

STRIKING A BALANCE:
WHISTLEBLOWING PROTECTIONS IN THE INTELLIGENCE COMMUNITY

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ABSTRACT

Whistleblowing has become more important and more controversial as many federal employees take their information directly to the press. Despite the several federal statutes offering employees protections from reprisal for whistleblowing within their agencies, employees continue to take inside knowledge of corruption, scandal, waste, and mismanagement directly to the public via the media. Current whistleblowing laws protect government employees who utilize their agency's internal grievance procedure, including informing their Inspector General's office, Office of Personnel Management, or other human resource office. The laws typically do not protect employees who leak information to the press. Federal employees within the intelligence community however, were explicitly excluded from most protection clauses until 1990. Even after those laws were amended to cover federal employees, the statutes are still designed to favor the agency. As an example, federal employees from the Central Intelligence Agency have one of the most complicated procedures for correctly blowing the whistle on their agency and/or superiors. The CIA is required by law to protect their employees; however, national security provides the agency with a strong defense that makes these statutes almost meaningless for CIA agents. Several CIA agents have been fired or demoted due to their whistleblowing.

To understand the consequences of excluding national security employees from the whistleblowing protection laws and the consequences of these exclusions, I will examine the legislative history of federal whistleblowing statutes and determine why national security agencies were excluded from coverage under these protection clauses. I will study the goals of various statutes, as described in Senate and House of Representative hearings and testimonies in the creation of several bills. I will focus on the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1987 that was vetoed by Ronald Reagan, the Intelligence Authorization Act of Fiscal Year 1999,

the Whistleblower Protection Act of 1989 and its 1994 amendments, and the Notification of Federal Employees of Antidiscrimination and Retaliation Act of 2003. Also currently in Congress is the Whistleblower Protection Enhancement Act of 2007 or H.R. 985 and the Federal Employee Protection of Disclosures Act or S. 274, which would add intelligence agency employees to protected groups when whistleblowing information is provided directly to authorized members of Congress or the agency's internal office.¹

I will then focus on the CIA and the process and procedures for handling employees' claims of wrongdoing within the agency. Currently whistleblowing literature focuses on business operations and mainstream government employees such as scientists, researchers and other professionals. Very little has been written on federal law enforcement employees such as the Federal Bureau of Investigation, CIA and others. In deciding to limit protections of national security employees in the whistleblowing statutes, it seems likely that Congress engaged in discussion about the consequences of including those employees in the protections. I will explore this question of whether Congress used national security as a rationale that effectively enables the federal government, particularly the executive branch, to knowingly participate in wrongdoing. This would enable individual agencies to engage in wrongdoing without fear of repercussion. Omitting employees from these agencies would also protect the executive branch and directors of the agencies from public scrutiny because national security keeps that information from ever becoming public knowledge. Under these rationales, agencies are able to set their own procedures for whistleblowing internally with little oversight from outsiders.

Finally, I will examine a few examples of whistleblowers in the CIA and the outcomes of their actions. Was the information they provided utilized to change the

¹ H.R. 985, S. 274.

organization or was the employee's life and career affected? These questions can help us understand whether national security employees are in great danger of reprisal and whether their knowledge about wrongdoing is critical to the public. I will examine two cases of Central Intelligence employees: one who sought to utilize the agency's internal procedures for whistleblowing and another charged with leaking information outside the agency to the media. These cases, taken from two very different points in history, will illustrate the differences in procedures, but similar outcomes of two CIA whistleblower cases. Richard Barlow was fired in 1989 for reporting to his superiors that Pakistan had built a nuclear bomb, and Mary O. McCarthy was fired in April 2006 after supposed leaks to the media about secret operations.

Little of the whistleblowing literature and case studies address the ways in which the public can access whistleblowing complaints and outcomes. I hope my research will contribute to the current debate in Congress for an effective whistleblowing statute to protect intelligence community employees and offer the public some access to critical information about these powerful agencies.

BIOGRAPHICAL SKETCH

Elizabeth Angela Herrera was born in El Paso, Texas on December 8, 1980. She lived there until 1999 when she moved to Ithaca, New York to attend Cornell University's College of Arts and Sciences. While at Cornell, Angela studied government and American studies and received a concentration in Latino Studies. During her time at Cornell, Angela became involved in several multicultural organizations such as *Movimiento Estudiantil Chicano de Aztlan* and the Multicultural Living Learning Unit. After receiving a Bachelor of Arts from Cornell, she went on to work as an admission professional at Cornell's Undergraduate Admissions Office. She spent four years working to increase the numbers of underrepresented students at Cornell. During her final year in admissions, Angela began her Master's degree at the Cornell Institute of Public Affairs. In 2007, she left her position in the admissions office, to complete her master's degree. Angela received a Master's of Public Administration in August 2008.

For my grandmothers: Gloria, Jessie, and Connie

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“We have to be in the inside in order to watch the keeper of the secrets...” – Tyrone Powers

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LIST OF ABBREVIATIONS

AFL-CIO – American Federation of Labor and Congress of Industrial Organizations

CEU – Complaints Examining Unit

CIA – Central Intelligence Agency

CSRA – Civil Service Reform Act

DCI – Director of Central Intelligence

DCIA – Director of Central Intelligence Agency

DIA – Defense Intelligence Agency

DOD – Department of Defense

DOJ – Department of Justice

EEOC – Equal Employment Opportunity Commission

EPA – Environmental Protection Agency

FBI – Federal Bureau of Investigation

GAO – Government Accountability Office

GAP – Government Accountability Project

HPSCI – House Permanent Select Committee on Intelligence

H.R. – House Resolution

IG – Inspector General

MSPB – Merit Systems Protection Board

No FEAR Act – Notification of Federal Employees Antidiscrimination and Retaliation Act

NSA – National Security Agency

OIG – Office of the Inspector General

OLC – Office of Legal Counsel

OPM – Office of Personnel Management

OSC – Office of Special Counsel

PEER – Public Employees for Environmental Responsibility

POGO – Project on Government Oversight

S. – Senate Bill

SCI – Sensitive Compartmented Information

SSCI – Senate Standing Committee on Intelligence

WPA – Whistleblower Protection Act

USC – United States Code

CHAPTER I

INTRODUCTION

Enron, WorldCom, September 11, 2001, Aru Ghraib, Central Intelligence Agency secret detention centers or “blacksites,” the truth about Vioxx and tobacco: such recent events and headlines in United States history have increased the public’s knowledge of corporate and government corruption. But how has the public learned of such corruption? The key to providing the public with information about these events have been insiders known as whistleblowers. It is very likely that today, most major newspapers across the nation feature breaking news provided by whistleblowers about illegal or unethical practices in government and business. The media also tells the public of these individuals’ bravery and unselfishness. In 2002, *Time* magazine’s “People of Year” issue featured three whistleblowers. Colleen Rowley of the FBI, Sherron Watkins from Enron, and Cynthia Cooper from WorldCom were given the credit they deserved for unmasking government mismanagement, accounting fraud, and phony bookkeeping.¹ With such knowledge and media coverage, public outcry for government and corporate transparency has increased. Lawmakers have attempted to respond with new statutes while more nongovernmental watchdog organizations have been established.

Employees of any organization may be witness to internal processes and information showing illegal, wasteful, or abusive actions. When individual employees take it upon themselves to report such wrongdoing to internal offices or outside groups or individuals, they are known as whistleblowers. Often ethical duties as public servants and commitment to justice compel employees to speak out. Whistleblowers are at risk of reprisal, though, particularly if the organization intends to keep the

¹ “The Whistleblowers, Person of the Year,” *Time* (30 December 2002) from <http://www.time.com/time/covers/0,16641,20021230,00.html>.

discovered processes or information secret. Employees in the private and public sectors receive legal protections from various national and state labor laws when participating in whistleblowing.² At the federal level of government, employees fall under the purview of several whistleblower protection laws, many of which are riddled with loopholes and confusing language. More specifically, intelligence employees of the Federal Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency, and National Security Agency have the fewest protections under these laws, as the information they witness can be deemed classified by the executive branch. Their ability to report wrongdoing within their agency is therefore limited by their involvement in intelligence gathering. Because of their limited legal protection under whistleblowing laws, intelligence employees often turn to the media or outside organizations to report agency wrongdoing.

Not everyone supports whistleblowers. Agency officials, Congress, U.S. presidents, inspector generals, and government attorneys have played crucial roles in expanding or limiting the protection of whistleblowers under the law. Often seen as snitches or rats by colleagues or government officials, whistleblowers may lose their jobs, pensions, friends, and status when speaking out. The media also participates in how whistleblowers are viewed by the public. As with *Time* magazine, media coverage can give whistleblowers celebrity status when the information they divulge reveals millions of dollars of fraud or the potential to save lives.

There are over twenty-five whistleblower protection laws, passed to protect public employees from reprisal. Federal employees, however, often lose retaliation cases in court or before the Merit Systems Protection Board. Their claims are often deemed as insufficient, erroneous, or classified by the Office of Special Counselor,

² For example, the Sarbanes-Oxley Act of 2002, Pub.L. 107-204, protects private sector employees who provide evidence of corporate fraud; the Civil Service Reform Act, Pub.L. 94-454, protects federal employees who file claims of mismanagement, abuse, or illegal activities within the public sector.

Merit Systems Protection Board, or various agencies' Inspector Generals. Federal employees lose in such great numbers that the media and nongovernment agencies offer whistleblowing hotlines, which become the preferred anonymous method for blowing the whistle.

Employees of the intelligence community face a particular challenge in striking a balance between protecting the government's interest and protecting the public. The dilemma faced by policy-makers lies in the ability to protect all such federal employees who report misconduct, and simultaneously protect the national security interests of the United States. The possibility to meet both these goals, however, is possible. A comprehensive, specific statute outlining the procedures and protections for every federal employee who wishes to provide information about wrongdoing to specific members of Congress or agency officials could address both the government and the employees' needs.

This thesis examines the conflicts and contradictions of several whistleblowing statutes. Against this background, the thesis focuses on the implications for allowing or omitting intelligence employees from the statutes. This analysis reveals the ways protecting national security has been used as a rationale to limit the passage of federal whistleblowing statutes covering intelligence employees. The thesis studies the Central Intelligence Agency's (CIA) as an example of a federal intelligence agency with few statutory protections for whistleblowers. As the analysis will show, the CIA's process for reporting wrongdoing within the agency requires intelligence employees to navigate complicated procedures that still leave the employees vulnerable to retaliation. The experiences of two employees from the CIA will be utilized to illustrate these issues surrounding whistleblowing at the national security level and the reasons employees may feel that the only way to share information is via the media or to report it after they have left the agency.

Chapter II provides an overview of the various definitions of whistleblowing developed by political science and legal scholars. These definitions encompass reasons whistleblowers report wrongdoing, what they hope to achieve, and the outcomes of blowing the whistle. The scholarship on whistleblowing offers differing viewpoints of whistleblowing and its effectiveness for inciting change. Chapter III analyzes the federal statutes that provide whistleblowing protections, from the Floyd-LaFollete of 1912 through the end of the 1990s. This analysis spans a little over 80 years of federal statutory history, which includes federal whistleblowing statutes affecting intelligence employees. Chapter IV traces the laws enacted from 2000 to those currently pending in Congress. This analysis outlines the current legal protections for federal whistleblowers. Further, pending bills in Congress provide a window into possible protections for intelligence employees.

Chapter V provides a brief analysis of the CIA's history of secrecy and denial, including the executive branch's use of national security as a justification for keeping secrets from citizens and Congress. This overview presents the CIA's history of engaging in and maintaining secrecy about its covert operations and U.S. sponsored assassinations. This analysis leads to Chapter VI, which examines ways that intelligence employees break the code of silence through whistleblowing and the media. The chapter explores the effects of whistleblowing laws on intelligence employees, exemplified by the cases of two well-known CIA whistleblowers. Finally, Chapter VII concludes that comprehensive legislation should be enacted that simultaneously protects the rights of whistleblowers in the intelligence community and national security interests. In particular, Chapter VII recommends that Congress combine pending House and Senate bills to create a statute that adequately strengthens whistleblower protections for all federal employees, including those in the intelligence community.

CHAPTER II

DEFINITIONS AND MOTIVES FOR WHISTLEBLOWING

Whistleblowing scholars offer several definitions all with various motives and outcomes. This chapter will explore how different scholars view whistleblowing. Each author offers a conclusion about the outcomes whistleblowers face after the act of whistleblowing occurs.

Definitions of Whistleblowing

The act of whistleblowing is defined by social scientists and legal scholars in a variety of ways. Scholars offer different definitions of whistleblowing according to how the individual reports the wrongdoing, the intent of reporting, and the results of blowing the whistle. According to Roberta Ann Johnson there are four key elements in whistleblowing: 1) it is an act that intends to make information public; 2) the information is conveyed to parties outside of the organization in order to make it public; 3) the information deals with wrongdoing inside the organization and; 4) the actor was or is a part of that organization.¹ She further argues that whistleblowers act as “policy entrepreneurs” when the information they seek to make public affects the procedures and policies within an organization.²

In contrast to Johnson’s arguments to view the whistleblower as a policy entrepreneur, Terance D. Miethe argues that a whistleblower may be acting for various reasons, not always with the greater good in mind. Because, according to Miethe, individuals often use whistleblowing to promote themselves or their career and are exposed by their superiors for having done so, whistleblowers are portrayed as “snitches,” “rats,” and “moles.”³ However, whistleblowers are viewed mostly as

¹ Roberta Ann Johnson, *Whistleblowing: When It Works and Why* (Boulder: Lynne Rienner, 2003), 3.

² Ibid.

³ Terance D. Miethe, *Whistleblowing at Work* (Boulder: Westview, 1999), 11.

“saviors,” particularly by the public, despite the outcomes of their information sharing. Beyond motive, whistleblowers are also labeled according to their methods: internal whistleblowers utilize organization offices and procedures to report their claims, while external whistleblowers report their information to law enforcement, lawyers, media, and various local, state, and federal agencies. Above all else, an important definition for whistleblowers, according to Miethe, is that they report the information to someone who has the power to take corrective action.⁴

Myron Peretz Glazer and Penina Migdal Glazer define whistleblowers as “ethical resisters.”⁵ According to Glazer and Glazer, “Ethical resisters are employees who publicly disclose unethical or illegal practices in the workplace.”⁶ Similar to the arguments made by Glazer and Glazer, Stephen M. Kohn and Michael D. Kohn emphasize the importance of whistleblowers to industry and government, but particularly to the public. Saving taxpayers’ money, exposing corruption, and changing bureaucratic problems are all important results from the information divulged from whistleblowers.

From yet another group of authors, Frederick Ellison, John Keenan, et al., whistleblowing receives a quite different definition. They define whistleblowing as an act or series of acts performed within an organization by an individual(s) who intend to make information of wrongdoing public.⁷ In this definition, motives are not considered relevant and the act must be intended to make the public aware. Intentions are purposeful, as the whistleblower wants the public to know about the wrongdoing, while the motive may be different for the whistleblower, such as belief in ethical duty. In contrast to Miethe’s definition, the fact that information is revealed to make the

⁴ Ibid., 18.

⁵ Myron Peretz Glazer, Penina Migdal Glazer, *The Whistleblowers* (New York: Basic Books, 1989), 4.

⁶ Ibid.

⁷ Frederick Ellison, John Keenan, et al., *Whistleblowing Research: Methodological and Moral Issues* (New York: Praeger, 1985), 12.

public aware makes whistleblowing a serious act against the employee's organization, as opposed to seeking an internal procedural change. In other authors' definitions, the information may be brought to internal offices or superiors as an act to change the organization from within, without the intent to make the public knowledgeable about that information. The consequences of public disclosure are deemed more serious by Ellison, Keenan, et al., who contend that "reasons for going outside the organization must be far weightier than the reasons for going quietly to a superior of one's immediate supervisor."⁸ Furthermore, they argue that the information must be recorded as "a matter of public record" through the newspaper, Congressional Records, or the media.⁹ That is not to say that the information necessarily successfully changes an organization; however, acknowledgment of the information by the public is an important aspect of their definition. The information revealed to the public must be "about possible or actual, nontrivial wrongdoing in an organization."¹⁰

Reasons for Whistleblowing

But why do individuals decide to 'blow the whistle'? Every author tackles this question differently, arguing that decisions are often influenced by professional and/or personal forces. Johnson argues that whistleblowing is encouraged at many levels of government, by the public, and the media. Changes in the bureaucracy to hire more educated individuals and provide intensive training to new employees may also contribute to the increased numbers of whistleblowers, according to Johnson. She also attributes this increase to the several state and federal laws that protect whistleblowers. Finally, some institutions promote whistleblowing and support employees who report wrongdoing and American culture values whistleblowing.¹¹

⁸ Ellison, Keenan, et al., 8.

⁹ Ibid., 13.

¹⁰ Ibid.

¹¹ Johnson, 4.

Changes in the bureaucracy include the requirement of more educated and trained individuals employed at all levels of government. These highly trained professionals “may feel that they have a distinct perspective on public problems and solutions, one that may be nonnegotiable...some professionals may be less prone than other officials to compromise when it comes to questionable decision-making or wrongdoing.”¹² Similarly, as organizations take on new initiatives and directives professionals may seek to ‘blow the whistle’ when they question how their agency is going to promote the public’s interest. However, employees in the public sector are less likely trigger protections due to several statutory exceptions within whistleblower protection laws. Therefore, agencies have instituted hotlines to allow employees to discuss wrongdoing anonymously to protect the employee from reprisal.¹³ Congress and the media support whistleblowers as well. Congress utilizes whistleblowers as a form of checks and balances on the other branches of government. Johnson argues that the ability for Congress to utilize information from whistleblowers “gives the legislature entrée into what the agency does and can be harnessed to legislative ends.”¹⁴ In contrast, the laws available to whistleblowers in the private sector promote employees’ ethical duties and protect workers from retaliation from their employer, according to Johnson.¹⁵

Accountability, transparency of government, and the protection of individual rights are qualities valued by Americans and when employees of large governmental agencies come forward, the media is the most likely avenue for them to report wrongdoing. The media supports whistleblowers regardless of the stage of the accusation. Portraying whistleblowers as heroes protecting citizens’ interests against a

¹² Ibid., 5.

¹³ For information about whistleblowing hotlines see Office of Special Counsel web site: <http://www.osc.gov/contacts.htm>.

¹⁴ Johnson, 11.

¹⁵ Ibid., 97.

corrupt government are often the headlines of whistleblower stories even as early as the accusation stage. Other venues for whistleblowing include private organizations and groups offering whistleblowing counseling and an outlet to discuss possible repercussions prior to blowing the whistle.¹⁶ These groups also offer training seminars about employee rights and may also offer legal services to whistleblowers who are victims of reprisal. Other nonprofit organizations support and encourage employee ethics and government accountability, such as PEER (Public Employees for Environmental Responsibility), GAP (Government Accountability Project), and POGO (Project on Government Oversight).¹⁷

Johnson however, warns against viewing whistleblowing as a heroic act, which assumes that the employee has decided to put all personal gain aside in order to claim illegal activities take place within his or her workplace.¹⁸ She argues that this simplistic view of the whistleblower's decision fails to recognize feelings of desperation or disappointment and any activities that he/she may have done prior to blowing the whistle to correct the situation. In this regard, the process of deciding to "blow the whistle" should be closely examined. According to Johnson, the individual is using a form of dissent against the employer for the good of the public or the organization.¹⁹ The act of whistleblowing is often viewed as a breach of loyalty between employee and employer; however, blowing the whistle is often the last resort for an employee. When the employee turns to whistleblowing as a last resort various consequences will occur during each stage of speaking out, such as the accusation being made public, the process of investigating the claim, and the actions that will

¹⁶ For more information about nongovernmental organizations see Whistleblower Protection Blog: www.whistleblowerblog.org.

¹⁷ For information about each organization see: www.whistleblowers.org, www.peer.org, www.pogo.org.

¹⁸ Johnson, 28.

¹⁹ *Ibid.*, 29.

follow if the claim is false or true. But as stated earlier, Johnson describes the whistleblower as a policy entrepreneur. There may be policy changes during various stages of whistleblowing, regardless of the outcome of the claim. In this regard, the whistleblower is a policy entrepreneur. The employer may handle the case internally, and the employee may be able to change internally without public knowledge. Therefore, the whistleblower may affect policies in the organization regardless of the claim's viability or any reprisal he/she may experience.

For Miethe, the motives of whistleblowers may differ from ways in which the media portrays them. However, most important for Miethe is the act itself and the ways in which whistleblowers are viewed by people around them. Legendary whistleblowers such as "Deep Throat," who revealed President Richard Nixon's involvement in the Watergate scandal, and Frank Serpico, who spoke out about New York City Police Department fraud, may have made historical changes within their organizations and the field itself; however, after their whistleblowing, colleagues did not appreciate their disclosures and called them traitors. As Miethe argues, whistleblowers who speak out against colleagues and agency corruption may receive labels such as "rat" or "snitch," which alter whistleblowing's social acceptability.²⁰

Miethe also argues that simply the threat of whistleblowing may be enough to change an organization. Organizations are often preoccupied with their public image. The potential for whistleblowers to go outside the agency to expose wrongdoing can ultimately curtail questionable practices. Organizations may utilize other internal processes to protect themselves against possible whistleblowing and eventual exposure. Regulatory audits and electronic surveillance assist organizations in protecting the management and their employees from wrongdoing by monitoring

²⁰ Miethe, 13.

financial and safety issues. These activities have steadily increased across all sectors in an effort to maintain a responsible organization.²¹

In his book Whistleblowers at Work, Miethe observes the increase in federal employees witnessing and reporting misconduct by utilizing three national surveys of federal employees from the United States Merit System Protection Board (MSPB) from 1981, 1984 and 1993. The surveys show that during those years the proportion of federal employees who said they witnessed wrongdoing decreased from half of all federal workers to 1 out of every 5 workers.²² Miethe argues that these results may have been caused by either less misconduct or more sophistication in the misconduct. However, “the proportion of observers who are whistleblowers nearly doubled between 1981 and 1992, and the rates of external whistleblowing more than doubled over that time period.”²³ This growth may stem from an increase in avenues for reporting or workers’ greater awareness of their legal rights; yet two-thirds of federal employees in the 1992 survey stated that they did not have the knowledge necessary to report misconduct or how the laws work.

The personal costs of whistleblowing are also important for potential whistleblowers to consider when contemplating exposing corruption, either internally or externally. Fear of reprisal was a primary factor leading to passage of most federal whistleblowing statutes after the 1990s. Reprisal comes in various forms, from dismissal to demotion. The threat of retaliation is also a form of reprisal. Verbal abuse, threats toward family members, physical intimidation, loss of autonomy, blacklisting, and financial loss may affect a whistleblower or a person threatening to blow the whistle. As Miethe reports, in the MSPB 1993 study of 1,500 federal employees who observed and reported misconduct within the preceding twelve

²¹ Ibid., 34.

²² Ibid., 42.

²³ Ibid.

months, the proportion of employees exposed to various forms of retaliation include the following: 23 percent, verbal harassment or intimidation; 22 percent, poor performance appraisal; 20 percent, shunned by co-workers or managers; and 13 percent, denial of award. There were nine other categories with smaller proportions.²⁴ However, this may be just a small sample of the total retaliation that may be disguised under other terms such as “reduction in force” or “changing needs of the agency.”²⁵ Factors such as race change the intensity of reprisal experienced by federal employees, with African-Americans twice as likely to experience retaliation than their white counterparts.²⁶

In their book, The Whistleblowers: Exposing Corruption in Government and Industry, Glazer and Glazer argue that whistleblowing has become increasingly important and grew out of the public’s disillusionment over Vietnam and Watergate. Overall, the country realized that high ranking government officials were using the federal bureaucracy to “engage in unethical and illegal practices under a cloak of secrecy.”²⁷ Glazer and Glazer conclude that whistleblowing became a legitimate form of social resistance against a corrupt government, locally and nationally.

Between 1964 and 1977, several accountability organizations and protection boards were established to protect employees and their disclosures. During this time an important shift in federal government regulation took place, moving away from industry specific regulations to general social regulations of all industries, illustrated by the establishment of Occupational Safety and Health Administration and the Environmental Protection Agency. During the early 1970s, a few whistleblowers made headlines and established the need and reliability of internal employees to

²⁴ Ibid., 75.

²⁵ Ibid., 74.

²⁶ Ibid., 79.

²⁷ Glazer, Glazer, 32.

expose wrongdoing. Individuals such as Serpico and Daniel Ellsberg gave whistleblowing its legitimacy in the eyes of the media and the public. Serpico's exposure of New York City Police Department corruption led to formal investigation and his testifying against widespread police officer payoffs amounting to millions of dollars.²⁸ After the investigation several police officers were convicted of accepting payoffs. In 1967, Ellsberg, who worked for the Rand Corporation, contributed to a top secret report of U.S. decision making in Vietnam at the request of Secretary of Defense Robert McNamara; this report is known as the Pentagon Papers. The report was over 7,000 pages long. In 1969, Ellsberg took copies of the report to the Senate Foreign Relations Committee and nineteen newspapers, which ultimately led to the conviction of several White House aides.²⁹ For Glazer and Glazer, these examples illustrate the how whistleblowing became a widespread way for employees to bring attention to agencies that misused public funds and deceived the public.

The Impact of Whistleblowing

Whistleblowers must reconcile the tension between their ethical duties to serve the public and the possible costs to their personal and professional life. Because of the support received from the public, federal whistleblowers are, ironically, often the least likely to be protected; the government hopes to keep whistleblowers silenced, as “no administration will welcome within its ranks scores of whistleblowers who want to reveal inadequate performance in federal agency.”³⁰

Kohn and Kohn discuss the legal rights of whistleblowers while highlighting the various avenues lawyers can take to defend whistleblowers and their rights. “Whistleblower cases are hard fought not just because of animosity which may arise in the course of an employment discrimination case, but also because of the economic or

²⁸ Frank Serpico, www.frankserpico.com (accessed June 28, 2008).

²⁹ Daniel Ellsberg, www.ellsberg.net (accessed June 28, 2008).

³⁰ Glazer, Glazer, 251.

political impact of the actual disclosures.”³¹ Their primary focus, in The Labor Lawyer’s Guide to the Rights and Responsibilities of Employee Whistleblowers, is to illustrate the problems found within the whistleblowing statutes.

There is no comprehensive federal law that prohibits employers from retaliating against employees who disclose potential corporate or governmental violations of law. Instead, over the past fifty years there has been a steady growth of specific statutory protections for employee whistleblowers. The statutory remedies cover a significant cross section of the American workforce, but are riddled with loopholes.³²

These loopholes can be found in the more than twenty-seven federal statutes protecting whistleblowers, each with its own specific limitations, such as industry or agency, filing provision, statutes of limitation, and protected activity. It is these loopholes that caused an increased awareness of the need for legal protections for federal whistleblowers.

For Ellison, Keenan, et al., the success of the whistleblower can be measured by four different outcomes. First, a change in policy within the organization can occur. Second, compensation to victims can also measure the usefulness of the information by serving as a deterrent or to reduce the overall harm done to individual victims. Third, the risks to the public are diminished if the information has led to changes within the organization before public outcry or increased risks. Finally, a careful investigation by either internal inspectors or external reviewing agencies assesses the situation that lead to changes or possible new evidence of wrongdoing. These four outcomes assist the public in realizing the usefulness of information

³¹ Stephen M. Kohn, Michael D. Kohn, *The Labor Lawyer’s Guide to the Rights and Responsibilities of Employee Whistleblowers* (New York: Quorum, 1988), 1.

³² *Ibid.*, 17.

provided by whistleblowers and the necessity to protect these individuals' personal and professional lives.³³

Aside from defining whistleblowing and its effects, experts in the field of whistleblowing policy differ in their opinions about the effectiveness of federal statutes that attempt to protect employees, particularly for those involved in national security and intelligence gathering. Sarah Wood Borak offers a comprehensive critique of the ineffectiveness of whistleblowing policies offered to federal employees in her article, "The Legacy of 'Deep Throat': The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002."³⁴ She argues that the overall benefits experienced by the public, the whistleblower, and the agency often outweigh the personal consequences experienced by government employees, particularly when the information is utilized to make necessary changes in government accountability. Legislation passed in the 1990s sought to protect federal whistleblowers; however, the focus of the laws shifted from what the actual information revealed to simply protecting the jobs of the employees. Borak argues that, as a result, the information is lost and changes in government agencies are not made. The bureaucratic processes to file whistleblower claims are cumbersome, and documents are backlogged in government agencies designed to manage whistleblower claims. The loopholes in the statutes that fail to protect federal employees as described by Kohn and Kohn are closely examined in Borak's article. She concludes that these administrative problems reduce the effectiveness of the whistleblower's information.

³³ Ellison, Keenan, et al., 19.

³⁴ Sarah Wood Borak, "The Legacy of 'Deep Throat': The Disclosure Process of the Whistleblower Protection Act of 1994 and the No FEAR Act of 2002," *University of Miami Law Review* 59 (July 2005), 617-624.

Whistleblowing is a unique form of protest for an employee. Employees must consider consequences to themselves and their families, as well as their relationships with other employees and supervisors in the agency they work for. A review of whistleblowing literature reveals that scholars agree that blowing the whistle is important to initiate changes in an organization. Many argue, however, that particularly for federal employees, initiating change proves to be difficult as the laws in place to protect them are complex and ineffective. As the legislative history will show in the following chapter, whistleblowers in the federal intelligence community are lost in a sea of laws and regulations that are supposed to protect them.

CHAPTER III

WHISTLEBLOWING LEGISLATIVE HISTORY

Legislation offered by various Congressional members to protect federal whistleblowers causes disagreements and struggles between the powers of the executive and legislative branches. The ability of the President to maintain control over executive agencies and the need for Congress to hear from employees in those agencies has resulted in varying degrees of protection for federal employees who blow the whistle. These struggles are most clearly illustrated during shifts in politics, such as changes in the political climate of the country, the President in office at the time, the public's sentiment toward the federal government, and the importance of employees' rights at a particular time in whistleblowing history. Private sector employees enjoy protections under the some federal laws and are also protected by state laws. Federal employees, particularly those employed in intelligence gathering agencies, are protected by only a few federal statutes. This chapter will outline the various laws that protect federal agency employees, tracing the enactment of the laws from the early 1900s to the end of the 1990s. The various shifts to strengthen or weaken protections for federal employees will also be explored. The history of 'whistleblowing' statutes protecting federal intelligence employees begins with the Civil Service Reform Act of 1978 (CSRA).¹

Before the CSRA

Prior to the CSRA, statutes included various clauses to protect employees from dismissal for talking to Congress, but failed to specify what information was protected. The Lloyd-LaFollete Act of 1912 protected the rights of civil service employees to individually or collectively petition Congress without interference. The Lloyd-LaFollete Act was added to an appropriations bill to prevent lawmakers from

¹ "Civil Service Reform Act of 1978," Pub.L. 94-454, signed into law on October 13, 1978.

hearing only one side of a story from Cabinet officials, but not directly from federal employees themselves. Congress insisted on having access to federal employees' complaints and observations about their agency and supervisors.² After much debate the interests of employees were included: "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."³ This Act rejected President Theodore Roosevelt's 1902⁴ and President William H. Taft's 1909 'gag order' to prohibit employees of executive departments from speaking to members of Congress.⁵ According to Representative James Tilghman Lloyd (D-MO), the Lloyd-LaFollete Act's purpose was to prevent executive officials from being able to "withhold information and suppress the truth or to conceal their official acts."⁶ However, it was not until the Watergate scandal that federal employees, as whistleblowers, were the primary focus of legislation.

Need for Transparency

President Richard Nixon's commitment to curtailing employment discrimination was demonstrated in Executive Order 11478, signed on August 8, 1969, which gave federal employees protections similar to Title VII of the Civil Rights Act of 1964.⁷ In 1972, the Equal Employment Opportunity Act amended the Civil Rights Act to include employees of government agencies at the federal, state,

² "Lloyd-LaFollete Act of 1912," 37 Stat. 555, § 6 (1912).

³ Ibid.

⁴ Executive Order January 31, 1902; Theodore Roosevelt in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=69698>.

⁵ Fisher, Louis, "National Security Whistleblower," *Congressional Research Service Report for Congress* (30 December 2005), 4.

⁶ 48 Cong. Rec. 10671 (1912), 5634.

⁷ Executive Order 11478, August 8, 1969; Richard Nixon in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=59072>.

and local levels. Under this amendment, public employees were given the same rights as private sector employees against employment discrimination, including protection against reprisal for having “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”⁸ This form of whistleblowing was now protected for all federal employees. However, the Equal Employment Opportunity Act and the Civil Rights Act were limited to discrimination on the basis of race, sex, religion, and national origin, but did not protect employees more broadly against retaliation for disclosures of mismanagement and waste.⁹

While Nixon’s commitment to federal employees was illustrated by the employment laws passed during his administration it was his illegal activities that produced a whistleblower that would ultimately end his career. The notorious Watergate scandal and the extensive investigation by *Washington Post* reporters Bob Woodward and Carl Bernstein into Nixon’s Committee for Re-Election Activities put whistleblowing in the minds of millions of Americans and Congress.¹⁰ While the *Washington Post* broke the story of the break-in into Democratic headquarters by Nixon campaign staff members, the information of the involvement of high ranking administration officials was given to reporters Woodward and Bernstein by an inside anonymous source, “Deep Throat.”¹¹ This information led to the subpoena of presidential tape recordings and Nixon’s eventual resignation in 1974.

The source, “Deep Throat,” was later revealed to be a federal employee, and specifically FBI former Assistant Director W. Mark Felt, leading to a five year debate

⁸ “Civil Rights Act of 1964,” Pub.L. 88-352, Sec. 704(a), signed into law July 2, 1964.

⁹ “Equal Employment Opportunity Act of 1972,” Pub.L. 92-261, Sec. 717, signed into law on May 25, 1972.

¹⁰ For more information on Watergate, see *The Great Coverup: Nixon and the Scandal of Watergate* by Barry Sussman; *Richard Nixon, Watergate, and the Press* by Louis Liebovich; and *The Nixon Watergate Tapes* by Richard M. Nixon.

¹¹ See “The Woodward and Bernstein Watergate Papers,” from www.hrc.utexas.edu/exhibitions/web/woodstein.

over the separation of powers and the enactment of the Ethics in Government Act on October 26, 1978.¹² Major provisions of the Act include requiring public disclosure of financial records by high-ranking civil service employees and public officials and prohibiting certain activities once their service had ended.¹³

While not technically whistleblowing by the definitions of some scholars, Felt's sharing of information to the public through the media, in order to expose wrongdoing at such high levels of government, makes "Deep Throat" the whistleblower of all whistleblowers. Congress and the new incoming President realized that faith in the government needed to be restored in the minds of citizens after disillusionment over dependability and trustworthiness of the federal government following the Watergate trial and the printing of the Pentagon Papers.

The CSRA

Newly-elected President Jimmy Carter hoped that Americans would regain trust in their government. Carter wanted to ensure that the government was truthful to the American people. He stated in his Inaugural Address, "I join in the hope that when my time as your President has ended, people might say this about our Nation...that we had ensured respect for the law and equal treatment under the law, for the weak and the powerful, for the rich and the poor; and--that we had enabled our people to be proud of their own Government once again."¹⁴ In his first State of the Union Address, Carter unveiled his goal to restructure the government and reform civil service:

But even the best organized Government will only be as effective as the people who carry out its policies. For this

¹² "Ethics in Government Act," Pub.L. 95-521, signed into law October 26, 1978.

¹³ *Ibid.*, Sec. 101.

¹⁴ Inaugural Address of President Jimmy Carter on January 20, 1977 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=6575>.

reason, I consider civil service reform to be absolutely vital. Worked out with the civil servants themselves, this reorganization plan will restore the merit principle to a system, which has grown into a bureaucratic maze. It will provide greater management flexibility and better rewards for better performance without compromising job security.¹⁵

With this promise the President sent Congress a legislative package consisting of the Civil Service Reform Act (CSRA) and the Reorganization Plan No. 2 that he hoped would change the civil service employment sector forever.¹⁶ The CSRA was passed on October 13, 1978 and the Reorganization Plan was enacted by Executive Order 12106 by President Carter on December 28, 1978.

The Reorganization Plan granted the Equal Employment Opportunity Commission (EEOC) jurisdiction in equal opportunity employment claims made by federal employees. Within each agency equal employment opportunity officers were required by law to assist employees and abide by Title VII guidelines. Under this plan, Nixon's inclusion of federal employees by Executive Order 11478 was also detailed under the Reorganization Plan.

The Reorganization Plan also changed the landscape of agencies in the federal government; it eliminated the Civil Service Commission. The Plan created the Merit Systems Protection Board (MSPB) to manage employee discrimination claims with regard to administrative procedures and employees' claims of wrongdoing within the merit system.¹⁷ The MSPB's responsibilities were to protect the merit system from

¹⁵ State of the Union Address of Jimmy Carter on January 19, 1978 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=30856>.

¹⁶ "Civil Service Reform Act of 1978," Pub.L. 95-454, signed into law on October 13, 1978 and the Reorganization Plan No. 2, submitted to Congress by President Jimmy Carter on May 23, became law on August 11, 1978.

¹⁷ The merit system is the process of promoting and hiring government employees based on their ability to perform a job, rather than on their political connections and was originally instituted by the Pendleton Civil Service Reform Act (22 Stat. 403).

political power and the rights of employees within the system. The MSPB serves as a “quasi-judicial agency in the Executive Branch that serves as the guardian of the Federal merit system...MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies.”¹⁸ The new Office of Personnel Management (OPM) was to handle the personnel management of the civil service of the federal government. According to a history provided by the Office of Personnel Management, the Office of Special Counsel (OSC) was also created within the Merit Systems Protection Board to “investigate charges that might be brought against any Federal official of violating the merit system rules and regulations, and to prosecute such matters before the Board.”¹⁹ Congress was, however, more concerned with whistleblowing than with violations of the merit system.²⁰ These cases consist of claims made by federal employees detecting fraud, mismanagement, or other wrongdoing within their agency and brought to the attention of higher management, Congress, or the media. Employees who blow the whistle are often punished by the agency for insubordination.²¹ As outlined in the CSRA, the OSC could prosecute agency managers who had taken employment actions against the whistleblower, including reduction in pay, emotion, discrimination, firing, or any other form of reprimand.

The CSRA was the first law to specifically protect whistleblowers against reprisals and to establish procedures for claims brought by federal whistleblowers. The Act included nine merit system principles and prohibited personnel practices, stating: “Employees should be protected against reprisal for the lawful disclosure of

¹⁸ Information retrieved from the Merit Systems Protection Board, www.mspb.gov on July 15, 2008.

¹⁹ See Office of Personnel Management web site’s “Biography of an Ideal,” at <http://www.opm.gov/BiographyofAnIdeal/SubMain1977-1979.asp/>.

²⁰ For more information see, Frank A. Yeager, “Assessing the Civil Service Reform Act’s Impact on Senior Manager Work Priorities,” *Public Administration Review* 47 no. 5 (Sep. - Oct., 1987), 417-424.

²¹ For more information about reprisal complaints, see “Whistleblowing and the Federal Employee,” *A Report from the Merit Systems Protection Board* (October 1981).

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.”²² This statute allows employees to appeal directly to the MSPB for redress, regardless of reasons provided by the agency for its actions against the employee. However, instances such as transfers or denials of promotion were to be brought before the OSC, if the employee believed those actions were based on a prohibited practice.²³ These reasons included whistleblowing, discrimination, nepotism, obstruction of rights to work and failing to take a personnel action if the taking of or failure to take such action violated any law, rule or regulation regarding merit system principles. Individuals who had experienced adverse personnel actions based on prohibited reasons could seek assistance from both the MSPB and OSC. Ultimately the MSPB was the final investigator and decision maker on the claim of the prohibited personnel practice and the OSC could not litigate in federal court on behalf of the employee against decisions made by the MSPB.

The CSRA was an important symbolic step toward more effective government. During Senate floor debate prior to the bill’s passage, Congress argued about the need to protect to the most patriotic employees who sacrifice their personal lives for the public’s interest. Previous legislations charged the EEOC to coordinate trainings and receive data from federal agencies with regard to employees’ claims, the OPM, OSC, and MSPB were primary contacts for federal employees.²⁴

Definitional Problems of the CSRA

²² Pub.L. 95-454, Sec. 2301.

²³ Pub.L. 95-454, Sec. 1206.

²⁴ Pub.L. 88-352, Sec. 705. Note: Federal employees with claims of discrimination in the workplace as they relate to the Civil Rights Act, continue to seek assistance from the Equal Employment Opportunity Commission. For a breakdown of federal agencies and how they assist federal employees see: <http://www.eeoc.gov/abouteeoc/coordination/mou.html>.

The loopholes in the CSRA begin with the definitions included in the Act. “Disclosures” are not defined and the law requires that claims initiated by an employee be “substantial and specific.”²⁵ The law also protected employers’ rights to dismiss employees solely on the basis of lack of merit, which many employees were unable to dispute. Despite the new legislation and the new protections it offered, the CSRA excluded from coverage all employees who served in the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency and “any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”²⁶ As explained by the Senate Committee on Government Affairs, the Act was not intended to protect employees who disclose “information which is classified or prohibited by statute from disclosure.”²⁷

Only the Federal Bureau of Investigation (FBI) had its own separate provision in the CSRA. Section 2303 provided protections through the Attorney General’s office for employees who blew the whistle on the FBI.²⁸ This provision was critical to the overall history of the FBI’s engagement in wrongdoing. Representative Patricia Schroeder (D-CO) stated that the protection of FBI agents was necessary to curtail the “woeful history” of the FBI.²⁹

Inspector General Act

During this same period, President Carter signed into law the Inspector General Act of 1978.³⁰ Designed to be independent and nonpartisan offices, the Office of the Inspector General of the twelve agencies under this law are to conduct

²⁵ Pub.L. 95-454, Sec. 2301.

²⁶ Pub.L. 95-454, Sec. 2302.

²⁷ Fisher, 7.

²⁸ Pub.L. 95-454, Sec. 2303.

²⁹ See 124 Cong. Rec. 34100 (1978).

³⁰ “Inspector General Act,” Pub.L. 95-452, signed into law on October 12, 1978.

audits and investigations of the procedures within the agency, support and advise the agency with regard to efficiency and effectiveness, and keep Congress fully informed about any deficiencies relating to the agency.³¹ Specifically excluded from the Act are all intelligence agencies, the entire Department of Justice, and the Central Intelligence Agency (CIA).³² The Department of Justice was assigned a statutory IG in a 1988 amendment to the Inspector General Act.³³ The CIA created an Office of the Inspector General's (IG) in 1952, but this Inspector General was not independent and was selected by the Director of Central Intelligence (DCI). President Carter said of the Inspector General Act, "We are pleased to have worked with the Congress in fashioning this legislation. The reorganization of audit and investigation activities complements other initiatives the administration has under way to fight fraud and abuse in Government, including the strong whistleblower protection provisions in the civil service reform bill...."³⁴

Problems with Both Laws

Despite the progress made by the Carter Administration to protect federal employees from reprisal, the efficiency and effectiveness of the CSRA was heavily disputed. During the 1980s, federal employees complained that the OSC was not investigating their claims in a timely manner. Federal employees also complained that the OSC revealed the identities of complainants to employers, which led to reprisal.³⁵ The OSC's primary mandate was to investigate claims of reprisal brought by

³¹ Originally twelve Inspector General Offices, currently there are 57 federal IGs. The list of federal agencies and departments with Inspector General offices can be found at:

<http://www.ignet.gov/igs/homepage1.html>

³² "Inspector General Act," Pub.L. 95-452, signed into law on October 12, 1978.

³³ "Inspector General Act Amendments," Pub.L. 100-504, signed into law on October 18, 1988.

³⁴ Signing Statement of Inspector General Act, Jimmy Carter, October 12, 1978 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web:

<http://www.presidency.ucsb.edu/ws/?pid=29968>.

³⁵ "Whistleblower Protection: Reasons for Whistleblower Complainants' Dissatisfaction Need to Be Explored," *Government Accountability Office* (November 1993), 5.

employees of the protected agencies. However, most cases were dismissed and only one had been prosecuted from the signing of the CSRA in 1978 through 1989.

Analysis of results of a survey conducted by the MSPB in 1984 concluded that the CSRA did not work and, in fact, the OSC closed 99 percent of reprisal cases immediately upon their investigation.³⁶ While good in its intentions, the CSRA was ineffective in protecting federal employees from reprisal.³⁷

In 1986, Congress began working on legislation to correct and enhance whistleblower protections. Several changes to reprisal claim procedures were to be included in the new legislation. Proposed by Representative Schroeder in 1987, House Resolution 25 attempted to give the OSC greater power to litigate claims and reduce the burden of proof on the employee. Senator Carl Levin (D-MI) introduced a similar bill, Senate Bill 508, which he hoped would increase the burden of proof on the employer. After hearings and debates, committees from both chambers concluded that a major problem was that the OSC did not view its role as an employee protector but rather as a protector of the merit system.³⁸ They also concluded that employees did not trust the OSC and viewed the MSPB as too restrictive.³⁹ Finally, under the combined bill known as the “Whistleblower Protection Act (WPA) of 1988,” Congress agreed to change the procedures for whistleblower claims under the CSRA. The WPA provided that the employee’s *prima facie* case must prove that retaliation for reporting violations of the merit system principles was a “factor” as opposed to a “significant” or “predominant factor” in a prohibited personnel action. The agency

³⁶ “Whistleblower Protection: Reasons for Whistleblower Complainants’ Dissatisfaction Need to Be Explored,” *Government Accountability Office* (November 1993), 5.

³⁷ For more information see 35 Cong. Rec. 4512; “Whistleblower Protection: Reasons for Whistleblower Complainants’ Dissatisfaction Need to Be Explored,” *Government Accountability Office* (November 1993); and “Whistleblower Protections: Implementation of the Whistleblower Statutes Has Been Mixed,” *Government Accountability Office* (March 1993).

³⁸ 35 Cong. Rec. 4512 (1989).

³⁹ *Ibid.*

would then have the burden to prove by “clear and convincing” evidence that the action was not based on the whistleblowing activity.⁴⁰ Despite the overwhelming support of a unanimous vote by Congress, the WPA of 1988 was pocket vetoed by President Ronald Reagan on October 26, 1988.⁴¹ He claimed that the Act would put untruthful whistleblowers in a position to delay or manipulate the process and that imposing a heavier burden of proof on the employer/agency unduly favored the employees over the management. Constitutionality was also an issue for Reagan. He claimed that if the OSC was given power to appeal an MSPB decision in a federal court, two executive agencies would appear before a federal judge.⁴² This would undermine executive power authorized to the President to resolve disputes between his subordinates. By the beginning of the following year, Congress was hard at work reforming Senate Bill 508 for the new president, George H.W. Bush.

On April 10, 1989, S. 20, “The Whistleblowing Protection Act of 1989” (WPA of 1989) was signed into law by President Bush.⁴³ In his signing statement, Bush stated, “Federal employee whistleblowers can make a valuable contribution to the Administration's commitment to ensure effective and efficient use of tax dollars by the Government.”⁴⁴ Although somewhat similar to S. 508, the new law made compromises on the objections to the previous bill, mainly that the OSC could not litigate cases in federal court. Under the new WPA of 1989, an employee has three avenues to raise a claim. The first is an employee appeal to the MSPB of an agency's

⁴⁰ S. Rpt. 100-413 on S. 508, “Whistleblower Protection Act of 1988,” July 6, 1988.

⁴¹ According to the U.S. Senate Reference Glossary, “The Constitution grants the President 10 days to review a measure passed by the Congress. If the President has not signed the bill after 10 days, it becomes law without his signature. However, if Congress adjourns during the 10-day period, the bill does not become law.” http://www.senate.gov/reference/glossary_term/pocket_veto.htm.

⁴² Fisher, 19.

⁴³ “Whistleblower Protection Act of 1989,” Pub.L. 101-12, signed into law on April 10, 1989.

⁴⁴ Signing Statement on “Whistleblower Protection Act of 1989,” by George Bush, on April 10, 1989 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=16900>.

adverse action, known as a “Chapter 77.” The second gives the OSC power to institute an action directly with the agency; and finally, an employee could file a grievance under the agency’s negotiated grievance procedures. These employee claims must identify a “personnel action” taken in response to a “protected disclosure” made by a “covered employee.” The prohibited personnel actions define conduct that may not be taken against an employee who makes a disclosure he or she “reasonably believes evidences – (i) a violations of any law, rule or regulations, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such a disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interests of national defense or the conduct of foreign affairs.”⁴⁵ The employee is protected when he or she discloses whistleblowing information as outlined through this process. Once again, however, the intelligence agencies’ employees were excluded from the Act, similar to the CSRA.⁴⁶

Changes to the CIA Office of the Inspector General

Following the Iran-Contra Affair, various government committees performed several investigations into the CIA’s files.⁴⁷ Although the Office of the Inspector General at the CIA issued a report on the scandal, it was not as exhaustive as the findings made by Congress’ investigation. Congress’ report concluded that the CIA IG did not have adequate staffing or the resources to conduct these types of intra-agency investigations.⁴⁸ Therefore, it recommended that the CIA have an independent

⁴⁵ Pub.L. 101-12, Sec. 4.

⁴⁶ Pub.L. 101-12, Sec. 2.

⁴⁷ For information on the several Congressional and governmental commissions investigating the Iran-Contra Affair, see: John Scott Masker, “Teaching the Iran-Contra Affair,” *PS: Political Science and Politics* 29, no. 4 (December 1996).

⁴⁸ 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).

IG, as in other agencies where IGs were appointed by the President and confirmed by the Senate. Senator Arlen Specter (R-PA) was in favor of such a bill, sponsoring an independent CIA IG amendment to the Intelligence Authorization Bill of 1989. Director of Central Intelligence (DCI) William Webster disagreed and offered to find a way to make the IG stronger without giving the office full independence. During Congressional hearings on the bill, he offered initiatives to better train and hire IG's during the Congressional Hearings on the bill.⁴⁹ The bill was temporarily sidelined when the Senate offered a compromise; the DCI would file reports to the Senate Standing Committee on Intelligence summarizing the activities of the IG. The Intelligence Authorization Act of 1989 contained a requirement that every six months the DCI report to House and Senate Intelligence committees the activities of the IG.⁵⁰ This only made Specter work for a stronger CIA IG bill.

By late 1989, Specter introduced a revised version of his original bill embedded in the Intelligence Authorization Act and began working to gain support from the congressional intelligence committees. DCI Webster and President Bush (a former DCI) opposed the bill. However, Bush changed his mind after the committees and Webster agreed on a bill that would not hinder the passage of the entire Intelligence Authorization Act, which contained the intelligence community budget. On November 30, 1989, Bush signed the Intelligence Authorization Act of 1990, including the CIA IG provision. The IG was statutorily independent, to an extent. Although the DCI could keep the IG from initiating internal investigations in the interest of national security, the IG continued to report to the DCI. The IG's role with regard to whistleblowers contained familiar language from earlier whistleblower protection legislation:

⁴⁹ Ibid.

⁵⁰ "Intelligence Authorization Act of 1989," Pub.L. 100-453, signed into law on September 29, 1988.

(3) The Inspector General is authorized to 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. Once such complaint or information has been received-

(A) the Inspector General shall not disclose the identity of the employee without the consent of the employee, unless the Inspector General determines that such disclosure is unavoidable during the course of the investigation; and

(B) no action constituting a reprisal or threat of reprisal, for making such complaint may be taken by any employee of the Agency 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.⁵¹

This Act thus created statutory protection for employees to seek assistance from the IG of the CIA without fear of reprisal.

Whistleblowing in the '90s

Despite the strides made by Congress to create procedures to protect federal employee whistleblowing, complaints came from whistleblowers and their advocates about the lack of progress made under the laws. During this time, the Government Accountability Office (GAO) offered Congress insight into the failures of the WPA of 1989. In 1993, the GAO issued a report stating that a major reason for the lack of success experienced by whistleblowers was the lack of dissemination of information about whistleblower protections in the agencies. “The lack of agency commitment appears to us to be a major problem in the whistleblower program. If the program is

⁵¹ “Intelligence Authorization Act of 1990,” Pub.L. 101-193, Sec. 801, signed into law on November 30, 1989.

to be successful, agencies' support for the program is critical."⁵² Effects of the WPA of 1989 were also discussed at great length by members of Congress.⁵³ The Senate Committee on Government Affairs was concerned with OSC actions to protect whistleblowers, while the Committee on Post Office and Civil Service in the House concluded that the 1989 Act had been counterproductive by creating "new reprisal victims."⁵⁴ The House committee was also disappointed with the outcomes whistleblowers received in federal court, stating that the "MSPB and the Federal Circuit have lost credibility with the practicing bar for civil service cases."⁵⁵ Since the creation of the Federal Circuit Court of Appeals in 1982, employees prevailed on the merits in only two cases alleging retaliation for whistleblowing.⁵⁶ Aside from the lack of progress in protecting whistleblowers who followed appropriate legal procedures, overall employee satisfaction was poor with regard to the process and the offices involved in handling their claims. The GAO report entitled, "Reasons for Whistleblower Complainants' Dissatisfaction Need to be Explored," addressed employees' views of the OSC and MSPB staffs' effectiveness. Approximately 81

⁵² "Whistleblower Protection: Reasons for Whistleblower Complainants' Dissatisfaction Need to Be Explored," *Government Accountability Office* (March 1993), 3.

⁵³ 140 Cong. Rec. 27357-61, 28823-26 (1994).

⁵⁴ H.Rept. No. 103-769, 103d Cong., 2nd sess. 12 (1994).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* Note: The Federal Circuit is charged with handling federal personnel claims, as described by the web site for the Court at <http://www.cafc.uscourts.gov/about.html>: "The United States Court of Appeals for the Federal Circuit was established under Article III of the Constitution on October 1, 1982. The court was formed by the merger of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims. The Federal Circuit is unique among the thirteen Circuit Courts of Appeals. It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, and veterans' benefits. Appeals to the court come from all federal district courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. The court also takes appeals of certain administrative agencies' decisions, including the United States Merit Systems Protection Board, the Boards of Contract Appeals, the Board of Patent Appeals and Interferences, and the Trademark Trial and Appeals Board. Decisions of the United States International Trade Commission, the Office of Compliance of the United States Congress and the Government Accountability Office Personnel Appeals Board are also reviewed by the court."

percent of federal employees who sought reprisal protection from the OSC gave the office poor ratings for effectiveness.⁵⁷

By 1994, Congress once again stepped in to ensure that whistleblowers' rights were protected. Amendments to the WPA of 1989 included a requirement that the OSC provide a written status report to the whistleblower ten days prior to terminating an investigation and allowing the employee to submit additional information.⁵⁸ The amendments gave prevailing parties the right to awards of attorney fees in some cases.⁵⁹ The changes also required the agencies' administrators to inform their employees of whistleblower protections and rights, and allowed the MSPB to order corrective actions to place an individual in a position he/she would have been in had the personnel practice not occurred, including the reimbursement of back pay and benefits lost by the employee after dismissal.⁶⁰ Again, Congress passed these amendments unanimously and the Whistleblower Protection Act Amendments of 1994 were signed by President Bill Clinton on October 29, 1994.⁶¹ Proponents of improving whistleblower legislation critiqued the amendments for their continued lack of protection for intelligence employees, who were still excluded from the law.⁶²

Intelligence Community Whistleblowers

From the 1978 CSRA to the WPA of 1994, intelligence employees were silenced by their exclusion from whistleblowing laws. Their only remedies were available from the Inspector Generals' offices for such agencies as the CIA, DIA, NSA, and others. Separate from the rest, the FBI's Office of Professional

⁵⁷ GAO report (November 1993), 21.

⁵⁸ "Whistleblower Protection Act Amendments of 1994," Pub.L. 103-424, Sec. 3, signed into law on October 29, 1994.

⁵⁹ Pub.L. 103-424, Sec. 2, (2).

⁶⁰ Pub.L. 103-424, Sec. 8.

⁶¹ Pub.L. 103-424.

⁶² For criticisms on the 1994 amendments see: The Government Accountability Project web site http://www.whistleblower.org/template/page.cfm?page_id=121.

Responsibility was responsible for enforcing whistleblower protections in the same manner as the CSRA.⁶³ However, it took almost ten years for Congress and the President to realize that, in fact, the FBI was not following those provisions. President Clinton directed the Attorney General to establish processes for whistleblower complaints within the FBI after the extensive publicity about FBI crime-lab whistleblower, Dr. Frederic Whitehurst.⁶⁴ Dr. Whitehurst blew the whistle on the flawed testimonies and inaccurate findings produced by various FBI crime-lab employees. Most significantly, his testimony in 1995 at the trial of the World Trade Center bombing called into question the scientific evidence collected by the FBI during the Oklahoma City bombing in 1995.⁶⁵ Yet, despite the public's continued distrust of the FBI, the laws barred employees from seeking third party assistance, such as non-governmental agencies, in whistleblower procedures.

Continued Problems

As the decade went on whistleblowers, particularly intelligence employees, continued to reveal that they were facing reprisal. According to an OSC report to

⁶³ Under current regulations, "(a) When an employee of, or applicant for employment with, the Federal Bureau of Investigation (FBI) (FBI Employee) makes a disclosure of information to the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office, the disclosure will be a 'protected disclosure' if the person making it reasonably believes that it 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. (b) Any office or official (other than the OIG or OPR) receiving a protected disclosure shall promptly report such disclosure to the OIG or OPR for investigation. The OIG and OPR shall proceed in accordance with procedures establishing their respective jurisdiction. The OIG or OPR may refer such allegations to FBI-INSD Internal Investigations Section for investigation unless the Deputy Attorney General determines that such referral shall not be made." <http://www.usdoj.gov/oarm/wb/law.htm>.

⁶⁴ Testimony of Stephen M. Kohn, Attorney for Frederic Whitehurst, 1997 Congressional Hearing from Global Security.org at http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm (accessed July 16, 2008).

⁶⁵ For more details about Whitehurst's whistleblowing and subsequent legal issues, see web sites for CNN and the *New York Times*: <http://www.cnn.com/US/9704/15/fbi.crime.lab.update/>.

Congress in 2000, the number of whistleblower reprisal claims in fiscal year 1998 was 691, with 654 of those cases closed by the OSC's Complaints Examining Unit (CEU).⁶⁶ It was, however, a major whistleblowing story that sent the executive and legislative branches into a frenzy over whistleblower protections and national security. In 1995, a senior State Department adviser and White House aide, Richard Nuccio, went to trusted friend, Congressman of New Jersey Robert G. Torricelli (D-NJ), to share information that he had held for two years about CIA operatives involved in killing a U.S. citizen in Guatemala. According to Nuccio, a Guatemalan colonel paid by the CIA was involved in the killing of an American innkeeper and a captured Guatemalan guerrilla who was married to an American lawyer.⁶⁷ Concerned that the CIA was covering up the information, Nuccio went to Torricelli, then a member of the House intelligence committee. Torricelli took the information to President Clinton and the *New York Times*. Then-DCI John M. Deutch dismissed both the chief of covert operations for Latin America and a station chief in Guatemala, claiming that they had failed to provide Congress and CIA headquarters with clear information about the case.⁶⁸ Despite this seemingly positive outcome, Deutch reprimanded Nuccio for having gone to Congress without proper approvals. Furthermore, Deutch revoked Nuccio's security clearance. Nuccio resigned the following year after several legal battles over his security clearance and his plea to Congress for greater reform within the CIA and more whistleblower protections.⁶⁹ Following the heated debates that ensued, Deutch called for an outside panel to review the legality of these types of whistleblowing disclosures made to Congress.

⁶⁶ Elaine Kaplan, Special Counsel, "A Report to Congress from the Office of Special Counsel FY 2000," from www.osc.gov.

⁶⁷ Tim Weiner, "CIA Chief Disciplines Official for Disclosure," *New York Times* (6 December 1996).

⁶⁸ "Fired CIA Official to Receive Career Medal," *National Catholic Reporter*, (24 March 2000).

⁶⁹ Tim Weiner, "A Secret Disclosed Imperils the Career of State Dept. Aide," *New York Times* (16 November 1998).

In November 1996, the Office of Legal Counsel (OLC) within the Department of Justice issued an opinion on the Nuccio matter's implications for national security.⁷⁰ The eight-page document sought to clarify several issues including the application of executive branch rules and practices on disclosure of classified information to members of Congress and the applicability of whistleblower protection statutes and Executive Order 12674 to employees with security clearances. Executive Order 12674 was included in the report because in 1989 President Bush established the "Principles of Ethical Conduct for Government Officers and Employees." The generality of the order may offer an answer to the question the legality of the Nuccio disclosures to Congress, because under the order employees are allowed to "disclose waste, fraud, abuse and corruption to appropriate authorities."⁷¹ The OLC opinion concluded that Executive Order 12356, signed in 1982 by President Reagan, mandated that classified information be handled solely in the executive branch.⁷² The OLC concluded further that employees of intelligence agencies do not have the right to disclose national security information to members of Congress because doing so takes control out of the hands of the President. It also argued that any disclosures made by employees to Congress on a "need to know" basis, which are protected by the Executive Orders and the Lloyd-LaFollete Act, are also limited by the requirement that employees first utilize the decision-making channels within their agency prior to taking information to Congress. The OLC concluded, as well, that under the whistleblower protection statutes, revoking of a Sensitive Compartmented Information

⁷⁰ Christopher Schroeder, "Memorandum for the General Counsel of the CIA," (26 November 1996) from <http://www.usdoj.gov/olc/nuccio.op.htm>.

⁷¹ Executive Order 12674, signed on April 12, 1989 by George H.W. Bush from http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/xeorders/eo12674.html.

⁷² Executive Order 12356, signed on April 2, 1982 by Ronald Reagan from http://epic.org/open_gov/eo_12356.html.

(SCI) security clearance is not a “personnel action” and that whistleblower protection laws only allowed disclosures of classified information brought to OSC or the IGs.⁷³

The release of this highly controversial OLC opinion prompted Congress to hold hearings to determine if legislation was necessary to curtail the President’s power over classified information and to protect employees who want to share information with Congress of wrongdoing that may be deemed classified. In two days of hearings, on February 4 and February 11, 1998, Justice Department officials continued to argue that congressional access to classified information held by intelligence community employees without the approval of agency supervisors was unconstitutional. Legislative solutions were promptly reported out of Congress following the hearings. The resulting Senate bill would direct the President to inform employees of their right to go to an appropriate committee of Congress to disclose evidence or reasons to believe that there was “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.”⁷⁴ In the House, Intelligence Committee Chairman Porter J. Goss (later DCI) made comments in Congressional hearings about the lack of protective measures for intelligence employees and the unacceptability of such a system.⁷⁵ In its final version, the Senate bill provided that the IG was the primary mechanism for intelligence whistleblowers, but that it should not be the only process.⁷⁶ Employees could also bring information of wrongdoing before the intelligence committees as another avenue to disclose information. The Senate bill also prohibited the agency from blocking the employee from going to Congress.

⁷³ Schroeder report.

⁷⁴ S. Rept. 105-165, 105 Congress, 2nd Sess 5 (1998).

⁷⁵ House Permanent Select Committee on Intelligence; Hearings on May 20 and June 10, 1998.

⁷⁶ “Intelligence Authorization Act of FY99,” Pub.L. 105-272, Sec. 702 (1)(a), signed into law on October 20, 1998.

After the Senate voted for the measure, S. 1668, 93-1, but prior to the House's vote on H.R. 3829, the Clinton Administration issued a Statement of Administration Policy stating that S. 1668 was unconstitutional and would be vetoed.⁷⁷ However, in June 1998 after conference committee, the two houses reported the Intelligence Community Whistleblower Protection Act of 1998 as part of the Intelligence Authorization Act of 1999. This included S. 1668 in full and was attached to the budget of thirteen intelligence agencies. A veto would impact the budgets of these agencies.

The Intelligence Authorization Act of 1999 was signed into law by President Clinton on October 20, 1998. In his signing statement, President Clinton stated, "The Constitution vests the President with authority to control disclosure of information when necessary for the discharge of his constitutional responsibilities. Nothing in this Act purports to change this principle."⁷⁸ The Act allows intelligence community employees to take a claim of wrongdoing to Congress and protects them from reprisal or threats of reprisal for going to the appropriate members of the intelligence committees. Important key findings of the Act included:

(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 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

⁷⁷ Executive Office of the President, "Statement of Administration Policy: S. 1668 – Disclosure to Congress Act of 1998," March 9, 1998 from http://www.fas.org/irp/congress/1998_cr/sap-s1668-s.html.

⁷⁸ Signing Statement on the "Intelligence Authorization Act of 1999," by Bill Clinton on October 8, 1998 in John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=55116>.

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.⁷⁹

The new law allows employees to report information to their IG or Congressional Intelligence Committees and protects them from all personnel actions described under the WPA of 1994. For the CIA specifically, upon receiving a complaint, the IG has 14 days to determine its credibility and if so it must be sent to the DCI, who then has seven days to report the matter to the intelligence committees.⁸⁰ If the complaint does not reach Congress within that time period, the employee may submit the complaint to either the Senate or House intelligence committee directly.⁸¹ The Act also requires the President to inform employees of their rights to disclose information.⁸² Attorney for the Office of Intelligence Policy and Review at the DOJ, Thomas Newcomb, summarized the effects this new legislation would have on the intelligence community: “For the most part, H.R. 3829 (the Act) simply averted a confrontation between the branches; along the way, however, it has provided some assistance to those within the Intelligence Community who recognize the need for informed oversight from Congress.”⁸³

⁷⁹ “Intelligence Authorization Act of 1999,” Pub.L. 105-272, Title VII, signed into law on October 8, 1998.

⁸⁰ Pub.L. 105-272, Title VII, Sec. 702.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Thomas Newcomb, “In From the Cold: The Intelligence Community Whistleblower Protection Act of 1998.” *Administrative Law Review* 53 (2001), 1268.

A new era of whistleblowing protections was opened in the 1990s for intelligence employees. Duties of Inspector Generals and procedures outlining how to bring information of wrongdoing to superiors and Congress offered federal employees some protections from reprisal. For employees of intelligence agencies, the laws specifically excluded their agencies from whistleblower protections until the late 1990s. At the same time, however, national security became increasingly important as intelligence agency whistleblowers brought detailed information of mismanagement and cover-ups to Congress and the media. The future of whistleblowers within the intelligence community would continue to take center stage as a series of new statutes and events would prompt greater attention from Congress and American legal scholars in the 2000s.

CHAPTER IV

THE MILLENIUM AND WHISTLEBLOWING

Beginning in 2000, whistleblower advocates expressed the need for greater federal agency accountability after whistleblowers came forward through the proper channels and received no assistance with their claims. Few whistleblowing allegations submitted to the MSPB resulted in positive decision in favor of the whistleblower during the 2000s. This chapter of the thesis provides an overview of Congress' and whistleblower supporters' attempts to establish more accountability in government agencies, despite the political climate.

A Need for More Regulation

Beginning in 2000, Congress once again investigated ways to offer better legislative protections to federal employees. In 2000, 245 cases were awaiting review by the OSC, which went up to 380 the following year and reached an all time high of 555 by 2002.¹ Many cases were delayed due to the lack of personnel at the OSC to handle the caseload. This problem, coupled with agencies lack of willingness to inform employees about whistleblower protections, prompted Congress to explore more avenues for agency accountability.²

The need for accountability was clearly illustrated by the Coleman-Adebayo case. In August 2000, Dr. Marsha Coleman-Adebayo won a civil suit against the Environmental Protection Agency for discrimination on the basis of race, sex, color and a hostile working environment.³ In her capacity as the liaison to the Clinton Administration's South African Commission, she reported to EPA administrators that South Africans were suffering from environmental hazards created by a U.S.-based

¹ Borak, 637.

² Stefanie Lindquist, "Developments in Federal Whistleblower Protection Laws," *Review of Public Personnel Administration* 23 no. 1 (March 2003), 79.

³ For more information on the Coleman-Adebayo case see "Alumna in Action – June/July 2002," from http://alum.barnard.edu/site/PageServer?pagename=alu_act_0602coleman_adebayo.

company. After her allegations were ignored by the EPA, she began to receive negative feedback about her work. She was denied several promotions and subsequently, filed a lawsuit against the EPA. She alleged that racial discrimination was the reason she was denied promotions and that the EPA violated Title VII of the Civil Rights Act.⁴ She won her case in federal court, which awarded her \$600,000 award in damages.⁵ The money to pay the award did not come from the EPA's budget, but from the Department of Treasury. The Judgment Fund was established through the Department of Treasury to fund settlements made by federal agencies. In reality, the agencies were not suffering financially in losing these cases.⁶ The Coleman-Adebayo case, the increased backlog of cases, and the millions of dollars spent by the Treasury's Judgment Fund provoked Congressional hearings about whistleblowing claims. Congressman James Sensenbrenner (R-WI) introduced a bill he hoped would hold agencies accountable for discrimination and retaliation by making them financially responsible for damages.

Introduced on October 19, 2000 by Sensenbrenner, H.R. 5516 outlined requirements to hold federal agencies accountable for violations of antidiscrimination and whistleblower protection laws through monetary damages, publicity, and Congressional oversight.⁷ The bill was introduced after Sensenbrenner, Chairman of the Committee on Science, began receiving several complaints from federal employees alleging discrimination and reprisal for speaking out against their agency and superiors. Congressional hearings on these issues began in March 2000, with prepared statements from: Blacks In Government, a non-profit government employee

⁴ From the United States District Court for the District of Columbia web site:

https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv2428-38 (accessed July 14, 2008).

⁵ Marsha Coleman-Adebayo, "Toward a Fair Federal Workplace," *New York Times* (27 May 2002).

⁶ Stefanie Lindquist, "Developments in Federal Whistleblower Protection Laws," *Review of Public Personnel Administration* 23 no.1 (March 2003), 79.

⁷ 106th Congress, 2nd Session in the House of Representatives, as introduced in the House: H.R. 5516, on October 19, 2000.

organization; the General Accounting Office;⁸ various Congressmen, including those whose districts served large numbers of federal employees, such as Maryland and Virginia; and the Equal Employment Opportunity Commission (EEOC).⁹ The 106th Congress came to a close and Sensenbrenner's H.R. 5516 was put on hold until early in 2001.

Sensenbrenner reintroduced the bill on the first day of the 107th Congressional session and H.R. 169 was sent to the Judiciary Congressional Hearings on May 9, 2001.¹⁰ At the hearing, testimonies were received from Kweisi Mfume, President and Chief Executive Officer of the National Association for the Advancement of Colored People (NAACP); J. Christopher Mihm, Director of Strategic Issues for the GAO; Bobby L. Harnage, Sr., National President of the American Federation of Government Employees, AFL-CIO; and Coleman-Adebayo. Each of these witnesses reiterated the need for more agency accountability. Many witnesses also worried about the amount of money that the taxpayers were contributing to defend the government. Mfume stated, "It was shocking to me to discover the amount of time, money and other resources that are expended defending the federal government in these legal actions."¹¹ On October 2, 2001, the House of Representatives agreed to final amendments and the bill was sent to the Senate.¹² By April of 2002, the Senate added a few small changes and the bill was ready for a vote. The bill was passed by both chambers of Congress unanimously and required the President's signature.¹³

The No FEAR Act and Greater Accountability

⁸ Later named the Government Accountability Office and referred to as the GAO from here in.

⁹ For various testimonies, see: Legislative History of Pub.L. 107-174.

¹⁰ For full Judiciary Congressional Hearings, see: 1 CIS H 52176.

¹¹ Congressional Hearing before the House Judiciary Committee, May 9, 2001 by Kweisi Mfume.

¹² 2001 Bill Tracking H.R. 169 (16 May 2002) from Congressional Information Service, Inc.

¹³ Ibid.

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 was signed by President George W. Bush on May 15, 2002.¹⁴ Known as the No FEAR Act, it applied to all federal executive agencies, including the Postal Service and intelligence agencies, which had been excluded from previous whistleblowers protection laws. The reimbursement section requires agencies to repay the Department of Treasury's Judgment Fund when monetary damages are awarded to plaintiffs.¹⁵ The notification section requires agencies to make the rights and protections of federal employees available in writing to past, present, and future employees of federal government, posted on the Internet, and through employee trainings.¹⁶ Section 203 requires agencies to submit an annual report to several high-ranking members of Congress and the EEOC.¹⁷ The report must include data on the number of claims filed by employees alleging discrimination and retaliation, and it must be submitted to Congress and the EEOC within 180 days after the end of the fiscal year. The Act also requires the GAO to conduct studies about aggrieved federal employees. Section 301 requires agencies to post employment data on their web sites, including the total number of discrimination complaints, average length of time these claims remain active, final decision on claims, and agency demographic data. The data set must include a 5-year history for each category. Finally, the Act requires the EEOC to collect and post all data sets from each agency on the EEOC web site.¹⁸

Priorities for Whistleblowing Change

In the span of the two years it took Congress to succeed in finalizing the No FEAR Act and having it signed into law, the United States experienced the worst

¹⁴ See "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002," Pub.L. 107-174, signed into law on May 15, 2002.

¹⁵ Pub.L. 107-174, Title II, Sec. 201.

¹⁶ Pub.L. 107-174, Title II, Sec. 202.

¹⁷ Pub.L. 107-174, Title II, Sec. 203.

¹⁸ Pub.L. 107-174, Title III, Sec. 301.

terrorist attack in its history on September 11, 2001. After the attack, several whistleblowers came forward about botched investigations, poor security in airports, and several other claims alleging that the federal government could have prevented the attack.¹⁹ These disclosures prompted the formation of the National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission), “an independent, bipartisan commission created by congressional legislation and the signature of President George W. Bush in late 2002.”²⁰ Whistleblowers from various intelligence agencies received little protection from reprisal under the law and the enforcement of the No FEAR Act was sidelined while the federal government worked on protecting the U.S. from further attacks.²¹

Some civil rights activists applauded the No FEAR Act as groundbreaking legislation and “the first civil rights law of the 21st century,” but others stated that the Act did little to actually hold agencies accountable for discrimination and reprisal.²² Because the national media brought attention to whistleblowers following September 11th, several bills were introduced in Congress to strengthen the WPA of 1994 with protections for federal employees in the intelligence community. After several years of minor revisions, in 2003, Senator Daniel Akaka (D-HI) introduced S. 1348 to strengthen the WPA. During Senate Hearings, Senator Peter Fitzgerald (D-IL) expressed the delicate balance that must be maintained in any new provisions for intelligence community whistleblowers:

...the easier it becomes to establish a prima facie case of whistleblower retaliation, the more likely it becomes that

¹⁹ “Public Statement: Release of 9/11 Commission Report, The Hon. Thomas H. Kean and the Hon. Lee H. Hamilton, July 22, 2004,” from the 9-11 Commission web site: http://govinfo.library.unt.edu/911/report/911Report_Statement.pdf.

²⁰ See “About the Commission,” on the 9-11 Commission web site: www.9-11commissions.gov at <http://govinfo.library.unt.edu/911/about/index.htm>.

²¹ Karin Leperi, Marsha Coleman, “Viewpoint Paralyzed with No Fear,” from [Governmentexecutive.com](http://www.govexec.com) (15 August 2003) at: <http://www.govexec.com/features/0803/0803view2.htm>.

²² Coleman-Adebayo (27 May 2002).

Federal managers will hesitate to take steps to eliminate unproductive or counterproductive appointees, impose reasonable disciplinary measures, or insist on efficiencies that some workers might challenge as retaliatory. Therefore, in revisiting this important area of law, I look forward to hearing specifically from the witnesses how their views best promote this delicate balance between encouraging good faith whistleblowing on the one hand, and on the other, encouraging proactive and non-risk adverse management of the Federal workforce.²³

Senate Bill 1348, known as the Federal Employee Protection of Disclosures Act, intended to add the revoking of security clearances to the existing prohibited personnel practices provisions and to establish a confidential process for employees to seek advice prior to reporting wrongdoing with national security information to Congress. During the hearings, several individuals within the Executive Branch challenged the Senate bill. Peter Keisler, Assistant Attorney General for the Civil Division in the Department of Justice, stated that the passage of the bill would undermine the Administration's ability to classify information. If security clearances were added to prohibit personnel practices, the MSPB and Federal Circuit may access the determinations of security clearances and classified information brought forward by a possible whistleblower during an investigation, Keisler stated: "We oppose these provisions because we believe they would interfere with the Executive Branch's constitutional responsibility to control and protect information relating to national security. And more specifically, the determination which individuals have a need to know specific types of classified information."²⁴ The bill was put on hold while Congress was out of session.²⁵

²³ S. 1358, "The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act," Hearing before the Committee on Governmental Affairs, U.S. Senate, 108th Congress, 1st Session (12 November 2003).

²⁴ Ibid.

²⁵ 2003 Bill Tracking Report S. 1348 (26 June 2003), Congressional Information Service, Inc.

During the same period, the deficiencies of the OSC were brought before Congress. In 2004, the GAO found that the OSC was backlogged and unable to meet the growing demands of whistleblower claims. The OSC “met the 15-day statutory limit [to respond to the whistleblower] for whistleblower disclosure cases about 26 percent of the time.”²⁶ At the same time, Scott Bloch, head of the OSC, was surrounded by controversy after he ordered his staff to refrain from talking to the public and removing “discrimination based on sexual orientation” from the OSC web site and all OSC published materials.²⁷ Bloch stated that the OSC was not responsible for handling discrimination cases based on sexual orientation. The White House ultimately overruled Bloch’s statement.²⁸

In 2005, the OSC was again under scrutiny for not properly investigating whistleblower claims. A complaint was made anonymously by employees of OSC, as well as their organizational supporters, POGO, GAP, and PEER, with a long list of allegations of improper handling of cases by OSC.²⁹ The claim alleged that the OSC investigative division closed approximately 600 cases within a few months without referring any for investigation in order to reduce the backlog of cases.³⁰ In response to these claims and Bloch’s reorganization plan that resulted in several employees leaving the OSC, Congressman Henry Waxman (D-CA) sent Bloch an inquiry about the handling of these cases. In a written statement, Waxman charged that “the Office of Special Counsel is supposed to protect whistleblowers and taxpayers, yet it appears

²⁶ Government Accountability Office, Report to Congressional Requesters, “U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress,” (March 2004), 11.

²⁷ Christopher Lee, “Official Says Law Doesn’t Cover Gays,” *Washington Post* (25 May 2005).

²⁸ *Ibid.*

²⁹ For the full complaint, see: <http://www.pogo.org/m/gp/gp-OSC-exhibits-03032005.pdf>.

³⁰ “Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch,” Submitted on March 3, 2005 by Debra S. Katz and Rashida Adams, Bernabei and Katz, PLLC: Counsel for Anonymous Career Employees of the U.S. Office of Special Counsel; The Government Accountability Project; The Human Rights Campaign; Public Employees for Environmental Responsibility; and The Project on Government Oversight.

that hundreds of cases may have been dismissed arbitrarily. We need to investigate how these cases have been handled and whether the Office of Special Counsel is doing its job.”³¹ Bloch contended that these cases had not met the standard of proof set forth by the Federal Circuit. This high standard of proof was a point of contention for whistleblower advocates. The standard of proof was set in 1999 in the Federal Circuit’s *LaChance v. White* decision, which held that the employee had not met the burden set forth by the WPA as amended.³² According to a POGO report:

The court decreed that the law only shields those charging government misconduct when that charge is supported by “irrefragable proof” (defined by the dictionary as undeniable, uncontestable, incontrovertible or incapable of being overturned). This standard never appears in the statute, reports by Congress on the language of the WPA, or any decision by the Merit Systems Protection Board involving whistleblower claims. Amendments to the statute approved by Congress in 1994 only require that the “employee reasonably believe his or her disclosure evidences” misconduct. Congress set this standard to provide protections to whistleblowers who might be “wrong” about their allegations, as well as those who were right. The unreasonable standard set by the court makes it virtually impossible for a whistleblower to prevail unless the wrongdoer confesses, in which case there is no need for a whistleblower.³³

These issues brought the need for whistleblower protection to a head, and a bill to strengthen the WPA of 1994 was reintroduced in 2005 and 2006 as S. 494, with similar provisions offered in the Akaka bill. The bill however, did not change the language of the burden of proof on the employee, leaving the court’s decision in *LaChance v. White* intact.³⁴ Several lawyers, advocates, and DOJ officials took part in

³¹ Christopher Lee, “Dispute at Whistle-Blower Office: Counsel Says Backlog is Reduced; Critics Question Retooling,” *Washington Post* (24 February 2005).

³² *LaChance v. White*, 174 F.3d 1378 (1999).

³³ “Homeland and National Security Whistleblower Protections: The Unfinished Agenda,” Project on Government Oversight (28 April 2005), 9.

³⁴ *LaChance v. White*, 174 F.3d 1378 (1999).

hearings and testimonies during the bill's consideration. Again, armed with criticism and data about the OSC's failures, Congress wanted to take action to protect whistleblowers despite the Administration's opposition.³⁵ However, Congress was in the midst of an election season and the bill was once again sidelined.³⁶

Bills on Hold

Finally, in 2007, the bill was reintroduced once again as S. 274 by Senator Akaka and was passed unanimously by the Senate on December 17. The bill contained few changes from the first bill introduced in 2003. During the same period, the House was considering a bill introduced by Waxman entitled the "Whistleblower Protection Enhancement Act."³⁷ Major elements the Senate bill are: adds all agencies that had been excluded from the WPA except the National Geospatial Intelligence Agency; allows employees to disclose information to authorized members of Congress, or agency officials through any transmissions (information and formal communications); adds the revoking or suspension of security clearances as a prohibited personnel action; allows the MSPB or Federal Circuit Court to review the clearance violation but cannot reinstate it; allows the OSC to appear as *amicus curiae* on behalf of the employee; and adds a statement to nondisclosure agreements to inform employees of their rights under the whistleblower protection laws.³⁸ The House bill includes: adds all agencies that had been excluded from the WPA of 1994; adds a section to outline the same protections for "National Security Whistleblowers;" add the term "applicant" to the entire bill wherever the term "employee" is indicated; adds scientists and government contractors under protections; protects disclosures

³⁵ For Congressional Hearings and Testimonies about whistleblower, see: 109 Bill Tracking S. 494.

³⁶ 2005 Bill Tracking Report S. 494 (2 May 2005), Congressional Information Service, Inc.

³⁷ See "Whistleblower Protection Enhancement Act of 2007," H.R. 985, 110th Congress, 1st Session introduced by Representative Henry A. Waxman, D-CA.

³⁸ See "Federal Employee Protection of Disclosures Act," S. 274, 110th Congress, 1st Session, introduced by Senator Daniel Akaka, D-HI.

made by employees during an investigation or as part of a refusal to violate the law; explains “clear and convincing evidence”; and gives the MSPB 180 days to take action on an employee’s claim after which the whistleblower can file suit in U.S. District Court.³⁹

The House passed H.R. 985 on March 14, 2007.⁴⁰ As of July 2008, the bill is currently in the Senate Committee on Homeland Security and Governmental Affairs.⁴¹ The Senate bill, S. 274, was passed on December 17, 2007 and is currently awaiting reference to a House committee. President George W. Bush threatened to veto both bills. He claims that the bills would increase the number of frivolous claims.⁴² Most Republican members of Congress agree, contending that the bills raise security concerns that may compromise the safety of the U.S. Waxman, however, as chairman of the House Committee on Oversight and Government Reform, argues that open government is necessary in light of several recent exposures of government wrongdoing at Abu Ghraib and the Iraq War.⁴³

The millennium brought whistleblowers several bills designed to increase protection against reprisal; however, bills were on hold in Congress due to national events and executive power. These bills would provide whistleblowers from all areas of the federal government with better protections, especially for intelligence employees. The two pending bills, however, are not supported by all members of

³⁹ H.R. 985.

⁴⁰ 153 Cong. Rec. H. 2517 (17 March 2007).

⁴¹ H.R. 985--110th Congress (2007): Whistleblower Protection Enhancement Act of 2007, *GovTrack.us* (database of federal legislation) <http://www.govtrack.us/congress/bill.xpd?bill=h110-985> (accessed July 22, 2008).

⁴² “Statement of Administration Policy on H.R. 985 – Whistleblower Protection Enhancement Act of 2007,” Executive Office of the President, Office of Management and Budget (13 March 2007). John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=25575>.

⁴³ Statement of Rep. Henry A. Waxman, House Committee on Oversight and Government Reform, Hearing on H.R. 984, the Executive Branch Reform Act, and H.R. 985, the Whistleblower Protection Enhancement Act: <http://fas.org/sgp/congress/2007/021307waxman.pdf>.

Congress or President Bush, and intelligence employees must wait until Congress' offers changes to the bills or a change in administration. Until then, intelligence whistleblowers must rely on current law, such as the No FEAR Act. The law did make several changes to the process of blowing the whistle and requires greater responsibility from government agencies. The responsibility of reporting data and information for the public is a way to increase government transparency. Requiring agencies to reimburse the Treasury is also a new attempt to hold agencies responsible in employee relations cases. However, despite the several attempts to strengthen whistleblower protections following No FEAR, national security was an overarching worry across the federal government. In the intelligence community, examples of employees who blow the whistle during a heightened period of fear of terrorism prove that government accountability is of the utmost importance to the public. For one agency in particular, the CIA, whistleblowers contributed to the growth and honesty of the organization authorized to gather information that may prevent national and international tragedies.

CHAPTER V

A LEGACY OF SECRECY: THE CENTRAL INTELLIGENCE AGENCY

As previously described, the national intelligence agencies were consistently excluded from whistleblower protection laws. More recently, however, the public has begun to recognize the necessity to protect employees of the intelligence community under federal whistleblowing laws. This chapter will outline a brief history of the CIA, one of the most secret government agencies of the Executive Branch. As its history will show, secrets were eventually revealed by CIA employees of the government's involvement in illegal activities such as mismanagement of federal funds, and even coup d'états and murder. The employees who revealed such information often did so anonymously or after their employment with the agency ended.

A National Clandestine Service

The CIA was created in 1947 by the National Security Act, which was signed into law by Harry S. Truman.¹ The agency was born out of the Office of Strategic Services and later the Strategic Services Unit in the post-World War II era. The agency would be headed by a Director of Central Intelligence, who would be chosen by the President and confirmed by the Senate. With the perceived threat of communism and the possibility of a third world war with Russia, the armed services generals devised a way for the United States to maintain a clandestine service. Secret hearings about the need for clandestine operations abroad were held by several congressional committees during the early 1940s.²

Several details about the organization were not included in the National Security Act. The Act did not specify where the money to fund clandestine operations

¹ See "National Security Act of 1947," Pub.L. 80-253, signed into law on July 26, 1947.

² Tom Weiner, *Legacy of Ashes: The History of the CIA* (New York: Doubleday, 2007), 5.

would come from. The Act gave the CIA broad powers to gather intelligence.³ The vagueness of the Act offered the CIA and its director, the Director of Central Intelligence (DCI), the ability to conduct covert actions without Congressional oversight. The Act mandates that the CIA:

- (1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions;
- (2) provide overall direction for the collection of national intelligence through human sources by elements of the intelligence community authorized to undertake such collection and, in coordination with other agencies of the Government which are authorized to undertake such collection, ensure that the most effective use is made of resources and that the risks to the United States and those involved in such collection are minimized;
- (3) correlate and evaluate intelligence-related to the national security and provide appropriate dissemination of such intelligence;
- (4) perform such additional services as are of common concern to the elements of the intelligence community, which services the Director of Central Intelligence determines can be more efficiently accomplished centrally; and
- (5) perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.⁴

For much of the 1940s and 1950s funding was provided to the agency secretly from funds appropriated to the Marshall Plan.⁵ CIA historians have found that the agency's culture and administrative reporting lines were riddled with problems. Secrecy provided the CIA a way to maintain a positive image at home early in its history. However, several studies during the early part of the agency's history

³ Pub.L. 80-254, Section 102(d).

⁴ Pub.L. 80-254, Section 102(d).

⁵ Weiner, 28.

concluded that the agency did not know nor understand how to run clandestine operations abroad, gather intelligence and most costly to the government, run foreign agents.⁶ Extensive research, including actual CIA documentation, provides information about botched operations in Russia, Germany, and Korea. Several CIA employees left the agency after each debacle without a sense of purpose or understanding of their missions.⁷

CIA Failures

Allen Dulles, who was the Director of the CIA throughout most of its early history, protected the agency at all costs. Quickly shifting the blame for botched investigations to individual CIA deputies and station chiefs, he led the CIA into several missions that were not fully reported to President Dwight D. Eisenhower and later to President John F. Kennedy. The largest secret mission undertaken in the late 1950s and 1960s was the plan to remove Fidel Castro from power in Cuba.⁸ Eisenhower left office in the midst of the CIA's plans to remove Castro, and he knew that his presidency would be tainted by the failed operations of the CIA. In his final days Eisenhower lamented, "The structure of our intelligence agency is faulty."⁹ In a National Security Agency meeting on January 5, 1961 he said of managing the CIA, "I have suffered an eight-year defeat on this" and he noted that he would leave "a legacy of ashes" for the next president.¹⁰

The failure of the agency to destabilize Cuba received criticism from all corners of government, especially after the Bay of Pigs fiasco in April 1961, when

⁶ For more information, see Weiner: 108, 133, and 154.

⁷ For more information about CIA agents' dissatisfaction, see Weiner; Ronald Kessler, *The CIA at War* (New York: St. Martin's Griffin, 2003); Rhodri Jeffreys-Jones, *The CIA and American Democracy*, 3rd Ed. (New Haven: Yale University Press, 1989).

⁸ See Weiner, 156-159; Kessler, 98; and Jeffreys-Jones, 97.

⁹ Weiner, 167.

¹⁰ Ibid.

CIA-trained Cubans failed to overthrow the Cuban government.¹¹ It was not until 1998 that a 1962 report of an investigation led by the CIA's own Inspector General, Lyman Kirkpatrick, was declassified. The report concluded that "Dulles and [Richard] Bissell [Director of Plans] had failed to keep two presidents and two administrations accurately and realistically informed about the operation."¹²

Congressional oversight of the CIA was not established until after the 1960s, when a growing dissent against the war in Southeast Asia swept across the country. By the 1970s, the need for oversight of the entire federal government came to the forefront, particularly after the Watergate scandal.¹³ Former agents were also in the media after becoming disillusioned with the agency in the late 1960s and bringing their stories to the public. In 1966, Victor Marchetti was a former assistant to DCI Richard Helms. He resigned in 1969 and published a book in 1971 entitled, The Rope Dancer, which chronicles his experiences in the CIA.¹⁴ The media was also involved in providing information about the need for oversight of intelligence agencies, particularly after several articles written by *New York Times* reporter Seymour H. Hersh exposed the CIA's foreign activities supporting the overthrow of foreign governments, the assassination of high ranking foreign officials, and illegal domestic intelligence activities.¹⁵

Hersh's investigative reporting revealed information from documents compiled and classified by the agency. In 1973, then-DCI James Schlesinger ordered every employee of the CIA to report to his office any current and past activities

¹¹ For information about the Bay of Pigs and foreign relations with Cuba during the 1960s, see "The Foreign Relations Series from the Kennedy Administration, Volume X" from http://www.state.gov/www/about_state/history/frusken.html.

¹² Weiner, 179.

¹³ See Chapter III for information about Watergate.

¹⁴ Victor Marchetti, *The Rope-Dancer* (Grosset & Dunlap, 1971).

¹⁵ Seymour M. Hersh, "Huge C.I.A. Operation Reported in U.S. Antiwar Forces, Other Dissidents in Nixon Years," *New York Times* (22 December 1974).

“which might be construed to be outside the legislative charter of this Agency.”¹⁶

Approximately 693 violations were included in the report; it was dubbed by the agency the “family jewels.”¹⁷ Hersh investigated for several months before he broke the story of the CIA spying on U.S. citizens against the CIA charter; this was just one of the many violations included in the “family jewels” report.¹⁸

In 1974, these revelations led to the enactment of the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961.¹⁹ The amendment required the President to report to Congress the descriptions and scope of CIA operations in a “timely fashion.”²⁰ It also sought to curtail excessive CIA spending by requiring the President to submit a “Findings” report to Congressional oversight committees, the Senate and House Foreign Relations Committees, before funding was appropriated to the CIA for any operations.²¹ The Amendment constituted a significant shift in Congressional policy, indicating that Congress would no longer allow the President to conduct national security operations without their knowledge or to “acquiesce blindly when the president affirmed a need for absolute secrecy.”²²

Congressional Oversight of the CIA

However, perhaps the most significant challenge to the CIA’s activities was the establishment of two commissions, the Rockefeller Commission and the Church Committee. The President’s Commission on CIA Activities Within the United States, or the Rockefeller Commission, was established by President Gerald Ford in 1974 and headed by Vice President Nelson Rockefeller to investigate the activities of the

¹⁶ Weiner, 328.

¹⁷ For declassified documents about the “family jewels” see the National Security Archive at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm>.

¹⁸ Hersh, article.

¹⁹ See “Foreign Assistance Act of 1974,” Pub.L. 93-559, signed into law on December 30, 1974.

²⁰ Ibid.

²¹ Pub.L. 93-559.

²² Athan Theoharis, ed., *Understanding Our Government: The Central Intelligence Agency, Security Under Scrutiny* (Greenwood Press, 2005), 177.

CIA.²³ In 1975, the Commission submitted a report to President Ford with information about CIA plots to assassinate Castro and Dominican Republic President Rafael Trujillo, as well as details from several other investigations, such as the assassination of President Kennedy and the CIA's domestic surveillance of U.S. citizens. The report also described deficiencies within the CIA's Office of the Inspector General. However, the report made few recommendations for amendments to the CIA's authority, for example, that the term "foreign" be added to the National Security Act to ensure that the CIA's scope only included foreign intelligence activities.²⁴ The commission findings and files were quickly utilized by the Church Committee.

Later that year, in April of 1975, the Senate determined that an external Congressional investigation into CIA activities was necessary. The "Select Committee to Study Governmental Operations with Respect to Intelligence Activities" was formed, chaired by Senator Frank Church (D-ID). The Church Committee's mandate was to "determine what secret governmental activities are necessary and how they best can be conducted under the rule of law."²⁵ In its report, the Church Committee recommended that the government of the United States should not utilize assassination and that a federal statute should make it a crime to conspire or participate in an assassination of a foreign official.²⁶ Several findings included

²³ For the full report and history of the Commission, see "The Assassination Archives and Research Center" web site at:

http://www.aarclibrary.org/publib/contents/church/contents_church_reports_rockcomm.htm and "History Matters" web site at: http://www.history-matters.com/archive/contents/church/contents_church_reports_rockcomm.htm.

²⁴ Appendix VI, "Proposed Amendments to the Statute," Report to the President by the Commission on CIA Activities within the United States, June 1975 from

http://www.aarclibrary.org/publib/church/rockcomm/html/Rockefeller_0152b.htm.

²⁵ Central Intelligence Agency web site, "A Look Back...the Church Committee Meets," <https://www.cia.gov/news-information/featured-story-archive/a-look-back-the-church-committee-meets.html>.

²⁶ Appendix A, "Alleged Assassination Plots Involving Foreign Leaders," November 20, 1975 from http://www.aarclibrary.org/publib/church/reports/ir/html/ChurchIR_0001a.htm.

detailed information about assassination plots, the opening of U.S. citizens' mail, and domestic surveillance by the CIA. Other unconstitutional activities conducted by the FBI and NSA were also included. Again, problems were found within the CIA IG's office. The report concluded that the IG was not conducting full investigations due to the CIA's withholding of information. Around the same time, former CIA agent Philip Agee wrote a major book about the CIA's dealings in Latin America. Agee is among the most well-known whistleblowers of the CIA for giving details about secret missions and undercover agents attempting to overthrow Latin American governments in the late 1960s. The publication of his book, "Inside the Company: CIA Diary," led to the annulment of his passport in 1979 and the CIA's view of him as a traitor.²⁷ However, Agee's information, together with the committees' investigations, led the Church Committee to recommend several statutory reforms including separating the DCI from the activities of the CIA and greater oversight by Congressional committees. Yet, the Church Committee's findings also maintained that intelligence was necessary to the federal government's abilities to implement foreign policy. Upon receiving the report in 1976, the Senate responded with several initiatives.

Statutory Changes to the CIA

In 1976, the Senate passed a resolution to form an Intelligence Oversight Committee. Senate Resolution 400 was approved on May 19, with the intention that: the newly formed Senate Select Committee on Intelligence would ensure that intelligence agencies were receiving funds appropriated by Congress specifically for that agency's activities; reports were submitted by the directors of the agency with the intention of making a non-classified version available to the public; and that directors

²⁷ Shane Scott, "Philip Agee, 72, Is Dead; Exposed Other C.I.A. Officers," *New York Times* (8 January 2008).

keep the committee “informed with respect to intelligence activities, including anticipated activities and those which constitute violations of constitutional rights or other law.”²⁸ A year later the House of Representatives formed a similar committee, the House Permanent Select Committee on Intelligence.²⁹

Congress also passed legislation aimed at government reform. In the next two years various statutes were enacted in response to the reports detailing the practices of gathering intelligence and the federal bureaucracy’s inability to protect employees’ rights.³⁰ The CSRA, Inspector General Act, and the Foreign Intelligence Surveillance Act are among the laws passed in the late 1970s. By 1980, the Intelligence Oversight Act aimed to curtail the intelligence agencies’ power even more. The Act required that the President report any activities of covert operations to the intelligence committees and granted the intelligence committees the right to request intelligence information.³¹ The following year, however, President Ronald Reagan attempted to restore some secrecy power back to the intelligence agencies. On December 4, 1981, Reagan signed Executive Order 12333, which restored intelligence agencies’ authority to conduct activities “as the President may direct from time to time.”³² For the CIA specifically, the order stated, the agency would “conduct special activities approved by the President.”³³ It would also conduct necessary intelligence activities in the United States, to be coordinated by the FBI. The sweeping powers Reagan

²⁸ Senate Resolution 400; May 19, 1976. For the full text, see: 94 S.Res. 400 CRS Digital Collection: <http://www.lexisnexis.com.proxy.library.cornell.edu/congcomp/getdoc?CRDC-ID=CRS-1976-FND-0010>.

²⁹ House Resolution 658; July 14, 1977. For information about its formation, see: <http://intelligence.house.gov/Faqs.aspx>.

³⁰ For more information see Chapter IV.

³¹ See “Intelligence Oversight Act of 1980,” 50 U.S.C. 413, added on October 14, 1980 to the National Security Act of 1947.

³² Executive Order 12333, “United States Intelligence Activities,” signed into law by Ronald Reagan on December 4, 1981 from John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=43324>.

³³ Ibid.

gave the intelligence agencies and the CIA offered once again the veil of secrecy for the agency to conduct activities that were otherwise illegal or unconstitutional under its original charter.

Problems Ensur

During that same year, in 1980, the CIA won a significant case in the Supreme Court after an ex-CIA agent wrote a book that had not been handed over to the agency for review prior to publication. The CIA requires all new employees to sign a secrecy agreement.³⁴ Under the agreement, the employee cannot publish or disclose any information related to the agency without prior agency approval. This was also true for any former employees. Frank Snepp's book, Decent Interval, revealed information about the CIA's involvement in South Vietnam; however, the CIA did not find any classified information in the book.³⁵ The agency took Snepp to court because he broke the contractual agreement he made with the agency prior to his employment. The Supreme Court affirmed and reversed in part the decision made by the United States Court of Appeals, Fourth Circuit. It held that Snepp broke a contractual agreement and thereby put the agency in danger.³⁶ The Court also stated that the violation did not depend on whether the book actually contained classified information, because Snepp should have given the book to the CIA prior to its publication to determine the information that could not be included. The Court granted the Government "relief in the form of a constructive trust over the profits derived by Snepp from the sale of the book."³⁷ Justices Stevens, Brennan, and Marshall dissented, arguing that such relief was not authorized by law. With the

³⁴ For information and an example of a CIA secrecy agreement see Joshua B. Bolten, "Enforcing the CIA's Secrecy Agreement Through Post publication Civil Action: *United States v. Snepp*," *Stanford Law Review* 32 no. 2 (January 1980), 410-411.

³⁵ *Snepp v. United States*, 444 U.S. 507, (1990) at Footnote 2.

³⁶ *Snepp v. United States*, 444 U.S. 507, (1990).

³⁷ *Snepp v. United States*, 444 U.S. 507, (1990) p. 517.

Snepp case and the Reagan Executive Order, the early 1980s reverted back to the era of favoring the rights of the agency over rights of the individual.

In the late 1980s, after the Iran-Contra Affair, the public and Congress grew increasingly suspicious of all CIA activities and intelligence reports.³⁸ Several miscalculations during Desert Storm in the Persian Gulf and mixed results in the Middle East left the CIA in disarray, even after several statutory attempts to fix it internally.³⁹ Congress and the presidents' distrust grew during this period and the CIA was kept largely out of foreign affairs.⁴⁰ However, following September 11, 2001, Congress sought to change the agency and national intelligence as a unit.

The 9-11 Commission's report included instances of lost information and the CIA's inability to convey important information to the appropriate people in the administration.⁴¹ The report also stated that the overwhelming responsibilities of coordinating CIA directives and general intelligence across all agencies left the DCI with limited power. The Commission recommended that the DCI position be split into two separate positions, as the DCI could not coordinate all of the U.S. intelligence agencies and run and manage the CIA. The Commission wrote in its final report: "The current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: (1) to oversee national intelligence centers on specific subjects of interest across the U.S. government and (2) to manage the national intelligence program and oversee agencies that contribute to it."⁴² In 2004, the Intelligence Reform and Terrorism

³⁸ For history of Iran-Contra Affair see Peter Kornbluh, *The Iran-Contra Scandal: The Declassified History* (New Press, 1993); Julie Wolf, "The Iran-Contra Affair," from <http://www.pbs.org/wgbh/amex/reagan/peopleevents/pande08.html>.

³⁹ Weiner, 426.

⁴⁰ *Ibid.*, 446-447.

⁴¹ The 9-11 Commissions Report Chapter 13, "How to Do It? A Different Way of Organizing the Government," from http://govinfo.library.unt.edu/911/report/911Report_Ch13.htm.

⁴² *Ibid.*

Prevention Act was signed into law by President Bush. The Act created a Director of National Intelligence as suggested by the Commission and changed the role of the DCI to a Director of Central Intelligence Agency (DCIA).⁴³

Porter J. Goss, a former House Permanent Standing Intelligence Committee member, was the last DCI and the first DCIA. He brought in several aides, who were considered highly political, to the CIA. Ironically, Goss was one of the authors of the Intelligence Authorization Act of 1999 which allows intelligence employees to take information of wrongdoing to select members of Congress.⁴⁴ Yet he politicized his brief term as DCIA by siding with the George W. Bush Administration's distaste for federal whistleblowers and more whistleblower protections.⁴⁵ After the restructuring the intelligence community reporting lines, several whistleblowers took their stories to the media due to several demotions and revoking of security clearances of internal whistleblowers. In 2005, Goss stated, "Those who choose to bypass the law and go straight to the press are not noble, honorable or patriotic, nor are they whistleblowers. Instead they are committing a criminal act that potentially places Americans lives at risk."⁴⁶

Despite the Administration's low tolerance for whistleblowers who talk to the media, the experiences of CIA whistleblowers demonstrate to the public the need for intelligence employees' protection from reprisal. In particular, the experiences of two former CIA employees explored in Chapter VI, illustrate the lack of whistleblowing protections in the intelligence community. The involvement of the media in whistleblower claims forces Congress to revisit whistleblower laws. It was only after September 11, 2001, however, that Congress' patience for reprisal wore thin and

⁴³ See "Intelligence Reform and Terrorism Prevention Act of 2004," Pub.L. 108-458, signed into law on December 15, 2004.

⁴⁴ Pub.L. 105-272, Title VII.

⁴⁵ Porter Goss, "Loose Lips Sink Spies," *New York Times* (12 February 2006).

⁴⁶ *Ibid.*

stronger measures were introduced to better protect intelligence community employees.

CHAPTER VI

WHISTLEBLOWING AND THE CIA

As outlined in Chapters II and III, the prescribed channels for whistleblowing in the intelligence community create a complex system for employees to navigate. The statutory procedures for blowing the whistle are complicated and difficult to manage. For CIA employees, specifically, the procedures may seem impossible to embark on; therefore, the employee's options are limited, such as providing information to the media or publishing books after they retire or leave the agency. Under current whistleblowing statutes, CIA employees have two statutorily defined venues for reporting information - the CIA Inspector General or Congress. Taking information to Congress, as discussed in Chapter IV, requires the employee to refrain from divulging classified information. In effect, this leaves the actual avenues for CIA whistleblowers as reporting information to the IG or the media.

Taking Claims to the IG

If a CIA employee observes any of the violations outlined in whistleblowing statutes, the employee can take the claim to the CIA Inspector General. Under current law, the CIA IG is responsible for receiving and investigating "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."¹ The IG must report this information to the Attorney General, but cannot release the identity of the complainant without the employee's prior consent.² Within 14 days the IG should investigate the claim and determine if the information is

¹ See "Intelligence Authorization Act of 1990," Pub.L. 101-193, Title VII, signed into law on December 11, 1989.

² Pub.L. 101-193, Title VIII, Sec. 17, (e).

credible; if so, that information must be submitted to the DCIA.³ When the DCIA receives the report, it must be sent to the Congressional intelligence committees, Senate Standing Committee on Intelligence (SSCI) and House Permanent Select Committee on Intelligence (HPSCI), within seven days, along with the director's comments.⁴ If the IG follows the appropriate timeline, he/she must notify the employee of any actions taken on the complaint no later than three days after the action is taken. If the IG does not submit the report to the DCIA within the 14 day period, the employee may send the complaint directly to the intelligence committees. However, before doing this the employee must send the DCIA, through the IG, a statement of the complaint and a notice of his/her intent to go to Congress directly. The complainant must then follow the DCIA's directions on how to go to Congress using the "appropriate security practices."⁵ It is unclear what happens if the DCIA does not respond to the employee's request to go to Congress. The Act does not address what happens to the complaint if the IG finds no truth to the complaint or if the DCIA fails to submit the claim with comments to Congress in seven days. The law also is state what other options the whistleblower has under the law; it only notes that an employee "*may* report such complaint or information to the Inspector General."⁶ It is difficult to establish whether or not an employee who ends up submitting information to Congress may receive any sort of reinstatement or protections for his/her job and salary. Congress cannot reinstate an employee or award back pay in the event retaliation took place. Such details, which are so clearly

³ Pub.L. 101-193, Title VIII.

⁴ Pub.L. 101-193, Title VIII, Sec. 17, (b).

⁵ "Intelligence Authorization Act of 1999," Pub.L. 105-272, Title VII, Sec. 702, signed into law on October 8, 1998.

⁶ *Ibid.*, emphasis added.

articulated in the Whistleblower Protection Act and No FEAR Act, are not easily understood for intelligence community employees.⁷

Internal Conflicts at the CIA

While the CIA IG has duties set forth by whistleblower protection laws, the CIA top officials recently made claims against the CIA's IG office. Directors and mid-level managers questioned the IG's investigative practices and asked for a formal internal investigation by the DCIA into the IG's office.⁸ Current CIA IG John Helgerson had conducted an investigation after September 11, 2001 into the CIA's performance prior to 9-11 and thereafter. In August 2007, Helgerson's official investigative report was released. The IG report stated that up to 60 agents knew of the threats posed by possible terrorists in the U.S. He recommended that then-DCIA George Tenet be held responsible, as well as those agents with information that could have prevented the attacks.⁹ Quick to defend the agency and the position of the DCIA was the current DCIA Michael V. Hayden. Hayden stated that many CIA agents criticized in the report argued that the IG's investigation was mishandled.¹⁰ However, the congressional intelligence committees and the 9-11 Commission praised the report and Helgerson's commitment to the IG's office mission.¹¹ After several complaints about the IG's practices, the time the investigations took, and the conclusions reached by the IG's report, DCIA Hayden instituted new measures to allow employees to complain about the IG's office. The announcement of the creation of an

⁷ See Chapter III for details about the WPA and No FEAR Act.

⁸ Mark Mazzetti, Shane Scott, "Watchdog of the C.I.A. Is Subject of C.I.A. Inquiry," *New York Times* (11 October 2007).

⁹ CIA Office of Inspector General, "OIG Report on CIA Accountability With Respect to the 9/11 Attacks," Executive Summary, Partially Declassified (June 2005): www.usatoday.com/news/pdf/2007%2008%2021%20cia%20ig%20report.pdf.

¹⁰ "Lawmakers Back CIA Inspector General," Associate Press, *USAToday* (12 October 2007).

¹¹ Mark Mazzetti, Shane Scott, "Lawmakers Raise Concerns Over Call for Investigation of C.I.A. Watchdog's Work," *New York Times* (13 October 2007).

ombudsman's office in the CIA was sent to CIA employees in February 2008.¹²

Hayden stated that the ombudsman would ensure fair internal agency investigations.

Also new to the IG's office would be a quality control officer and new recording equipment. CIA officials said that Helgeson was in favor of all the new measures set forth by the DCIA.

Ironically, in this case the IG turned into a whistleblower by doing his job. The DCIA however, was quick to criticize the IG's investigations despite the overwhelming evidence in the 9-11 Commission report that supported the IG report's findings. Despite the statutory independence of the IG office, the DCIA can quickly control the results of any investigations that may tarnish the CIA, past or present, because of his political affiliation with the President. Intelligence committee members disagreed with the investigation into the IG's office, but as Senator Ron Wyden (D-OR) stated to the *Washington Post*, "I'm all for the inspector general taking steps that help C.I.A. employees understand his processes, but that can be done without an approach that can threaten the inspector general's independence."¹³ Senate intelligence committee Republicans feel the same way. "The C.I.A. has a track record of resisting accountability," Christopher S. Bond (R-MO) committee's vice chairman, said in a statement to the *New York Times*. Bond said IG Helgeson had been doing "great work," and added, "I will be watching carefully to make sure that nothing is done to restrain or diminish that important office."¹⁴ Debates about the independence of the CIA IG continue both internally and in Congress.¹⁵

The Last Resort: The Media

¹² Mark Mazzetti, "C.I.A. Tells of Changes for Its Internal Inquiries," *New York Times* (2 February 2008).

¹³ Mazzetti (2 February 2008).

¹⁴ Mark Mazzetti, Scott Shane (13 October 2007).

¹⁵ See Chapter IV for current debates on bills in Congress.

Given the strict reporting procedures currently facing all CIA employees, it is more likely that an employee or former employee will go directly to the media. As discussed in Chapter V, for some whistleblowers, such as Agee and Marchetti, writing books was the only option for public disclosure. The media as an outlet for whistleblowing, however, does not protect an employee's job or reputation. Luckily, because reporters can often preserve the identity of their sources, the whistleblower may avoid being accused for not coming forward. The whistleblower, however, can remain in his/her current job and continue to pursue career goals. If the whistleblower goes directly to a media source, such as Felt, it may be decades before the whistleblower's identity is revealed.¹⁶ However, based on whistleblowers' experiences with the media demonstrate that they may be most concerned with the importance of disclosing the information. In a recent *Vanity Fair* article, Felt's son, Mark Felt Jr. described his father's contradictory feelings about going to the media: "Making the decision [to go to the press] would have been difficult, painful, and excruciating, and outside the bounds of his life's work. He would not have done it if he didn't feel it was the *only* way to get around the corruption in the White House and Justice Department. He was tortured inside, but never would show it."¹⁷

Two Whistleblowers' Experiences

Regardless of how whistleblowers come forward, intelligence community employees, and CIA employees specifically, have faced reprisals and loss of wages, pensions, and reputation. The experiences of Mary McCarthy and Richard Barlow illustrate the costs to whistleblowers' personal and professional lives, despite the importance of the information they reveal. McCarthy was fired from the CIA on April

¹⁶ See Chapter II for information about "Deep Throat."

¹⁷ John D. O'Connor, "The Deep Throat Revelation: 'I am the guy they call Deep Throat'" *Vanity Fair* (July 2005): <http://www.vanityfair.com/politics/features/2005/07/deepthroat200507>.

20, 2006, ten days before her retirement.¹⁸ Barlow was terminated in August 1989 for “performance deficiencies” from the Department of Defense for information he discovered and shared with Congress during his tenure at the CIA and DOD.¹⁹ Both cases illustrate the varying degrees of difficulties current and former CIA employees face when it comes to blowing the whistle.

McCarthy started her career in 1984 as an analyst in the CIA and then went on to work for the Clinton Administration as a special assistant and senior director of intelligence programs. She worked for a few weeks in the Bush administration, but returned to the CIA to work in the IG’s office. While McCarthy continues to deny she leaked any secret information to the media, several intelligence officials have identified her as the agent fired for leaking information to the press.²⁰

In 2005, *Washington Post* investigative reporter Dana Priest published a series of articles about the CIA’s secret prisons abroad and covert operations that involved renditions.²¹ The reporting earned Priest a 2006 Pulitzer Prize for Beat Reporting.²² Following the publications of these articles, then DCI Porter J. Goss learned of the leaks coming from within the agency and called for a full internal investigation of CIA employees with knowledge of such operations, subjecting them to polygraph tests.²³ CIA officials stated that an employee who had failed a polygraph had then confessed

¹⁸ R. Jeffrey Smith, Dafna Linzer, “CIA Office’s Job Made Any Leaks More Delicate,” *Washington Post* (23 April 2006).

¹⁹ For a full history on the Barlow case, see POGO’s web site: <http://www.pogo.org/p/government/rbarlow.html>.

²⁰ Smith, Linzer (23 April 2006).

²¹ Renditions are described as a major covert operation where the U.S. hands over arrested foreign individuals to foreign governments to hold as to avoid U.S. criminal proceedings. This form of covert operations keeps the U.S government free from any human rights responsibilities and allows the CIA full access to these individuals at the agreement of the holding government. The practice is condemned by many in Congress because these individuals are not offered a fair trial and the foreign government may not uphold the human rights agreements of the U.S. See: Laura Barnett, “Extraordinary Rendition: International Law and the Prohibition of Torture,” *Library of Parliament* (12 February 2008).

²² Pulitzer Prize web site: <http://www.pulitzer.org/citation/2006,Beat+Reporting>.

²³ Mark Mazzetti, Shane Scott, “C.I.A. Director Has Made Plugging the Leaks a Top Priority,” *New York Times* (23 April 2006).

to leaking information to the *Post*.²⁴ CIA spokesman Paul Gimigliano told *The New York Times*: “A C.I.A. officer has been fired for unauthorized contact with the media and for the unauthorized disclosure of classified information. This is a violation of the secrecy agreement that is the condition of employment with C.I.A. The officer has acknowledged the contact and the disclosures.”²⁵ However because the Privacy Act protected the employee’s identity, Gimigliano did not name the employee. Media outlets claimed that McCarthy was the fired employee after receiving tips from internal CIA officials.²⁶ Because the polygraph cannot be used as evidence in court proceedings, McCarthy was not prosecuted and continued to receive her pension. However, her lawyer continues to deny that McCarthy was the source in the *Post*’s series of articles on secret prisons in 2005. It is interesting to note that the articles contain explicit references to “CIA officials” or “former CIA official” and yet, no other CIA employees have been dismissed. Debates continue over the discharge of McCarthy.²⁷ Some say that she was wrong to divulge classified information, which was in clear violation of her agreement not to give that information to non-approved outsiders without prior approval. Others claim that the dismissal was justified but that it was necessary to reveal information about the CIA’s secret “black site” prisons and the detention of individuals without any recourse for a fair trial. Given her tenure at the CIA and her involvement in high security programs, the media was perhaps her only alternative. In an interview with MSNBC news analyst Keith Olbermann, Larry Johnson, a former State Department Counterterrorism expert and CIA employee stated: “...the last thing we need to have is our intelligence agency politicized. And

²⁴ Ibid.

²⁵ David Johnston, Scott Shane, “C.I.A. Fires Senior Officer Over Leaks,” *New York Times* (22 April 2006).

²⁶ For the full McCarthy story see: R. Jeffrey Smith, Dafna Linzer, “Dismissed CIA Officer Denies Leak Role,” *Washington Post* (25 April 2006).

²⁷ For debates about McCarthy, see: R. Jeffrey Smith, Dafna Linzer, “CIA Officer’s Job Made Any More Leaks More Delicate,” *Washington Post* (23 April 2006).

yet what's going on here is, anyone that speaks out critical of the Bush White House, when you have Paul Pillar, for example, who came out and said the White House was wrong in trying to link Saddam Hussein to Osama bin Laden, what did the White House do? They put the word out through their operatives; they tried to smear Paul Pillar. Mary McCarthy, I think, is the latest victim of this. And they tried to make an example of her.”²⁸

Many former intelligence community employees agree that the issues brought forth by McCarthy should have been publicly disclosed. Johnson continued on the issue of the classified information in the *Post*: “In fact, that [information] came from multiple sources within the intelligence community who were alarmed that the United States was starting to engage in the very practices we used to condemn the Soviets for.”²⁹ By using the media to disclose wrongdoing as a confidential source, McCarthy was able to remain in her CIA position a year after her contacts with the *Post*.

Barlow began his career in 1985 as a CIA analyst of nuclear weapons in developing countries. In 1988 he received an Exceptional Accomplishment Award from the CIA.³⁰ During his tenure at the CIA, Barlow analyzed information about Pakistan's nuclear capabilities. He was surprised to learn that the CIA and the State Department had been lying to Congress about Pakistan's nuclear capabilities because the CIA wanted to continue to support economic aid to recruit and train Pakistani military to fight for the purpose of driving out the Soviet Union troops from Afghanistan.³¹ According to the Pressler Amendment the President must certify each

²⁸ Brad Wilmoth, “Olbermann Attacks Bush Admin ‘McCarthyism’ Against ‘Scapegoat’ Mary McCarthy,” *News Busters* web site (26 April 2006): <http://newsbusters.org/node/5082>.

²⁹ *Ibid.*

³⁰ For information about Richard Barlow and his biography, see the Project on Government Oversight web site: www.pogo.org/p/government/rbarlow.html.

³¹ Lyndsey Layton, “Whistle-Blower’s Fight for Pension Drags On,” *Washington Post* (7 July 2007).

year that Pakistan does not have nuclear weapons.³² Without this presidential confirmation U.S. financial aid would not be given to Pakistan. During the Reagan Administration, the misrepresented confirmations were seen as little more than a payoff to the Pakistani leadership for its support in defeating the Soviet Union in Afghanistan. Barlow had discovered this information during his tenure at the CIA but resigned in 1987 after CIA officials tried to remove him from working on nuclear intelligence.³³ He then joined the Department of Defense as a Foreign Affairs Specialist in 1989. He sent a report to then-Defense Secretary Richard Cheney about Pakistan's development of nuclear weapons and the sale of nuclear technology to other countries that the U.S. deemed as terrorist. Barlow's report included a statement of violations of laws that keep the U.S. government from giving aid to countries who support terrorism.³⁴ Cheney dismissed the report and Barlow received a termination notice in August 1989.

According to the GAO investigation in Barlow's dismissal, "The investigative files included a memorandum written by the supervisor that explained the basis for the employee's proposed termination. In addition to discussing the performance deficiencies, the memorandum indicated that the employee's supervisor perceived that the employee might make an unauthorized disclosure of national security information to congressional staff."³⁵ Barlow's security clearance was revoked and he was barred from any work on nuclear intelligence. He resigned his position and was temporarily

³² "International Security and Development Cooperation Act of 1985," Pub.L. 99-83, signed into law on August 8, 1985.

³³ Jeff Gerth, "Criticism of C.I.A. Analyst's Dismissal Bolsters a Fight for Whistle-Blower Protections," *New York Times* (20 July 1997).

³⁴ Adrian Levy, Cathy Scott-Clart, "The Man Who Knew Too Much," *The Guardian* (13 October 2007).

³⁵ Theodore C. Barreaux, "Inspectors General: Joint Investigation of Personnel Actions Regarding a Former Defense Employee," GAO Report (10 July 1997).

reassigned to another position in the DOD. Barlow formally resigned from DOD in 1992 after his security clearance was not reissued for his new position.

In 1993, Barlow's information about Pakistan's nuclear weapons program was revealed to the nation by reporter Seymour Hersh in the *New Yorker*. After this article was published, Senators called for an investigation into Barlow's claims of reprisal. This investigation was carried out by the Inspector Generals of the State Department, CIA and DOD, with the GAO sending the findings directly to Congress. They concluded that reprisal had, indeed, taken place. Barlow filed a lawsuit against the DOD for a wrongful dismissal and Congress supported his case.³⁶ However, Congress was unable to pass any amendments to provide Barlow with monetary relief. At the recommendation of Congress as an avenue to seek monetary damages, Barlow and his lawyer, Paul C. Warnke a former Assistant Secretary of Defense under the Carter Administration, went to the Federal Claims Court.³⁷ Once in court, the Executive Branch used its State Secrets Privilege to keep important evidence from being heard. As of February 2008, Barlow has yet to receive his pension or any back pay through Congress or Federal Claims Court.³⁸

Barlow's case is unique as a former CIA employee who did not actually blow the whistle, but rather submitted a report to his superiors of information he discovered as an analyst. Yet his superiors used the "threat of whistleblowing" as a reason to terminate his security clearance and force him out of his position. Similar to opinions offered by government employees after the McCarthy event, former intelligence employees and politicians support Barlow's decision to speak the truth.³⁹ The

³⁶ Lyndsey Layton, "Whistle-Blower's Fight for Pension Drags On," *Washington Post* (7 July 2007).

³⁷ *Ibid.*

³⁸ For complete timeline of the Richard Barlow case, see HistoryCommons.org web site at: <http://www.historycommons.org/context.jsp?item=a81barlowstate&scale=3#a81barlowstate>.

³⁹ For more information about Barlow's support see: www.pogo.org; www.whistleblower.org; and www.nswbc.org.

information discovered and reported by Barlow was true and yet, those in the DOD at the time escaped unscathed and are now in the highest positions within the current administration.

These two cases offer a unique insight into the lives of employees in the intelligence community who experienced reprisal due to their agency's broad definition of whistleblowing and fear of public disclosure. The experiences of McCarthy and Barlow also provide an insight into legislative reform needed to protect whistleblowers more effectively.

CHAPTER VII

THE FUTURE OF WHISTLEBLOWER PROTECTIONS

While each whistleblower bill currently pending in Congress, H.R. 985 and S. 274, offers great improvements, a unified version of the bills would better protect federal intelligence employees and close many of the loopholes in previous laws. Currently, intelligence community employees have few options under the law to blow the whistle. These options do not protect the employee from reprisal in every case. Intelligence employees therefore must speak to the media to remain anonymous and protect their careers. The media can also produce quick results for the whistleblowers, by getting the information about wrongdoing out to the public. Changes within the bureaucracy or Congressional hearings can occur quickly when the newspapers or television media bring forward information about unlawful activity in the federal government. For that reason, Congress should pass a bill that combines the best aspects of the two pending bills, along with a few extra additions. In doing so, Congress would offer more adequate protections and coverage for intelligence whistleblowers.

Protecting Whistleblowers and National Security

Intelligence community employees receive the narrowest whistleblowing protections, as illustrated by the experiences of CIA employees. While the number of known whistleblowers from the CIA is limited to those who have made headlines, those who are publicly known have faced great adversity. Most of these individuals were unable to remain CIA employees and all are viewed with mixed emotions by members of Congress, other politicians, and their colleagues in the intelligence community. They are, however, supported by the public.¹ The information they

¹ For an example of the public's support of whistleblowing, see Democracy Corps survey conducted by Greenburg, Quinlan, Rosner Research of 1014 likely voters, February 14-19, 2007 from <http://www.democracycorps.com/>.

provided to the media, Congress, and their superiors bring the need for government transparency to the forefront in American politics. Scholars debate both the legality of whistleblowers' claims under current federal law and the motivations of whistleblowers.² Within the same analysis, scholars argue that the government fails to capitalize on the information whistleblowers provide to bring necessary changes to the federal government and executive branch transparency. The government also fails to provide the public with information about the changes agencies make when whistleblowers come forward. The knowledge of government wrongdoing makes the public question the leadership of the country and process of disseminating information about government activities.

The government's assertion of interests in national security and state secrets as a means to keep information from the public creates major obstacles for potential intelligence whistleblowers. As described in Chapter III, Congress has limited capabilities to approve or disapprove the invocation of state secrets privilege, which leaves the executive branch with the ability to keep information from the public. National security or the invoking of state secret privileges offers the executive branch and its agencies a virtually limitless means of restraining the dissemination of information and of controlling the extent of information released to the public. In the national climate after September 11, 2001, the use of national security as a mechanism to control the media and public opinion has greatly expanded, similar to that utilized by various administrations during the Cold War. Further, the government has been able to use public fear as a mechanism to enhance the assertion of national security as a basis to maintain secrecy. This tactic, which is used to increase public insecurity about the proliferation of terrorism or religious extremism, is similar to that used

² For some arguments about whistleblower claims, see Johnson, Kohn, Ellison, and Mieth. For a broad overview of whistleblowing scholarship, see Chapter II.

against communism. Writing during the Cold War, national security scholar Arthur Macy Cox states, “Fear, much of it whipped up by government national security managers, has been the central reason for public acquiescence in giving priority to security at the expense of freedom.”³ This method holds true in recent U.S. history as well, and fear, combined with genuine concern of protecting national security interests, increases the chances that intelligence whistleblowers will experience reprisal and receive unfair trials on their reprisal claims before the MSPB or Federal Circuit Court. The heightened sense of the need to protect the nation at all costs means that whistleblowers may be punished for compromising or jeopardizing national security, especially if they are employed within those agencies charged with finding out information about national security threats, such as the CIA.

Whistleblowers’ Options

The press is the only currently available option for national security or intelligence community employees who seek to protect their identity and careers while also blowing the whistle on unethical practices. After Ellsberg’s release of the Pentagon Papers to the press, two important cases were decided in the Supreme Court about press access to and printing of classified information, *New York Times Co. v. United States* and *United States v. Washington Post Co., et. al.*⁴ In these consolidated cases, the freedom of the press was questioned when President Nixon attempted to suspend the printing of the Pentagon Papers in the *New York Times* and *Washington Post*. The Court found in favor of the newspapers’ freedom of the press to print information discovered during investigative reporting. Justice Hugo Black, writing for the majority, outlined these freedoms and rights:

³ Arthur Macy Cox, *The Myths of National Security* (Beacon: Boston, 1975), 2.

⁴ *New York Times Co. v. United States*, 403 U.S. 713, (1971); *United States v. Washington Post Co.*, 403 U.S. 943, (1971).

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.⁵

While the press enjoys such rights, it also has the power to control and disseminate information to the public. Whistleblowers, who may seem powerful by holding onto such information, are actually powerless and must be willing to continue working silently, offer information anonymously, or offer information to the press as close to their retirement as possible. McCarthy, who had information about secret CIA prisons abroad and disclosed the information to the *Washington Post*, chose to do the latter to protect her reputation and finances.⁶

While it is not clear that going to the press offers immediate results for the whistleblower seeking to change his or her agency, the media does contribute to the national debate about the importance of whistleblowing. By highlighting whistleblower stories and covering their struggles after blowing the whistle, the press publicizes the need for better whistleblower protections. It is beyond the scope of this thesis to analyze the media's involvement in policy-making, but it is worth noting the media's power to disseminate information which may lead to social and governmental

⁵ Ibid.

⁶ For more information about McCarthy's case, see Chapter VI.

change, and ultimately, government transparency and the limiting of governmental power. "...The debate over stopping government leakers is not about politics; it is about government power. Whistle-blowers and the media outlets they ultimately talk to serve a vital role - one that was imagined by the founders of this country. The press was not meant only to be a megaphone for those in power - a means to keep people informed of what they were doing - it was to be a monitor of power."⁷

The media's function as an outlet for whistleblowers may suffice temporarily while reforms for intelligence whistleblower protection laws continue in Congress. However, as in the case of Barlow, who wrote in his report of the secrets within the DOD, the possibility of blowing the whistle is relevant to all intelligence employees in their everyday work-lives. By simply doing his job, Barlow was considered a threat to the agencies he worked for.⁸ He utilized the internal processes available to him by speaking with his superiors and did not threaten to go to Congress with the information he discovered. Speaking or writing the truth within the scope of intelligence agency employment, therefore, can be construed as whistleblowing by co-workers or superiors, particularly if the information threatens the jobs of other individuals in the agency. It is difficult to make generalizations the extent to which senior administration officials will lie to protect the interests of the President or the agency; however in Barlow's case it was apparent that then-Secretary of Defense Richard Cheney and other senior officials at the DOD were willing to dismiss the truth and invent information to protect the administration's perceived interests. Barlow's case may exemplify the public servant who sees his role within the government to research and report his findings honestly. Yet depending on the climate of the nation, honesty may not always be the best policy.

⁷ Dante Chinni, "National Security vs. Freedom of the Press," *Christian Science Monitor* (23 May 2006), from www.csmonitor.com (accessed June 28, 2008).

⁸ For detailed information about Barlow's case, see Chapter VI.

Intelligence Employees and their Rights

Whistleblowing laws pertaining to federal employees in the intelligence community are riddled with loopholes. The protections offered to these employees are limited and the avenues for them to take after witnessing or discovering illegal activities, gross mismanagement of funds, abuse of authority, or actions that may affect the public's health or safety are wrapped in bureaucratic procedures that discourage employees from blowing the whistle. Congress has wavered in its support for whistleblowers in the intelligence community, with the exception of a few politicians who have devoted themselves to protecting these employees. Politics and party affiliation also create barriers for whistleblowers, as evidenced by President Reagan's veto of stronger whistleblower protections. Moreover the laws that are in place for whistleblowers often do not protect them from reprisal. It should not be surprising that in 2005, the Congressional Research Service found that intelligence community employees were more likely to go to Congress than utilize internal reporting processes because whistleblowers were not adequately protected.⁹ Going directly to Congress is, according to employees, the most efficient way to share information, as the employees view their agencies' preferred procedures as ineffective and time consuming. Given the overwhelming data on employees' dissatisfaction with whistleblower protections, it is clear that both legislative and cultural changes are needed in the government.

The Future of Whistleblowing Protections: Recommendation for a New Bill

As described in Chapter IV, two bills currently pending in Congress, H.R. 985 and S. 274, contain elements to strengthen whistleblower protections across all federal agencies. Each bill would amend and add new protections to the WPA as amended.¹⁰

⁹ Fisher, 13-14.

¹⁰ 5 U.S.C. 2303, as of January 2006 from: <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=87725742051+0+0+0&WAIAction=retrieve>.

Although each bill has merits, neither is adequate on its own to solve the problem of weak protections in current laws under Title 5. A better course for Congress to take would be to enact a comprehensive bill that combines elements of H.R. 985 and S. 274, as well as a few additional amendments to provide adequate protections for intelligence community whistleblowers. The important elements from each pending bill are outlined in Table 1.¹¹ This table includes the portion of each bill that would strengthen whistleblower protections for federal employees and, specifically, intelligence employees.

Who Is Covered

A combined bill should extend protections to applicants, current employees, and former employees of all agencies previously omitted from whistleblower protection laws, such as the FBI, CIA and NSA. Federally employed scientists, as well as government contractors, should also be protected within the law. This will ensure that individuals, such as McCarthy, are able to enjoy their pension and contribute to government transparency after leaving an agency. The language used in the House bill to protect national security employees is similar to the Intelligence Community Whistleblower Protection Act of 1999, and therefore, it is not necessary to separate “National Security Whistleblowers” within the new proposal. It will be clear that intelligence employees, current, former, and future whistleblowers, are protected when going to their superiors, the OIG, and select members of Congress, as outlined in previous legislation. Amending this section of Title 5 to include employees of previously omitted agencies, the current procedures for whom to share information with will still be in effect.

¹¹ For a discussion the legislative language and impact of each bill see: Stephen M. Kohn, “S. 274 and H.R. 985 Comparison and Recommendations,” National Whistleblower Center (24 April 2007).

Table 1: Comparison of Pending Whistleblowing Legislation

Senate Bill 274

Protects disclosures made during formal or informal transmissions

Adds the suspension of revocation of security clearances to a prohibited personnel action

Allows MSPB or Court to issue declaratory or appropriate relief if security clearance revocation or suspension is unjustified, but cannot reinstate clearance

Allows OSC to appear as amicus curiae on behalf of employee

House of Representatives 985

Protects disclosures made as part of an agency or MSPB investigation or an employee's refusal to violate a Law

Protects "applicants" for federal employment

Under "clear and convincing evidence" the definition states "evidence indicating that the matter to be proved is highly probable or reasonably certain"

Provides a new section to protect the rights of national security whistleblowers, in addition all rights already protected by previous legislation

Includes government contractors and scientists as protected employees

Allows employees to take a judgment to the Court of Appeals of the Federal Circuit within 90 days following the order

Procedural Changes

As described in the Senate bill, any communications, documents, transmissions via email, or written correspondence should be protected means to disclose information that the employee or applicant reasonably believes violates the law.¹² These additions of allowing various transmissions for applicants or employees to disclose information will encourage individuals to come forward and share information with the appropriate people in any way they feel comfortable. Also, utilizing the House bill's protection of disclosures made during an investigation and the protection guidelines for employees or applicants who refuse to violate the law will safeguard those participating in an internal investigation.¹³ Employees will be more likely to speak up if they know that their disclosure will not lead to reprisal.

Yet another addition taken from the Senate bill is adding the suspension of security clearance as prohibited personnel practices.¹⁴ The law could not provide the remedy of reinstating or approving security clearances, as only the President or their designee may do so. The law could however, allow the MSPB to order an employee's job reinstatement and order back pay, which would to offer the employee some remedy even if the agency cannot reinstate the employee's security clearance. Another change is that the nondisclosure form would contain a whistleblowing provision to inform employees that in signing the form, they may not divulge classified information of wrongdoing to anyone but Congress, the IG, and their superiors. While it is likely that agencies will continue to require employees to sign secrecy statements with regard to the press and other non-governmental entities, this change would allow employees to seek assistance from Congress or their employee relations officers without fear of violating such contracts.

¹² S. 274, Sec. I

¹³ H.R. 985, Sec. 5.

¹⁴ S. 274, Sec. 1.

Another procedural change offered in H.R. 985 would alter the processing of whistleblower claims. Upon the review of the complaint, the IG or the agency head will still have 180 days to determine if the complaint has merit and issue a corrective action. If no progress is made on the complaint within 180 days or an order denying relief is issued, the employee may take the case to a Federal Circuit Court within the 90 days that follow the period after the order is given.¹⁵ During a Federal Court proceeding, the federal government may still be able to invoke state privilege, but it would have to submit to select member of Congress a detailed report of the case and its reasons for invoking state privileges, and Congress may require the agency to work with the employee to settle out of court:

In any case in which an Executive agency asserts the privilege commonly referred to as the ‘state secrets privilege’, whether or not an Inspector General has conducted an investigation under subsection (b), the head of that agency shall, at the same time it asserts the privilege, issue a report to authorized Members of Congress, accompanied by a classified annex if necessary, describing the reasons for the assertion, explaining why the court hearing the matter does not have the ability to maintain the protection of classified information related to the assertion, detailing the steps the agency has taken to arrive at a mutually agreeable settlement with the employee, former employee, or applicant for employment, setting forth the date on which the classified information at issue will be declassified, and providing all relevant information about the underlying substantive matter.¹⁶

Requiring such a report from the agency is a major addition to the previous intelligence community whistleblower protection acts and this inclusion in a new bill will add Congress as a third party to review the classified information in the claim. The bill makes it clear that the invoking of state secrets “shall not be grounds for a

¹⁵ H.R. 985, Sec. 2303a(c)(2)(B)(3).

¹⁶ H.R. 985, Sec. 2303a.

dismissal of a case.”¹⁷ Therefore, an employee is guaranteed that those authorized members of Congress will also view the claim on its merits. The members of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, who already review various issues of national security, would be charged with another duty in line with their existing function.¹⁸ Allowing Congress access to such information would allow a true balance and equality among the branches of government and require accountability at all levels of government.

Yet another procedural change is from the House bill. Federal employees’ complaints may still be deemed insufficient by the IG or agency, and the employee may seek action from the MSPB or Federal Circuit Court. A new recourse is to allow employees to take the final judgment of the appropriate United States district court to the Court of Appeals for the Federal Circuit.¹⁹ This addition offers employees another step to prove their claim. While this is beneficial for employees, it will also calm the worry that a new bill will give rise to frivolous claims, as few individuals would be willing to spend the time and money to continue the case without sufficient evidence.

A new law, using a combination of new procedures and language from current pending bills, will fully protect employees and the information they provide. As Thomas Devine, Executive Director of the Government Accountability Project, states, “Genuine rights are long overdue for those who champion accountability within the federal bureaucracy.”²⁰ A newly amended Whistleblower Protection Act will protect those who protect the country.

Next Steps

¹⁷ Ibid.

¹⁸ David Everett Colton, “Speaking Truth to Power: Intelligence Oversight in an Imperfect World,” *University of Pennsylvania Law Review* 137, no. 571 (1988), 584.

¹⁹ H.R. 985, Sec. 9.

²⁰ Peter Katel, “Protecting Whistleblowers,” *Congressional Quarterly Researcher* 16 no. 12 (31 March 2006), 281.

The disclosure process under current federal whistleblowing laws is insufficient to achieve greater government transparency. These laws do not adequately protect intelligence community whistleblowers. The government's ability to use national security as a guise for secrecy is a major hindrance to the effectiveness of the laws. Current laws also fail to utilize the information provided by whistleblowers to hold agencies, officials, and politicians accountable for mismanagement, fraud, and abuse. The current option of blowing the whistle may engage the employee in the legal system, albeit through flawed protections, but it does not focus on the information provided by the employee or the need for greater government transparency. Thus, Congress should conduct further hearings to evaluate what specific language could be added to the pending legislation that would enhance the use of whistleblowers' information while protecting their rights.

Within the intelligence community, a culture of honesty and transparency is far from the norm in several agencies, and for whistleblowers in these agencies, the risk to their personal and professional lives may keep them silent. As in the case of the CIA, information that was revealed several decades later could have changed the course of U.S. history had whistleblower laws offered employees protection from reprisal. New protections for whistleblowers at all levels of government can save millions of federal dollars, protect lives, and lead to a more efficient government. New language and procedures are needed and well overdue to accomplish these goals. With such changes, greater government transparency can be achieved and employees will be able to do their jobs fully and honestly without fear of reprisal.

BIBLIOGRAPHY

Books

Cox, Arthur Macy. *The Myths of National Security: The Peril of Secret Government*. Boston: Beacon Press, 1975.

Ellison, Frederick, John Keenan, Paula Lockhart, Jane van Schaick. *Whistleblowing: Managing Dissent in the Workplace*. New York: Praeger, 1985.

Ellison, Frederick, John Keenan, Paula Lockhart, Jane van Schaick. *Whistleblowing Research: Methodological and Moral Issues*. New York: Praeger, 1985.

Fain, Tyrus G., ed. *The Intelligence Community: History, Organization, and Issues*. New York: R.R. Bowker, 1977.

Glazer, Myron Peretz and Penina Migdal Glazer. *The Whistleblowers: Exposing Corruption in Government and Industry*. New York: Basic Books, Inc., 1989.

Jeffreys-Jones, Rhodri. *The CIA and American Democracy, 3rd Ed.* New Haven: Yale, 1989.

Johnson, Roberta Ann. *Whistleblowing: When It Works and Why*. Boulder: Lynne Rienner, 2003.

Kessler, Ronald. *The CIA at War: Inside the Secret Campaign Against Terror*. New York: St. Martin's Griffin, 2003.

Kitts, Kenneth. *Presidential Commissions and National Security*. Boulder: Lynne Rienner, 2006.

Kohn, Stephen M., Michael D. Kohn. *The Labor Lawyer's Guide to the Rights and Responsibilities of Employee Whistleblowers*. Westport: Greenwood, 1988.

Kohn, Stephen M. *Concepts and Procedures in Whistleblowing*. Westport: Quorum Books, 2001.

Kornbluh, Richard, ed. *The Iran-Contra Scandal: The Declassified History*. New York: New Press, 1999.

Liebovich, Louis. *Richard Nixon, Watergate, and the Press*. Westport: Praeger, 2003.

Marchetti, Victor. *The Rope Dancer*. New York: Grosset & Dunlap, 1971.

Miethe, Terance D. *Whistleblowing at Work*. Boulder: Westview, 1999.

- Powers, Tyrone. *Eyes to My Soul: The Rise or Decline of a Black F.B.I. Agent*. Dover: Majority Press, 1996.
- Sussman, Barry. *The Great Coverup: Nixon and the Scandal of Watergate*. New York: Crowell, 1972.
- Theoharis, Athan, ed. *Understanding our Government: The Central Intelligence Agency, Security Under Scrutiny*. Westport: Greenwood Press, 2006.
- Weiner, Tim. *Legacy of Ashes: The History of the CIA*. New York: Doubleday, 2007.
- Westman, Daniel P. *Whistleblowing: The Law of Retaliatory Discharge*. Washington: BNA, 1991.

Reports and Articles

- Alford, Fred C. "Whistle-blower Narratives: The Experience of Choiceless Choice." *Social Research* 74, no. 1, (2007): 223-251.
- Barreaux, Theodore C. "Inspectors General: Joint Investigation of Personnel Actions Regarding a Former Defense Employee," *GAO Report* (10 July 1997).
- Barnett, Laura. "Extraordinary Rendition: International Law and the Prohibition of Torture." *Library of Parliament* (12 February 2008).
- Bolton, Joshua B. "Enforcing the CIA Secrecy Agreement Through Post Publication Civil Action: *United States v. Snepp*." *Stanford Law Review* 32, no. 2, (January 1980).
- Borak, Sarah Wood. "The Legacy of Deep Throat: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002." *University of Miami Law Review* 59, (2004).
- Brewer, Gene A., Sally Coleman Selden. "Whistleblowers in the Federal Civil Service: New Evidence of the Public Service Ethic." *Journal of Public Administration Research and Theory* 8, no. 3, (July 1998): 413-439.
- Chinni, Dante. "National Security vs. Freedom of the Press." *Christian Science Monitor* (23 May 2006), from www.csmonitor.com. (Accessed 28 June 2008).
- Colton, David Everett. "Speaking Truth to Power: Intelligence Oversight in an Imperfect World." *University of Pennsylvania Law Review* 137, no. 571, (1988): 571-613.

- Dettmer, Jamie, Ted Hayes. "Whistle-blowers Need More Help." *Insight on the News*. 17, no. 16, (30 April 2001).
- Fisher, Louis. "National Security Whistleblowers." *Congressional Research Service Report* (30 December 2005).
- Flanagan, Stephen J. "Managing the Intelligence Community." *International Security* 10, no. 1, (Summer 1985): 58-95.
- Johnson, Loch. "The U.S. Congress and the C.I.A.: Monitoring the Dark Side of Government." *Legislative Studies Quarterly* 4, (November 1980): 477-499.
- Johnson, Roberta Ann, Michael E. Kraft. "Bureaucratic Whistleblowing and Policy Change." *The Western Political Quarterly* 43, no. 4, (December 1990): 849-874.
- Kaiser, Frederick M. "Statutory Offices of Inspector General: Establishment and Evolution." *Congressional Research Service Report for Congress* 5, (March 2003).
- Kaplan, Elaine. "A Report to Congress from the Office of Special Counsel FY 2000." Office of Special Counsel. From www.osc.gov.
- Katel, Peter. "Protecting Whistleblowers." *Congressional Quarterly Researchers Plus Archive* 16, no. 12, (31 March 2006).
- Kellough, Edward J. "Affirmative Action in Government Employment." *Annals of the American Academy of Political and Social Science* 523, (September 1992): 117-130.
- Kohn, Stephen M. "S. 274 and H.R. 985 Comparison and Recommendations." *National Whistleblower Center* (24 April 2007).
- Leperi, Karin, Marsha Coleman. "Viewpoint Paralyzed with Fear." Governmentexecutive.com (15 August 2002).
- Levy, Adrian, Cathy Scott-Clart. "The Man Who Knew Too Much." *The Guardian* (13 April 2007).
- Lindquist, Stefanie. "Developments in Federal Whistleblower Protection Laws." *Review of Public Personnel Administration*, 23, no. 1, (March 2003): 78-82.
- Masker, John Scott. "Teaching the Iran-Contra Affair." *PS: Political Science and Politics* 29, no. 4 (December 1996).
- Miceli, Marcia P., Janet P. Near, Charles R. Schwenk. "Who Blows the Whistle and

- Why?" *Industrial and Labor Relations Review* 45, no. 1, (October 1991): 113-130.
- Mihm, Christopher J. "The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing." *Government Accountability Office Testimony* (9 May 2001).
- Newcomb, Thomas. "In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998." *Administrative Law Review* 53, no. 1235, (2001).
- O'Connor, John. "The Deep Throat Revelation: 'I am the guy they call Deep Throat.'" *Vanity Fair* (July 2005) from:
<http://www.vanityfair.com/politics/features/2005/07/deepthroat200507>.
- Rocha, Ester and Brian H Kleiner. "To Blow or Not To Blow the Whistle? That is the Question." *Management Research News* 28, no. 11/12, (2005).
- Schroeder, Christopher. "Memorandum for the General Counsel of the CIA." (26 November 1996) from <http://www.usdoj.gov/olc/nuccio.op.htm>.
- Snider, L. Britt. "Creating a Statutory Inspector General at the CIA." Unclassified Document, Central Intelligence Agency web site:
<https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/docs/v44i5a02p.htm>.
- Whitaker, L. Paige, Michael Schmeling. "Whistleblower Protections for Federal Employees." *Congressional Research Service Report* (18 May 1998).
- Whitaker, Paige L. "The Whistleblower Protection Act: An Overview." *Congressional Research Service Report for Congress* (12 March 2007).
- Wilmouth, Brad. "Olbermann Attacks Bush Admin 'McCarthyism' Against 'Scapegoat' Mary McCarthy." *News Busters* web site (26 April 2006) from <http://newsbusters.org/node/5082>.
- Yeager, Frank A. "Assessing the Civil Service Reform Act's Impact on Senior Manager Work Priorities." *Public Administration Review* 47 no. 5, (Sep. - Oct., 1987): 417-424.
- "Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch." (Submitted on March 3, 2005) by Debra S. Katz and Rashida Adams, Bernabei and Katz, PLLC: Counsel for Anonymous Career Employee of the U.S. Office of Special Counsel; the Government Accountability Project; The Human Rights Campaign; Public Employees for Environmental Responsibility; and the Project on Government Oversight.

- “Fired CIA Official to Receive Career Medal.” *National Catholic Reporter* (24 March 2000).
- “Homeland and National Security Whistleblower Protections: The Unfinished Agenda.” *Project on Government Oversight* (28 April 2005).
- “House Passes Whistleblower Protection Bill.” *Federal EEO Advisor* 10, no. 3, (1 April 2007).
- “Lawmakers Back CIA Inspector General.” Associated Press, *USAToday* (12 October 2007).
- “No FEAR Proponents Say Law Has Not Had Intended Effect.” *Federal Human Resources Week* 13, no. 36, (8 January 2007).
- “No FEAR Proponents Plan to Petition Congress for Stronger Legislation.” *Federal EEO Advisor* 9, no. 12, (1 January 2007).
- “OIG Report on CIA Accountability with Respect to the 9/11 Attacks.” CIA Office of the Inspector General, Executive Summary, Partially Declassified (June 2005) at: www.usatoday.com/news/pdf/2007%2008%2021%20cia%20ig%20report.pdf.
- Testimony of Stephen M. Kohn, Attorney for Frederic Whitehurst, 1997 *Congressional Hearing* (accessed on 16 July 2008). Global Security.org: http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm.
- “The Whistleblowers: Person of the Year.” *Time* (30 December 2002).
- “U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress.” *Government Accountability Office* (March 2004).
- “Whistleblowers protection, 1989-1990 legislative chronology.” *Congress and the Nation, 1989-1992*. Washington: CQ Press, 1993. (accessed 9 August 2007). From *CQ Electronic Library, CQ Congress Collection*, <http://library.cqpress.com/congress/catn89-0000013681>. Document ID: catn89-0000013681.
- “Whistleblowing and the Federal Employee.” *A Report from the Merit Systems Protection Board* (October, 1981).
- “Whistleblower Protection: Employees’ Awareness and Impact of the Whistleblower Protection Act of 1989.” GAO Testimony Statement of Nancy R. Kingsbury, Director of Federal Human Resource Management Issues (31 May 1993).

“Whistleblower Protection: Reasons for Whistleblower Complainants’ Dissatisfaction Need to Be Explored.” *Government Accountability Office* (March 1993).

“Whistleblower Protections: Implementation of the Whistleblower Statutes Has Been Mixed.” *Government Accountability Office* (March 1993).

Cases

New York Times Co. v. United States, 403 U.S. 713, (1971).

White v. LaChance, 528 U.S. 1153, (2000).

Snepp v. United States, 498 U.S. 816, (1990).

New York Times Co. v. United States, 403 U.S. 713, (1971).

United States v. Washington Post Co., 403 U.S. 943, (1971).

From the New York Times Archives Web Search: www.nytimes.com

Coleman-Adebayo, Marsha. “Toward a Fair Federal Workplace.” *New York Times* (27 May 2002).

Gerth, Jeff. “Criticism of C.I.A. Analyst’s Dismissal Bolsters a Fight for Whistleblower Protections.” *New York Times* (20 July 1997).

Goss, Porter. “Loose Lips Sink Spies: [Op-Ed].” *New York Times* (10 February 2006).

Hersh, Seymour M. “Huge C.I.A. Operation Reported in U.S. Antiwar Forces, Other Dissidents in Nixon Years.” *New York Times* (22 December 1974).

Johnston, David. “F.B.I. Removes 4 Lab Workers Including Critic of Crime Unit.” *New York Times* (28 January 1997).

Johnston, David, Shane Scott. “C.I.A. Fires Senior Officer Over Leaks.” *New York Times* (22 April 2006).

Mazzetti, Mark. “C.I.A. Tells of Changes for Its Internal Inquiries.” *New York Times* (2 February 2008).

Mazzetti, Mark, Shane Scott. “Lawmakers Raise Concerns Over Call for Investigation of C.I.A. Watchdog’s Work.” *New York Times* (13 October 2007).

Mazzetti, Mark, Shane Scott. "C.I.A. Director Has Made Plugging the leaks a Top Priority." *New York Times* (23 April 2006).

Mazzetti, Mark, Shane Scott. "Watchdog of the C.I.A. is Subject of C.I.A. Inquiry." *New York Times* (11 October 2007).

Scott, Shane. "Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S." *New York Times* (4 June 2006).

Scott, Shane. "Philip Agee, 72, Is Dead; Exposed Other C.I.A. Officers." *New York Times* (8 January 2008).

Weiner, Tim. "A Secret Disclosed Imperils the Career of State Dept. Aide." *New York Times* (16 November 1998).

Weiner, Tim. "CIA Chief Disciplines Official for Disclosure." *New York Times* (6 December 1996).

From the Washington Post Archives Web Search: www.washingtonpost.com

Layton, Lyndsey. "Whistle-blower's Fight for Pension Drags On." *Washington Post* (7 July 2007).

Lee, Christopher. "Dispute at Whistle-blower Office: Counsel Says Backlog is Reduced; Critics Question Retooling." *Washington Post* (24 February 2005).

Lee, Christopher. "Official Says Law Doesn't Cover Gays." *Washington Post* (25 May 2005).

Smith, R. Jeffrey, Dafna Linzer. "CIA Office's Job Made Any Leaks More Delicate." *Washington Post* (23 April 2006).

Smith, R. Jeffrey, Dafna Linzer. "Dismissed CIA Officer Denies Leak Role." *Washington Post* (25 April 2006).

Laws, Bills, and Legislative Histories from Lexus-Nexus Congressional; THOMAS.gov; The American Presidency Project at <http://www.presidency.ucsb.edu/index.php>:

Executive Order January 31, 1902; Theodore Roosevelt in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=69698>.

“Lloyd-LaFollete Act of 1912,” 37 Stat. 555 1912.

48 Cong. Rec. 10671 (1912), 5634.

“Pendleton Civil Service Reform Act,” (22 Stat. 403).

“National Security Act,” Pub.L. 80-253, July 26, 1947.

“Civil Rights Act of 1964,” Pub.L. 88-352, July 2, 1964.

Executive Order 11478, August 8, 1968; Richard Nixon in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=59072>.

“Equal Employment Opportunity Act of 1972,” Pub.L. 92-261, May 25, 1972.

“Foreign Assistance Act of 1974,” Pub.L. 93-556, December 20, 1974.
Senate Resolution 400, May 19, 1976.

Inaugural Address of President Jimmy Carter on January 20, 1977 in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=6575>.

House Resolution 658, July 14, 1977.

State of the Union Address of Jimmy Carter on January 19, 1978 in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=30856>.

“Inspector General Act,” Pub.L. 95-452, October 12, 1978.

Signing Statement of Inspector General Act, Jimmy Carter, October 12, 1978 in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=29968>.

“Civil Service Reform Act,” Pub. L. 94-454, Oct. 13, 1978.

Reorganization Plan No. 2, August 11, 1978.

124 Cong. Rec. 34100 (1978).

“Ethics in Government Act,” Pub.L. 95-521, October 26, 1978.

“Intelligence Oversight Act of 1980,” 50 U.S.C. 413, October 14, 1980

Executive Order 12333, “United States Intelligence Activities,” signed into law by Ronald Reagan on December 4, 1981 from John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=43324>.

Executive Order 12356, signed on April 2, 1982 by Ronald Reagan from http://epic.org/open_gov/eo_12356.html.

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

H. Rept. No. 100-433 (1987)

S. Rept. No. 100-216 (1987).

Public Papers of the Presidents, 1988-89, II, at 139.

S. Rpt. 100-413 on S. 508, “Whistleblower Protection Act of 1988,” July 6, 1988.

“Intelligence Authorization Act of 1989,” Pub.L. 100-453, September 29, 1988.

“Inspector General Act Amendments,” Pub.L. 100-504, October 18, 1988.

35 Cong. Rec. 4512 (1989).

“Whistleblower Protection Act of 1989,” Pub.L. 101-12, April 10, 1989.

Signing Statement on “Whistleblower Protection Act of 1989,” by George Bush, on April 10, 1989 in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=16900>.

Executive Order 12674, signed on April 12, 1989 by George H.W. Bush from http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/xeorders/eo12674.htm

“Intelligence Authorization Act of 1990,” Pub.L. 101-193, November 30, 1989.

H.Rept. No. 103-769, 103d Cong., 2nd Session, (1994).

140 Cong. Rec. 27357-61, 28823-26 (1994).

“Whistleblower Protection Act Amendments of 1994,” Pub.L. 103-424, October 29, 1994.

S. Rept. 105-165, 105 Congress, 2nd Session (1998).

Executive Office of the President, “Statement of Administration Policy: S. 1668 – Disclosure to Congress Act of 1998,” March 9, 1998 from http://www.fas.org/irp/congress/1998_cr/sap-s1668-s.html.

House Permanent Select Committee on Intelligence; Hearings on May 20 and June 10, 1998.

“Intelligence Authorization Act of 1999,” Pub.L. 105-272, October 20, 1998.

Signing Statement on the “Intelligence Authorization Act of 1999,” by Bill Clinton on October 8, 1998 in John T. Woolley and Gerhard Peters. *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=55116>.

106th Congress, 2nd Session in the House of Representatives, as introduced in the House: H.R. 5516 on October 19, 2000.

House Judiciary Committee Hearings, 1 CIS H 52176, 2002.

“Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,” Public Law 107-174, May 15, 2002.

2001 Bill Tracking H.R. 169, May 16, 2002.

S. 1358, “The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act,” Hearing before the Committee on governmental Affairs, U.S. Senate, 108th Congress, 1st Session, November 12, 2003.

“Intelligence Reform and Terrorism Prevention Act of 2004,” Pub.L. 108-458, December 15, 2004.

H.R. 985 “Whistleblower Protection Enhancement Act of 2007” 110th Congress, 1st Session, introduced by Representative Henry A. Waxman D-CA.

S. 274 “Federal Employee Protection of Disclosures Act,” 110th Congress, 1st Session, introduced by Senator Daniel Akaka, D-HI.

United States Code (2000 suppl. 5), from the U.S. Code Online via GPO Access
www.wais.access.gpo.gov.

Web Sites for Research:

The American Presidency Project web site:
<http://www.presidency.ucsb.edu/ws/index.php?pid=16900>

Biography of Marsha Coleman-Adebayo:
http://alum.bardard.edu/site/PageServer?pagename=alu_act_0602coleman_adebayo

Central Intelligence Agency research web site:
<https://www.cia.gov/library/index.html>

Daniel Ellsberg web site:
www.ellsberg.net

Department of Justice web site for whistleblowing:
<http://www.usdoj.gov/oarm/wb/law.htm>

Equal Employment Opportunity Commission web site:
<http://www.eeoc.gov/policy/vii.html>

From “The Foreign Relation Series from the Kennedy Administration, Volume X:”
www.state.gov/www/about_state/history/frusken.html

Government Accountability Project (GAP)
www.whistleblowers.org

History of the Church Commissions at the “Assassination Archives and Research Center:”
www.aarchlibrary.org/publib/contents/church/contents_church_reports_rockcomm.htm

History of the Church Report at “History Matters:”
www.history-matters.com/archive/contents/church/contents_church_reports_rockcomm.htm

History of the Iran-Contra Scandal:
www.pbs.org/wgbh/amex/reagan/peopleevents/pande08.htm.

History of Richard Barlow at “History Commons” web site:
www.historycommons.org/context.jsp?item=a81barlowstate&scale=3#a81barlowstate.

History of the United States Court of Appeals for the Federal Circuit:
www.cafc.uscourts.gov/about.html

Information about Federal Offices of the Inspector General:
www.ignet.gov/igs/homepage1.html

Information about the Pulitzer Prize:
www.pulitzer.org/citation/2006,Beat+Reporting.

Information about the pocket veto from the U.S. Senate web site:
http://www.senate.gov/reference/glossary_term/pocket_veto.htm.

Library of Congress- THOMAS web site:
<http://thomas.loc.gov/>

The National Archive Service for information about the “family jewels:”
www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm

The Project on Government Oversight (POGO)
www.pogo.org

Public Employees for Environmental Responsibility (PEER)
www.peer.org

Frank Serpico web site:
www.frankserpico.com

United States Court of Appeals for the Federal Circuit web site:
<http://www.cafc.uscourts.gov/about.html>

U. S. Office of Personnel Management web site:
<http://www.opm.gov>

U.S. Office of Personnel Management web site’s “Biography of an Ideal,” at
[http://www.opm.gov/BiographyofAnIdeal/SubMain1977-1979.asp /](http://www.opm.gov/BiographyofAnIdeal/SubMain1977-1979.asp/).

U.S. Merit Systems Protection Board web site:
<http://www.mspb.gov>

Whistleblower Protection Blog
www.whistleblowerblog.org

“The Woodward and Bernstein Watergate Papers,” from
www.hrc.utexas.edu/exhibitions/web/woodstein.

The 9-11 Commission web site and full report:
www.9-11commission.gov