought review by the Merits Systems Protection Board (MSPB), but the Supreme Court upheld the Navy's action by ruling that the grant of security clearance to a particular employee, "a sensitive and inherently discretionary judgment call, is *committed by law* to the appropriate agency of the Executive Branch."[142] The conflict in *Egan* was solely within the executive branch (Navy versus MSPB), not between Congress and the executive branch.

The focus on statutory, not constitutional, issues was reflected in briefs submitted by the parties. The Justice Department noted: "The issue in this case is one of statutory construction and 'at bottom . . . turns on congressional intent.'"[143] The Court directed the parties to address this question: "Whether, in the course of reviewing the removal of an employee for failure to maintain a required security

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[137] (...continued)
Whistle-Blower or Troublemaker, Bunny Greenhouse Isn't Backing Down," *Washington Post*, Oct. 19, 2005, at C1.

[138] National Security Decision Directive 84 (1983); see Louis Fisher, "Congressional-Executive Struggles Over Information Secrecy Pledges," 42 Adm. L. Rev. 89, 90 (1990).

[139] 101 Stat. 1329-432, § 630 (1987); 102 Stat. 1756, § 619 (1988).

[140] National Federation of Federal Employees v. United States, 688 F.Supp. 671 (D.D.C. 1988).

[141] Id. at 685 (citing Department of the Navy v. Egan, 198 S.Ct. at 824, 484 U.S. 518, 527 (1988)).

[142] Department of the Navy v. Egan, 484 U.S. at 527 (emphasis added).

[143] U.S. Department of Justice, "Brief for the Petitioner," Department of the Navy v. Egan, October Term 1987, at 22 (citing Clarke v. Securities Industry Ass'n, No. 85-971, Jan. 14, 1987).

clearance, the Merit Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance."[144]

The questions centered on 5 U.S.C. §§ 7512, 7513, 7532, and 7701. The Justice Department, after analyzing the relevant statutes and their legislative history, found no basis for concluding that Congress intended the MSPB to review the merits of security clearance determinations.[145] Oral argument before the Court on December 2, 1987, explored the statutory intent of Congress. At no time did the Justice Department suggest that classified information could be withheld from Congress. The Court's ruling in favor of the Navy did not limit in any way the right of Congress to classified information. The Court decided the "narrow question" of whether the MSPB had *statutory* authority to review the substance of a decision to deny a security clearance.[146]

Although the Court referred to independent constitutional powers of the President, including those as Commander in Chief and as head of the executive branch,[147] and noted the President's responsibility with regard to foreign policy,[148] its decision was based on statutory construction. In stating that courts "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," the Court added this important qualification: "*unless Congress specifically has provided otherwise*."[149] The Justice Department's brief had also stated: "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive branch in military and national security affairs."[150] Nothing in the legislative history of the Civil Service Reform Act of 1978 convinced the Court that MSPB could review, on the merits, an agency's security-clearance determination.[151]

The President's national security powers surfaced at times during oral argument before the Supreme Court, when the Justice Department and Egan's attorney, William J. Nold, debated the underlying statutory issues. After the department made its presentation, Nold told the Justices: "I think that we start out with the same premise. We start out with the premise that this is a case that involves statutory interpretation." Nold stated his view of the department's occasional references to constitutional matters: "What they seem to do in my view is to start building a cloud around the statute. They start building this cloud and they call it national security,

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[144] Id. at (I) (emphasis added).

[145] U.S. Department of Justice, "Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit," Department of the Navy v. Thomas E. Egan, October Term 1986, at 4-5, 13, 15-16, 18.

[146] 484 U.S. at 520.

[147] Id. at 527.

[148] Id. at 529.

[149] Id. at 530 (emphasis added).

[150] U.S. Department of Justice, "Brief for the Petitioner," Department of the Navy v. Egan, October Term, 1987, at 21.

[151] 484 U.S. at 531 n.6.

and as their argument progresses . . . the cloud gets darker and darker and darker, so that by the time we get to the end, we can't see the statute anymore. What we see is this cloud called national security."[152]

In disposing of the issue on statutory grounds, the Court also cited the President's role as Commander in Chief and said that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."[153] The constitutional issue would have been joined had the Court faced statutory language that the administration objected to as an interference with executive power. That issue was not present in *Egan.*

The District Court's Decision

Having relied on *Egan*, Judge Gasch also looked to language in the Supreme Court's *Curtiss-Wright* decision.[154] From the latter case Judge Gasch concluded that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern."[155]

The central issue in *Curtiss-Wright* was the scope of congressional power. The Court was asked how broadly Congress could delegate *its* powers to the President in the field of foreign affairs. The previous year the Court had struck down the National Industrial Recovery Act because it had delegated an excessive amount of legislative power to the President in the field of domestic policy.[156] The question before the Court in *Curtiss-Wright* was whether Congress could use more general standards in foreign affairs than it could in domestic affairs, and the Court said it could.

Several courts have remarked on Justice Sutherland's views in *Curtiss-Wright* regarding the scope of presidential power in foreign relations. In the Steel Seizure Case of 1952, Justice Robert Jackson noted that "much of the [Sutherland] opinion is dictum"——comments extraneous to the issue before the Court.[157] In 1981, a federal appellate court cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement

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[152] Transcript of Oral Argument, Dec. 2, 1987, at 19.

[153] 484 U.S. at 527.

[154] United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

[155] 688 F.Supp. at 685.

[156] Schechter Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[157] Youngstown Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (concurring op.).

of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization."[158]

On October 31, 1988, the Supreme Court noted probable jurisdiction in the case decided by Judge Gasch, now styled *American Foreign Service Assn.* v. *Garfinkel.*[159] Both the House and the Senate submitted briefs protesting Judge Gasch's analysis of the President's powers over foreign affairs. During oral argument, the Justice Department spoke repeatedly about the President's constitutional role to control classified information. The attorney for AFSA challenging the Reagan nondisclosure policy objected that the decision by Judge Gasch, "by declaring that the Executive Branch has such sweeping power, has impeded the kind of accommodation that should take place in this kind of controversy," and hoped that the Court "wipes that decision off the books."[160]

On April 18, 1989, the Court issued a per curiam order that vacated Judge Gasch's order and remanded the case for further consideration.[161] In doing so, the Court cautioned Judge Gasch to avoid expounding on constitutional matters: "Having thus skirted the statutory question whether the Executive Branch's implementation of [Nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees' [the government's] argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security."[162] The Court counseled Judge Gasch that the district court "should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings."[163]

On remand, Judge Gasch held that the plaintiffs (American Foreign Service Association and Members of Congress) failed to state a cause of action for courts to decide.[164] Having dismissed the plaintiffs' complaint on that ground, Judge Gasch found it unnecessary to address any of the constitutional issues.[165]

Funding Restrictions (Nondisclosure Forms)

Congress continues to enact provisions in appropriations bills to deny funds to implement nondisclosure forms. Legislation enacted on January 23, 2004 provided

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[158] American Intern. Group v. Islamic Republic of Iran, 657 F.2nd 430, 438 n.6 (D.C. Cir. 1981).

[159] 488 U.S. 923 (1988).

[160] Transcript of Oral Argument, March 20, 1989, at 60.

[161] American Foreign Service Assn. v. Garfinkel, 490 U.S. 153 (1989).

[162] Id. at 158.

[163] Id. at 161.

[164] American Foreign Service Ass'n v. Garfinkel, 732 F.Supp. 13 (D.D.C. 1990).

[165] Id. at 16.

that no funds appropriated in the Consolidated Appropriation Act for fiscal 2004, or in any other statute, "may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: 'These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights or liabilities created'" by the Lloyd-LaFollette Act (5 U.S.C. § 7211), the Military Whistleblower Protection Act, the Whistleblower Protection Act, the Intelligence Identities Protection Act, and other statutes that enable Congress to receive information from agency employees. Notwithstanding that provision, a nondisclosure policy form or agreement that is executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the federal government, "may contain provisions appropriate to the particular activity for which such document is to be used." Such form or agreement shall, at a minimum, require that the person "will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government." Furthermore, such nondisclosure forms "shall also make it clear that they do not bar disclosures to Congress or to an authorized official or an executive agency or the Department of Justice that are essential to reporting a substantial violation of law."[166] That language also appears in the Transportation, Treasury appropriations law enacted on November 30, 2005.[167]

Funding Restrictions (Access to Congress)

Also in annual appropriations acts, Congress adopts language to deny funds to pay the salary of any executive official who prevents agency employees from communicating with a Member of Congress, committee or subcommittee. Language in the Consolidated Appropriations Act for fiscal 2004 provided that no part of any appropriation contained in that statute or any other would be available for the payment of the salary of any federal government officer or employee who "(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee." Funds are also denied for the payment of the salary of any federal officer or employee who "(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any

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[166] 188 Stat. 355, § 620 (2004).

[167] P.L. No. 109-115, § 820 (2005).

communication or contact of such other officer or employee with any Member, committee, or subcommittee as described in paragraph (1)."[168] That language appears also in the Transportation, Treasury appropriations statute for fiscal 2006.[169]

OLC Opinion in 1996

On November 26, 1996, the Office of Legal Counsel (OLC) in the Justice Department issued an eight-page opinion on "(1) the application of executive branch rules and practices on disclosure of classified information to Members of Congress, in light of relevant congressional enactments; (2) the applicability of the Whistleblower Protection Act; and (3) the applicability of Executive Order 12674."[170]

Executive Order 12674, signed by President Bush on April 12, 1989, established "Principles of Ethical Conduct for Government Officers and Employees." The principles included: "Employees shall disclose waste, fraud, abuse and corruption to appropriate authorities."[171] The executive order defines "employee" to mean "any officer or employee of an agency, including a special Government employee,"[172] and defines "agency" to mean "any executive agency as defined in 5 U.S.C. 105, including any executive department as defined in 5 U.S.C. 101, Government corporation as defined in 5 U.S.C. 103, or an independent establishment in the executive branch as defined in 5 U.S.C. 104 (other than the General Accounting Office), and the United States Postal Service and Postal Rate Commission."[173] "Appropriate authorities" is not defined in the executive order.

Oversight of Intelligence Community

The question before the OLC was whether this executive order authorized an agency employee to disclose "waste, fraud, abuse and corruption" to a Member of Congress, particularly "members of oversight committees with direct interest in such abuse and corruption."[174] The context of the memorandum focused on oversight committees that have jurisdiction over the Intelligence Community. OLC did "not question that in certain circumstances the term ["appropriate authorities"] could include a member of a congressional oversight committee." However, OLC concluded that the question of who is an "appropriate authority" to receive classified information "is governed by Executive Order 12356 and the related directives and

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[168] 118 Stat. 354, § 618 (2004).

[169] P.L. 109-115, § 818 (2005).

[170] Memorandum for Michael J. O'Neil, General Counsel, Central Intelligence Agency, from Christopher H. Schroeder, Acting Assistant Attorney General, "Access to Classified Information," Nov. 26, 1996, at 1 (hereafter OLC Memo). Available from author.

[171] Section 101(k) in Executive Order 12674, 54 Fed. Reg. 15159 (1989).

[172] Id. at 15161 (§ 503(b)).

[173] Id.at § 503(c)).

[174] OLC Memo, at 7-8.

practices." The latter executive order "should control because it more directly and specifically addresses the subject at issue, the disclosure of classified information."[175]

Executive Order 12356, signed by President Reagan on April 2, 1982, governed the handling of classified information in the executive branch.[176] OLC was asked to address the relationship between that executive order and two congressional enactments concerning the rights of federal employees to provide information to Congress: the Lloyd-LaFollette Act and the annual provision that prohibited the use of appropriated funds to implement or enforce the nondisclosure agreement policy.

Reach of Lloyd-LaFollette

OLC cited the Justice Department's brief in the *Garfinkel* case to the Supreme Court, where the department held that a congressional enactment would be unconstitutional if it were interpreted "to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so."[177] In effect, this position would support restraints such as those in the executive orders issued by Presidents Roosevelt and Taft, at least with respect to classified information. OLC concluded that Lloyd-LaFollette does not confer a right to furnish national security information to Congress, the nondisclosure agreements may be validly applied to a disclosure to a Member of Congress, and the appropriations language "does not authorize any disclosure to a Member of Congress that is not permitted under Executive Order 12356."[178]

"Need to Know" by Lawmakers

OLC was also asked whether Executive Order 12356 could be read to permit a cleared employee of the executive branch "to disclose classified information to a cleared member of Congress based on the employee's determination of the member's need to know."[179] OLC noted that Members of Congress, as constitutionally elected officers, do not receive security clearances but are instead presumed to be trustworthy. However, lawmakers are not exempt "from fulfilling the 'need-to-know' requirement." On the issue whether individual employees "are free to make a disclosure to Members of Congress based on their own determination on the need-to-know question," OLC said that the answer "is most assuredly 'no.'"[180] The determination of "need to know" regarding disclosures of classified information to Congress "is made through established decisionmaking channels at each agency." OLC stated the opinion that it would be "antithetical to the existing system for an

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[175] Id. at 8.

[176] 47 Fed. Reg. 14874 (1982).

[177] OLC Memo, at 3.

[178] Id. at 4.

[179] Id. at 5.

[180] Id.

agency to permit individual employees to decide unilaterally to disclose classified information to a Member of Congress——and we are unaware of any agency that does so."[181]

Regarding the WPA, OLC was asked whether denial or revocation of a Sensitive Compartmented Information (SCI) security clearance is a "personnel action" within the meaning of the WPA. Citing such cases as the Supreme Court's decision in *Egan* and *McCabe* v. *Department of the Air Force*, decided by the Court of Appeals for the Federal Circuit, OLC concluded that the revocation of a security clearance is not a personnel action within the meaning of the WPA.[182]

OLC also examined language in Title 5, under prohibited personnel practices, that nothing in that subsection shall be construed "to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[183] OLC said the Justice Department in *Garfinkel* had rejected the argument that the quoted language conferred an affirmative right to make disclosures of classified information to Members of Congress. Subsection 2302(b)(8)(B) discussed disclosures of classified information only to inspectors general or the Office of Special Counsel of the MSPB.

CIA Whistleblower Act of 1998

OLC's memo prompted Congress to hold hearings and analyze the Administration's position that the President exercises exclusive control over the disclosure of classified information, including disclosure to Members of Congress and its committees. The Senate Intelligence Committee asked CRS to evaluate OLC's statutory and constitutional conclusions, and that analysis was published.[184] The Committee also held two days of hearings.[185] The Justice Department continued to hold that bills drafted to assure congressional access to classified information, submitted to Congress by intelligence community employees without the permission of their supervisors, were unconstitutional.

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[181] Id. at 6.

[182] Id.

[183] 5 U.S.C. § 2302(b) (2000).

[184] Prepared statement by Louis Fisher, Congressional Research Service, "Executive Employee Access to Congress," reprinted in "Disclosure of Classified Information to Congress," hearings before the Senate Select Committee on Intelligence, 105th Cong., 2nd sess. 5-13 (1998).

[185] Id. at 5-37 (testimony by Louis Fisher, CRS, and Peter Raven-Hansen, George Washington University Law School) and 39-61 (Louis Fisher and Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice).

The Senate Bill

The Senate Intelligence Committee unanimously reported legislation after commenting that the Administration's "intransigence on this issue compelled the Committee to act."[186] The Senate bill would have directed the President to inform employees within the intelligence community that it is not prohibited by law, executive order, or regulation, nor contrary to public law, to disclose certain information, including classified information, to an appropriate committee of Congress.[187] The purpose of the bill was to make employees within the intelligence community aware that they may, without seeking or obtaining prior authorization from an agency supervisor, disclose certain information to Congress, including classified information, when they have reason to believe that the information is specific and direct evidence of "a violation of law, rule or regulation; a false statement to Congress on an issue of material fact; or gross mismanagement, a gross waste of funds, a flagrant abuse of authority, or a substantial and specific danger to public health or safety."[188]

The House Bill

The House Intelligence Committee held two days of hearings on a bill that provided an alternative procedure for gaining information from national security whistleblowers.[189] Chairman Porter J. Goss made these opening comments:

> The present arrangement, or lack of arrangement, for whistleblowers in our [intelligence] community is not the answer. CIA, as I understand, has no written regulation in place and NSA had one that was disavowed by the current administration. I know of no regulation or system within the Intelligence Community that ensures the confidentiality of the whistleblower. There is no legal protective mechanism for an IC whistleblower against official and unofficial retaliation of which I am aware. Nothing currently gives him a right to be heard directly by the intelligence committees.
>
> I think the only exception I can think of might be one under clauses of the Agent Identities Protection Act, which is a very narrow area.
>
> The result of this system is unacceptable. Employees of the IC may, at present, have to take huge chances with classified documents, compartmented information and their careers in order to come down to report to us. . . . Worst of all, from an institutional point of view, is that very few employees dare to run this gauntlet to bring us the information we need to do appropriate oversight.[190]

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[186] S.Rept. No. 105-165, 105th Cong., 2nd sess. 5 (1998).

[187] Id. at 1.

[188] Id.

[189] House Permanent Select Committee on Intelligence, "Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act," 106th Cong., 1st sess. (1999) [Hearings on May 20 and June 10, 1998].

[190] Id. at 2.

"Sole Process" and "Holdback"

Chairman Goss identified two central issues in the legislation. One was the question whether CIA employees should report their concerns only to the inspector general. Was the IG to be the "sole process" by which an employee may report a serious or flagrant problem to Congress? Second, should the head of an intelligence agency have a "holdback" power? That is, should the agency head be authorized to block a whistleblower's complaint "in the exceptional case and in order to protect vital law enforcement, foreign affairs on national security interest."[191]

When the House bill was reported it was decided that the IG mechanism for whistleblowers should not be the "sole process" for them to report wrongdoing to Congress. The House bill would provide an additional procedure to the existing IG route.[192] The House Intelligence Committee recognized that some agency employees might "choose not to report a problem either through the process outlined [in the bill] or through another process authorized by their management, but instead approach the committee directly."[193] The committee also decided to eliminate the "holdback" provision. Agency heads would not have the authority to block disclosures by agency employees to Congress. A statutory acknowledgment of holdback authority was dropped because it was considered "unwarranted and could undermine important congressional prerogatives."[194]

Authority Over Classified Information

Like the Senate, the House Intelligence Committee rejected the Administration's "assertion that, as Commander in Chief, the President has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity."[195] Consistent with that position, the committee rejected the theory that the President, as Chief Executive, "has a constitutional right to authorize all contact between executive branch employees and Congress." The issue of whether an agency employee "must 'ask the boss' before approaching the intelligence committees with unclassified information about wrongdoing seems well below any constitutional threshold."[196] The handling of classified information was addressed in the bill that became law.

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[191] Id. at 4.

[192] H.Rept. No. 105-747 (Part 1), 105th Cong., 2nd sess. 13 (1998).

[193] Id. at 20.

[194] Id. at 14.

[195] Id. at 15.

[196] Id.

By Bradford Fitch

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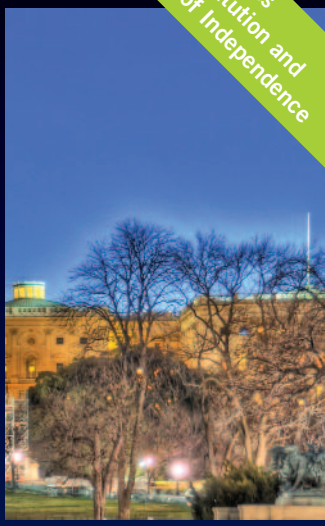

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The Statute

The two houses worked out their differences in conference committee and reported the Intelligence Community Whistleblower Protection Act as Title VII to the Intelligence Authorization Act for Fiscal Year 1999. The compromise bill established "an additional process to accommodate the disclosure of classified information of interest to Congress." The new procedure was not "the exclusive process by which an Intelligence Community employee may make a report to Congress." The conference report stated that "the managers agree that an Intelligence Community employee should not be subject to reprisals or threats of reprisals for making a report to appropriate Members or staff of the intelligence committees about wrongdoing within the Intelligence Community."[197] The statute covered communications from the agency to Capitol Hill through the intelligence committees.

The statutory language lists six findings: "(1) national security is a shared responsibility requiring joint efforts and mutual respect by Congress and the President; (2) the principles of comity between the branches of Government apply to the handling of national security information; (3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a "need to know" of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community; (4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community; (5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and (6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting."[198]

Under the procedures set forth in the statute, an employee or contractor of the CIA "who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General."[199] The language "may report" is consistent with the congressional rejection of the IG office as being the "sole process" for reporting complaints.

The statute defines "urgent concern" to mean any of the following: (1) "A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinion concerning public policy matters"; (2) "A false statement to Congress, or a willful withholding from Congress, or an issue of material fact relating to the funding,

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[197] H.Rept. No. 105-780, 105th Cong., 2nd sess. 34 (1998).

[198] 112 Stat. 2413-14, § 701 (1998).

[199] Id. at 2414, § 702 (a)(1).

administration, or operation of an intelligence activity"; and (3) "An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) in response to an employee's reporting an urgent concern in accordance with this paragraph."

Upon receiving the complaint or information, the IG has 14 calendar days to determine whether it appears credible. If the IG decides it is, the complaint must be transmitted to the CIA Director who has seven calendar days to forward the matter to the intelligence committees. If the IG does not transmit the complaint or information, or does not transmit it in an accurate form, the employee may submit the matter to Congress by contacting either or both of the intelligence committees. The statute provides for no "holdback" procedure.

In 2001, Congress enacted modifications to this statute.[200] The changes relate to communications between the IG and the director as to whether a complaint from an agency employee appears credible, and the authority of employees to contact the intelligence committees when the IG does not find the complaint credible.

The Richard Barlow Case

In 2002, the U.S. Court of Federal Claims decided the case of Richard Barlow, who in the late 1980s faced termination from the Defense Department and suspension of security clearances following disputes within the executive branch, and between the executive branch and Congress, about Pakistan's nuclear capabilities. Some central questions reportedly were whether executive officials had misled lawmakers, in secret briefings, regarding Pakistan's activities, and whether the Reagan Administration had improperly certified to Congress that Pakistan did not have nuclear weapons.[201]

After a number of investigations by the Defense Department and several by inspectors general and the General Accounting Office regarding retaliations against Barlow's whistleblower activities, a bill was introduced (S. 2274) to provide for the relief of Barlow.[202] The private bill included the sum of $1,100,000 to compensate him for losses incurred as a consequence of "(1) personnel actions taken by the Department of Defense affecting Mr. Barlow's employment at the Department (including Mr. Barlow's top secret security clearance) during the period of August 4, 1989, through February 27, 1992; and (2) Mr. Barlow's separation from service with the Department of Defense on February 27, 1992."[203] On October 5, 1998, the Senate referred the matter to the Court of Federal Claims requesting that it report back findings of fact and conclusions "that are sufficient to inform the Congress of

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[200] 115 Stat. 1399-00, § 309 (2001).

[201] Seymour M. Hersh, "On the Nuclear Edge," *The New Yorker*, March 29, 1993, at 56.

[202] For a description of these investigations, see Barlow v. United States, 51 Fed.Cl. 380, 390-92 (2002).

[203] S. 2274, 105th Cong., 2nd sess. (1998).

the nature, extent, and character of the claim for compensation referred to in such bill [S. 2274] as a legal or equitable claim against the United States or a gratuity."[204]

State Secrets Privilege

Barlow and his attorneys, through the discovery process, sought documents which they alleged would show that Congress had been misled about Pakistan's capabilities. They claimed that the evidence would show a motivation on the part of Barlow's supervisor in the Defense Department to take adverse personnel actions against him for his whistleblowing. On February 10, 2000, CIA Director George Tenet signed a declaration and formal claim of state secrets privilege and statutory privilege. The declaration denied Barlow and his attorney access to any of the classified intelligence information under Tenet's control. Tenet said that it would not be possible "to sanitize or redact in any meaningful way" the information that Barlow sought.[205] A separate declaration by Lt. Gen. Michael V. Hayden, Director of the National Security Agency, also invoked the state secrets privilege to assert the agency's privilege over NSA intelligence reports and information from intelligence reports contained in minutes of the Nuclear Export Violations Working Group (NEVWG) meetings.[206]

The Tenet declaration did not automatically block Barlow's access to the requested materials. Tenet acknowledged that the branch that decides what evidence to admit is the judiciary, not the executive branch: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters beings addressed in litigation."[207] The Hayden declaration did not contain that language, but courts have discretion to determine whether an executive claim of state secrets privilege should be treated as absolute or as qualified. The Court of Federal Claims had several options. It could have ordered the government to provide a full public account of why disclosure of the information would harm national security.[208] It could have conducted "an *in camera* examination of the requested materials"[209] and also asked that sensitive material be redacted to permit access by Barlow.

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[204] 144 Cong. Rec. 23357 (1998).

[205] Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence, Feb. 10, 2000, Barlow v. United States, Congressional Reference No. 98-887X, at 9 (hereafter "Tenet Declaration"). Available from author.

[206] "Declaration of Lieutenant General Michael V. Hayden, United States Air Force, Director of the National Security Agency, Feb. 2000, Barlow v. United States, Congressional Reference No. 98-887X. Available from author.

[207] Tenet Declaration, at 7.

[208] Ellsberg v. Mitchell, 709 F.2nd 51, 60-64 (D.C. Cir. 1983).

[209] Id. at 64.

Options for the Court

In a decision filed July 18, 2000, and reissued August 3, 2000, the Court of Federal Claims initially acknowledged that the state secrets privilege was qualified, not absolute. Although it noted that some courts have held that state secrets are "absolutely privileged from disclosure in the courts,"[210] it stated that "the mere formal declaration of the privilege does not end the court's inquiry."[211] Toward the end of this analysis, however, the court ruled that state secrets were absolute: "The privilege is absolute, the law having evolved to reflect a choice of secrecy over any balancing of risks and harms."[212] The court concluded that the documents sought by Barlow, "to the extent not already produced or located, are privileged *in toto*."[213]

The court continued the trial and allowed the government to introduce the documents and testimony to support its case, while at the same time denying Barlow access to documents and testimony he requested to support his position. On May 4, 2000, Barlow's attorneys, Paul C. Warnke and Diane S. Pickersgill, objected that the state secrets privilege should not apply to congressional reference cases to prevent Barlow and the court access to "key evidence."[214] Warnke and Pickersgill argued that the court should review the documents in camera.[215] They noted that the Senate had ordered the court to "make a determination of the merits" of Barlow's claim for compensation and that the information he sought in discovery was "necessary for this Court to make a fully-informed decision and thus a fully-informed recommendation to Congress."[216]

Applying *Egan*

In the January 14, 2002, ruling, the court recognized that there had been a "temporary suspension" of Barlow's security clearance.[217] In *Egan*, the plaintiff's security clearance had been revoked. The court stated that in *Egan* the Supreme Court held that "the authority to protect classified information remains within the Executive Branch," determinations about security clearances are an attempt to predict an individual's future behavior, and that such "'[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified

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[210] Barlow v. United States, No. 98-887X, 2000 WL 1141087, at 4, citing Halkin v. Helms, 690 F.2nd 977, 990 (D.C. Cir. 1982).

[211] Barlow v. United States, WL 1141087, at 4.

[212] Id. at 8-9.

[213] Id. at 9.

[214] Plaintiff's Opposition to Defendant's Motion for a Protective Order, Barlow v. United States, Congressional Reference No. 98-887 X, at 1.

[215] Id. at 9.

[216] Id. at 14.

[217] Barlow v. United States, 51 Fed.Cl. at 393.

information' and, in turn, not by the courts."[218] The court then concluded: "Basing a claim to relief in any way on the suspension of the clearance would inevitably draw the court into improperly second guessing executive branch offices in a highly discretionary function. We decline to do so."[219]

The Supreme Court in *Egan* supported the discretionary judgment of the executive branch to determine security clearances and to revoke them. The Court's decision did address the question of whether a court may examine, in camera, classified documents to determine whether they were properly withheld from a plaintiff under the state secrets privilege.

"Official Secrets"

In 2000, Congress passed a bill that would have established criminal penalties for leaking classified information. Fines and imprisonment for up to three years were included to punish any current or former government employee who "knowingly and willfully discloses, or attempts to disclose," any classified information to a person not authorized to receive the information, "knowing that the person is not authorized access to such classified information."[220] Criminal liability did not apply to the disclosure of classified information to federal judges established under Article III or to any Member or committee of Congress.

During House debate on the bill reported from conference committee, several Members referred to it as an "official secrets" law.[221] One Member said it would intimidate whistleblowers.[222] Another thought it "would silence whistleblowers in a way that has never before come before this body and which has never before been enacted."[223] Another disagreed: "I do not think that is true at all. First of all, whistle-blowers are protected under the current law. Secondly, whistle-blowers who have a concern about whether information is properly classified or there is a concern about the agency that they are working for, can come to Congress."[224] Similarly, another Member regarded whistleblowers as protected by the bill "[s]o long as they come

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[218] Id. at 394 (internal quote from Egan, 484 U.S. at 528).

[219] Id.

[220] Section 304 of H.R. 4392, as reported from conference committee; H.Rept. No. 106-969, 106th Cong., 2nd sess. 6-7 (2000).

[221] 146 Cong. Rec. 22390 (Rep. Pelosi) and 22394 (Rep. Barr) (2000). In 1889, Great Britain enacted an Official Secrets Act to punish individuals who leak government secrets. It was revised in 1911, 1920, 1939, and 1989.

[222] Id. at 22393 (Rep. Conyers).

[223] Id. at 22394 (Rep. Barr).

[224] Id. at 22395 (Rep. Hutchinson).

forward with matters that are security matters about which they are concerned and they disclose them to people who are cleared to received such information."[225]

This debate raised the possibility that leaking information to the press would put reporters at risk. One Member stated that "this [bill] does not pertain to the news media."[226] Another saw "nothing [in the bill] to prevent reporters from being hauled in before grand juries and being forced to reveal their sources."[227] Chief executives of four of the largest news organizations (CNN, the New York Times, Newspaper Association of America, and the Washington Post) wrote to President Clinton, urging him to veto the bill. The Radio-Television News Directors Association also joined in this appeal to President Clinton.[228]

President Clinton vetoed the bill on November 4, 2000. Among other points, he said that the bill "was passed without benefit of public hearings——a particular concern given that it is the public that this law seeks ultimately to protect. The Administration shares the process burden since its deliberations lacked the thoroughness this provision warranted, which in turn led to a failure to apprise the Congress of the concerns I am expressing today."[229]

Pending Legislation

Legislation has been introduced in the House and the Senate to make changes in the Whistleblower Protection Act. S. 494, called the Federal Employee Protection of Disclosures Act, was introduced on March 2, 2005, and reported from the Committee on Homeland Security and Governmental Affairs on May 25. The purpose is "to clarify the disclosures of information protection from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes."[230]

In reporting the bill, the Senate Committee on Homeland Security and Governmental Affairs noted that the terrorist attacks of 9/11 "have brought renewed attention to those who disclose information regarding security lapses at our nation's

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[225] Id. (Rep. Lewis).

[226] Id. (Rep. Hutchinson).

[227] Id. (Rep. Pelosi).

[228] Raymond Bonner, "News Organizations Ask White House to Veto Secrecy Measure," *New York Times*, Nov. 1, 2000, at A32.

[229] Public Papers of the Presidents, 2000-2001, III, at 2467. See also John M. Broder, "President Vetoes Measure to Punish Disclosing Secrets," *New York Times*, Nov 5, 2000, at 1; Walter Pincus, "Clinton Vetoes Bill Targeting Leaks of Classified Information," *Washington Post*, Nov. 5, 2000, at A5.

[230] S. 494, 109th Cong., 1st sess. 1-2 (2005), as reported by the Committee on Homeland Security and Governmental Affairs.

airports, borders, law enforcement agencies, and nuclear facilities." It further states that the right of federal employees to be free from agency retaliation "has been diminished as a result of a series of decisions of the Federal Circuit Court of Appeals that have narrowly defined who qualifies as a whistleblower under the WPA and what statements are considered protected disclosures."[231] The bill is designed to clarify that disclosures of classified information to appropriate committees of Congress are protected, to codify the "anti-gag" provision that Congress has placed in annual appropriations bills to protect agency employees who come forward with disclosures of illegality, to authorize the OSC to file amicus briefs in whistleblower cases, and to allow whistleblower cases to be heard by all federal appellate courts for a period of five years.[232]

The committee report also discusses a provision in the bill that relates to whistleblower actions after 9/11, when agency employees "in several high profile cases have come forward to disclose government waste, fraud, and abuse that posed a risk to national security," but then faced retaliatory action by having their security clearance removed. The Federal Circuit had held that the MSPB lacks jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing. Former Special Counsel Elaine Kaplan testified in 2001 that revoking a security clearance "can be a basis for camouflaging retaliation."[233] The Senate bill makes it a prohibited personnel practice for a manager to suspend, revoke, or take other actions regarding an employee's security clearance or access to classified information in retaliation for whistleblowing. Further, the bill provides for expedited review of whistleblower cases by the OSC, the MSPB, and the reviewing cases where a security clearance has been revoked or suspended.[234]

The Justice Department regards this provision as an intrusion into the President's prerogative to control national security information and those who have access to it. The committee regards executive branch authority over classified material as "not exclusive, and that Congress properly plays a role."[235] The committee cites *Egan* for support ("*unless Congress has specifically provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs").[236]

Title 5 has included a provision (Section 2302(b)) that nothing in the subsection shall be construed to authorize the withholding of information from Congress or the taking of any personnel action against an agency employee who discloses information to Congress. The Senate bill provides that a whistleblower must limit the disclosure to a Member of Congress who is authorized to receive the information or to a

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[231] Id. at 2.

[232] Id.

[233] Id. at 15.

[234] Id. at 16.

[235] Id.

[236] Id. (emphasis added by committee).

legislative staffer who holds the appropriate security clearance and is authorized to receive the information.[237]

H.R. 1317, introduced on March 15, 2005, contains a number of provisions similar to S. 494, including clarification of disclosures that are protected from prohibited personnel practices and a statement to be placed in nondisclosure forms. The House bill directs the Comptroller General to conduct a study of security clearance revocations in whistleblower cases after 1996. H.R. 1317 was marked up on September 29, 2005, and ordered to be reported.

Conclusions

To perform its legislative and constitutional functions, Congress depends on information (domestic and national security) available from the executive branch. The Supreme Court remarked in 1927 that a legislative body "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information——which not infrequently is true——recourse must be had to those who do possess it."[238] Congress needs information to pass legislation, oversee the administration of programs, inform the public, and carry out its constitutional duties.

Balancing this legislative need for information with the protection of sensitive national security information remains a continuing policy issue. Congress has never accepted the theory that the President has exclusive, ultimate, and unimpeded authority over the collection, retention, and dissemination of national security information. Agency heads provide Congress with information, but some Members of Congress have also expressed a need to receive information directly from rank-and-file employees within an agency. Whistleblowers have helped uncover agency wrongdoing, illegalities, waste, and corruption. The interest of Congress in maintaining an open channel with agency employees is demonstrated through such statutes as Lloyd-LaFollette, the appropriations riders on the nondisclosure policy, the Military Whistleblower Protection Act, and the Intelligence Community Whistleblower Act.

Congress also recognizes the need to protect national security information, especially that related to sources and methods, from disclosure. This awareness is reflected in legislation that allows and encourages intelligence community employees to report issues of waste, fraud, or mismanagement to the intelligence committees of Congress.

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[237] Id. at 18.

[238] McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

Appendix: Whistleblower Organizations

Several organizations have been active with whistleblowing issues. They testify before congressional committees, provide assistance with litigation, and offer other services. Some of these organizations cover whistleblowing in general. Others focus on national security whistleblowing. From October 9 to October 12, 2005, in Chincoteague, Va., the first annual National Security Whistleblowers Conference was held. It was sponsored by the National Security Whistleblower Coalition, the Cavallo Foundation, Harriet Crosby, the Fertel Foundation, the Fund for Constitutional Government, and Project on Government Oversight. The purpose was to bring together national security whistleblowers to learn from each other, to find collective support for their efforts, and to develop strategies.

Government Accountability Project (GAP)

Founded in 1977, GAP is a non-profit, public interest organization and law firm that receives funding from foundations, individuals, and legal fees. It describes its mission as protecting the public interest by promoting government and corporate accountability through advancing occupational free speech and ethical conduct, defending whistleblowers, and empowering citizen activists. It litigates whistleblower cases, publicizes whistleblower concerns, and develops policy and legal reforms for whistleblower laws. Much of its work has been in the area of nuclear oversight, food and drug safety, worker health and safety, international reform and national security.[239]

National Security Whistleblowers Coalition

The coaliton is a nonpartisan organization dedicated to aiding national security whistleblowers. Its stated mission is to advocate governmental and legal reform, educate the public concerning whistleblowing activity, provide comfort and fellowship to national security whistleblowers subject to retaliation, and work with other public interest organizations to effect goals defined in the organization's mission statement. Its membership consists exclusively of current or former federal employees or civilians working under contract to the United States who, to their detriment and personal risk, bring to light fraud, waste, and abuse in government operations and agencies related to national security.[240]

National Whistleblower Center

The National Whistleblower Center is a non-profit, tax-exempt, educational, and advocacy organization dedicated to helping whistleblowers. Since 1988, it states it has used whistleblowers' disclosures to improve environmental protection, nuclear safety, and government and corporate accountability. The primary goal of the center is to ensure that disclosures about government or industry actions that violated the law or harm the environment are fully heard, and that the whistleblowers who risk

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[239] For information on GAP, see [http://www.whistleblower.org/about/index.cfm].

[240] See [http://www.nswbc.org].

their careers to expose wrongdoing are defended. In addition to assisting whistleblowers, the center lobbies Congress on the need to protect whistleblowers and insists that officials be held fully accountable for their conduct. The center maintains a national referral service and sponsors litigation.[241]

Project On Government Oversight (POGO)

POGO began in 1981 as an independent, non-profit organization that investigates and exposes corruption in order to achieve a more accountable federal government. It operates on the principle that representation and accountability are fundamental to maintaining a strong and functioning democracy. Initially it was known as the Project on Military Procurement. It is committed to exposing waste, fraud and corruption in the following areas: defense, homeland security, energy and environment, contract oversight, and open government. POGO's "Contract Oversight Investigations" examine the federal government's policies and relationships with grant recipients as well as major companies that receive billions of dollars in contracts and subsidies annually.[242]

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[241] See [http://www.whistleblowers.org].

[242] See [http://www.pogo.org/p/x/aboutus.html].

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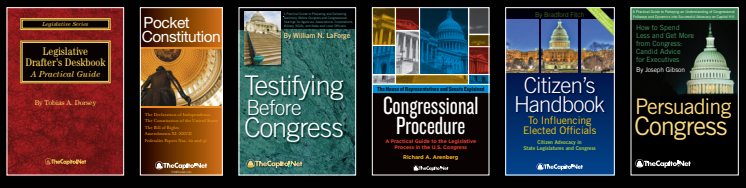
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