

The amendments reflect several other important advances. They close loopholes, expand protections, and provide further guidance on how to translate the new legal standards. The amendments specify that employees can prove the connection between whistleblowing and a reprisal through showing a short time lag—in particular, in cases in which an adverse action is taken *after* an employee engages in legally-protected whistleblowing and *before* the employee's next performance appraisal. They restore civil service rights to Department of Veterans Administration professionals, and create whistleblower protection for employees of government corporations such as the Legal Services Corporation. The amendments flatly outlaw retaliatory orders to take psychiatric fitness-for-duty examinations. Finally, they end a pattern of pyrrhic victories by awarding not only back-pay if employees qualify, but also consequential damages when they win, covering medical and other expenses and otherwise restoring them to their pre-whistleblowing positions on the job.

Depending on how MSPB case law evolves, whistleblowers may have gained even more through the legislative history constructed around the amendments by members of Congress. For example, the amendments include a new catch-all clause that effectively outlaws any harassment with a chilling effect. In legislative history, Congress specifically instructed that illegal discrimination includes security clearance reprisals, as well as retaliatory investigations, prosecutive referrals, Reductions-in-Force and other common dirty tricks that had never been specifically mentioned—or outlawed—in civil service law. The legislative history makes other meaningful changes: it rejects, for example, 15 MSPB and Federal Circuit decisions as wrong and disqualifies them as valid precedents; it flatly prohibits OSC leaks of information about employee cases (and reaffirms that OSC officials who do so are subject to personal liability); and it requires the Special Counsel to warn complainants of all significant findings and wait ten days for a response before closing a case.

The legislative history also offers assistance in settlements and attorney fees: employees do not have to wait until filing or

formally winning an MSPB appeal to receive back pay. If they pursue legal action and subsequently the reprisal ends, moreover, they may not be denied attorney fees for the litigation they have pursued.

Despite these positive developments, not all the news has been good. The vehicle for the 1994 amendments was legislation to reauthorize the Office of Special Counsel. The OSC's track record did not improve in the wake of the 1994 amendments, and the results of the amendments to date are mixed at best.

In its FY 1995 annual report, the OSC reported working on 603 whistleblower cases—but only filed complaints charging Whistleblower Protection Act violations and seeking relief for three employees. The year before, the OSC filed twelve complaints out of 662 cases. Continuing its 17-year pattern, moreover, the OSC did not litigate a single reprisal case before the MSPB to restore a whistleblower's job. Special Counsel Kathleen Koch's term expired in December 1996; her successor faces a serious challenge in restoring the OSC's credibility.

There are signs of improvement in reported decisions at the MSPB. In 1995 the MSPB reviewed four cases, and ruled against whistleblowers in all four decisions on the merits. Since the arrival of new Board member Beth Slavet, however, the trend has reversed. In 1996 the MSPB found Whistleblower Protection Act violations in three of five published decisions on the merits. To illustrate how patterns may be changing, an initial MSPB decision in May 1997 backed a whistleblowing administrative law judge and reversed a retaliatory reduction-in-force that targeted the judge for removal. This outcome would have been hard to imagine several years ago.

These statistics, however, tell only part of the story. The MSPB's FY 1995 annual report disclosed that it ruled on a total of 428 whistleblower cases (excluding requests for temporary relief through stays). The vast majority were either settled, or decided by administrative judges in unpublished decisions without full Board reviews and rulings. The MSPB's annual report indicated that employees obtained some relief—through mitigation

or settlement, at a minimum—in 111 out of the 428 cases. Again, the reality may be even worse than the appearance. Unpublished initial decisions by administrative judges that are approved by the MSPB without comment can become a form of ghost law that in practice severely undercuts the protections provided by the Whistleblower Protection Act.

At the Federal Circuit Court of Appeals, meanwhile, the 1994 amendments barely created a ripple. The Court remains a dead end for whistleblowers seeking relief under the Act. In 1995 and 1996 the Circuit considered six cases, and ruled against whistleblowers in all six decisions on the merits.

THE FALSE CLAIMS ACT

The False Claims Act—and its value as an avenue for blowing the whistle on fraud—are discussed in chapter three. One of the lesser known but potentially significant provisions of the False Claims Act, however, is protection from reprisals. Whistleblowers should be aware of this legal option. It is found at 31 U.S.C. sec. 3730(b).

Under the False Claims Act, if a whistleblower is discharged, demoted, threatened, or forced to suffer discrimination in any way, s/he is allowed to file a separate claim against the employer. If the individual wins, s/he is entitled to reinstatement with full seniority, two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of discrimination, including litigation costs and attorney's fees. Through these protections, the law recognizes and rewards whistleblowers for the crucial role they play in saving tax dollars.

The False Claims Act has the longest statute of limitations—six years—on the books for whistleblowers. It also protects whistleblowers against all discriminatory practices, not limited to those identified as unacceptable under civil service law.

In theory, it is important that the whistleblower protections of the False Claims Act could be provided through a jury trial in U.S. District Court, rather than a government administrative forum such as the Merit Systems Protection Board. Because of

their independence, the federal courts should be better able to protect a whistleblower without direct pressure from the whistleblower's company or agency.

In practice, however, the whistleblower clause has largely remained dormant. In 1995 and 1996, employees lost all five published decisions on the merits of the cases. Further, courts generally have barred federal employees who have attempted to file False Claims Act reprisal cases after challenging fraud in government contracts from the inside. Despite the Whistleblower Protection Act clause preserving alternative statutory remedies, the courts have held in False Claims Act cases that civil service law is the exclusive legal remedy for federal workers.

For further information about False Claims Act *qui tam* or retaliation options, contact Taxpayers Against Fraud (TAF) in Washington, D.C. A non-profit organization that specializes in monitoring the Act, TAF maintains a network for attorney referrals and publishes a quarterly law review of research into the latest False Claims Act decisions. (See Appendix B for additional information.)

PROTECTIONS UNDER STATE LAW FOR PRIVATE AND PUBLIC SECTOR EMPLOYEES

In contrast to the federal public sector, there is no comprehensive law that prohibits employers in the private sector from retaliating against whistleblowers. As a result, some states have adopted common-law remedies under the "public policy exception to the termination-at-will doctrine." This means that private-sector employees who work without a contract can no longer be fired "at will" for blowing the whistle on an issue of particular importance to the public, such as public health or safety. In the past, such an employee could be fired for any reason or no reason. But today, 42 states and the District of Columbia offer protection to workers who suffer discrimination for speaking out in defense of the public.

Although each of the 42 states interprets the public policy exception slightly differently, most classify retaliatory discharge

as a tort, which is a wrongful act for which a civil action can be brought in court. Consequently, employees who file claims are entitled to jury trials; and if they are successful, punitive damages (a monetary award beyond the actual loss, to punish the source of the damage and deter its recurrence) generally are available. Although they vary in scope and effectiveness, these laws give private-sector whistleblowers a chance to fight back in court. Generally, they have one to two year statutes of limitations.

The following states and the District of Columbia have recognized the public policy exception to the termination-at-will doctrine:

Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Eighteen states also have passed specific statutes protecting private-sector whistleblowers:

California, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee and Washington.

Some of these states provide broad protection, while others offer only narrow or limited coverage. Statutes in Florida and Montana, for example, exclude employees of independent contractors. Consult an attorney to determine what kind of protection is offered in your state and what procedure to follow in filing a claim.

In addition to these protections for private-sector employees, 38 states have adopted laws protecting government workers, generally state employees. Again, you should consult an attorney if you are a government employee considering exercise of your rights under state law. The relevant states are:

Alaska, Arizona, California, Colorado, Connecticut, Florida,

Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

PIECEMEAL FEDERAL PROTECTIONS FOR PRIVATE AND PUBLIC SECTOR EMPLOYEES

Beyond the public policy exception, private-sector employees must contend with a confusing, piecemeal system of scattered free speech laws. The federal government has passed 28 whistleblower protection provisions. These are tucked into various federal laws—such as environmental, banking or public health and safety statutes—to shield employees who help to enforce those laws.

The statutes often cover federal, state and local government workers, as well as private-sector employees (although the Energy Reorganization Act excludes federal workers at the Nuclear Regulatory Commission and the Department of Energy). They generally prohibit retaliatory discrimination against whistleblowers in broad terms, rather than listing specific reprisals which are prohibited. The most commonly used statute is OSHA (the Occupational Safety and Health Act); about half of the laws involve environmental protection. As a rule, the vehicle through which employees defend their whistleblower protection rights under these statutes is an administrative hearing at the Department of Labor (DOL).

Many of the laws, particularly environmental statutes with whistleblower protections, follow a standard model. An employee who reports a violation of the statute, either internally or to an outside entity, is covered by that law's employee protection clause. As under the Civil Service Reform Act, the employee does not need definitive proof that the action s/he witnessed was a violation of the law. The definition of an act of retaliation (or "dis-

crimination," as it is called in these laws) is relatively broad: it can constitute any negative change in the terms or conditions of employment. This can range from something as clearcut as termination to a more subtle action, such as a lowered performance evaluation. The statutes require an employer to demonstrate that the employer took the adverse action *because of* the employee's whistleblowing. Even if the whistleblower can prove the connection, or nexus, an employer can still prevail by demonstrating—with a preponderance of the evidence—that s/he had another, legitimate reason to take the action.

Whistleblowers who believe that they have suffered retaliation must act quickly under these statutes: in most cases, an employee has 30 days after first learning of the adverse action to file a complaint. There are some exceptions to this timeframe: employees filing under the Energy Reorganization Act to challenge illegality at nuclear power or weapons facilities, for example, have 180 days to file a complaint.

Department of Labor complaints begin with an informal investigation. The laws generally require a decision within 90 days, but the process often takes much longer; be prepared for the suit to drag out for years. First, the Department issues an initial determination after a 30-day investigation. Within five days, either party can file a request for a hearing to appeal that decision with the Chief Administrative Law Judge for the Department. Keep in mind that most employers *will* file an appeal if the investigation backs the employee; employers know that time and money are two things few whistleblowers have to expend. Once either party files an appeal to the Chief Administrative Law Judge, the case begins anew with a clean slate, at a hearing on the merits.

A whistleblower seeking to pursue these legal remedies should consider both the length of time and the various steps involved before devising a strategy. Given the cumbersome nature of the process, your best strategy may be to file an initial complaint on your own for the initial investigation, and use that time to locate an attorney for the likely appeal. Of course, even if you are going to start the case on your own, it is a good idea to consult with a

lawyer to make sure you are acting wisely and have preserved your rights for any later hearing.

Hearings generally take place within three to nine months after an appeal is filed, and usually last only a few days. After the hearing, the Administrative Law Judge issues a recommended decision. Either party can appeal the recommended decision to the Administrative Review Board (ARB) of the DOL. A final ARB order may be appealed to a U.S. Circuit Court of Appeals.

If the employee wins, the remedies available generally are categorized as "make whole" relief, designed to return the employee to the position s/he would have held if the adverse action had not taken place. This includes back pay, any lost promotions, and reasonable attorney fees and costs. Consequential damages can also be recovered, such as medical bills. A few of the statutes also allow for punitive damages for an employer's retaliatory actions, but it is extremely rare for whistleblowers to be awarded meaningful punitive damages.

From start to finish, the entire process frequently takes two or more years. Employees should therefore consider carefully whether to pursue a remedy under one of these federal statutes, or through a state claim. Often it is possible to pursue both, but findings of fact in one forum may be binding on the other. The timeframe for a state case varies from state to state.

The Department of Labor's track record in deciding whistleblower cases on the merits has been erratic. The record of decisions on the whistleblower provisions of the Occupational Safety and Health Act (OSHA)—the statute most frequently invoked by employees—is dismal; decisions for whistleblowers filing under environmental statutes have been mixed.

The Occupational Safety and Health Act forbids discrimination against an employee for exercising any right protected under the Act, including the right to make an OSHA or related complaint about worker safety. There is a vacuum of current publicly available data on the law's track record. The most recent figures supplied by the Department of Labor may help explain why it has been an abysmal failure. In fiscal year 1989, 3342

reprisal complaints were made to OSHA. Of those, DOL found evidence of discrimination in 559, and filed suit with the U.S. District Court in only 23. In FY 1990, 3526 complaints were made; 539 were found to have merit, and only 21 cases were filed in court. Of the cases the Department of Labor filed in court, the courts have backed the government's reprisal findings in roughly half the decisions on the merits. Not surprisingly, employees facing these odds are often hesitant to report worker safety problems. A 1989 survey of OSHA inspectors by the General Accounting Office found that some 22 percent of the inspectors concluded workers were not free to exercise their rights to provide confidential testimony. Almost half of the inspectors stated that employees believe they would have little or no protection if they reported violations.

A review of decisions under the seven environmental statutes handled at the Department of Labor suggests an uneven record. During the 1980s and early 1990s, employees routinely won only once or twice a year under all the environmental whistleblower laws combined. In 1995 and 1996, however, whistleblowers won 16 decisions on the merits under the same statutes, and lost 36. Curiously, nuclear power and weapons industry employees did not do as well under the Energy Reorganization Act as under the other statutes, although the Act's provisions reflect more sympathetic legal standards for whistleblowers. Nuclear whistleblowers had a 10-26 record on the merits, compared to the 6-10 record of environmental whistleblowers who were appealing under laws with tougher standards for employees to meet.

One explanation for DOL's erratic rulings under environmental statutes may be a 1996 internal reorganization within the Department of Labor. On April 17, the Secretary of Labor delegated authority to review recommended decisions by Administrative Law Judges to an Appeals Review Board. Prior to that date, decisions on the merits by the Secretary in 1996 had favored whistleblowers by a 9-5 margin. Nuclear whistleblowers had won six of eight cases. After April 17 through year's end, however, employees were 1-13 for reported decisions on the mer-

its, including 0-12 for nuclear whistleblowers under the Energy Reorganization Act.

The record in other areas is equally discouraging. In the wake of the savings and loan scandals, for example, Congress passed clauses protecting government or corporate whistleblowers challenging violations of the banking laws (see 12 U.S.C. sec. 1441a(g) and 12 U.S.C. sec. 1831j). Analogous to the environmental protections, these whistleblower rights were tacked into broad legislation such as the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). The laws provide access to District Court and apply the favorable Whistleblower Protection Act legal burdens of proof. They cover employees of financial institutions, the Resolution Trust Corporation, as well as other relevant government agencies and contractors. The protections are narrow, safeguarding disclosures to government regulatory or law enforcement agencies. Although they appear promising, these laws have proven a false start for whistleblowers to date. Through 1996, there were only three reported decisions on the merits; whistleblowers lost all three. In other cases, courts have rejected procedural challenges and cleared the way for trial—so the pattern could shift. At best, however, the laws have been little-used and have not made an impact.

On balance, the whistleblower protection clauses in these federal laws reflect serious structural limitations, and each has its own peculiarities. Perhaps most important, none of these laws covers employees for *all* public policy dissent: the boundary for each is violation of the particular statute at issue. This creates an inconsistent—and often irrational—system of legal protection for private-sector whistleblowers. Food industry workers, for example, traditionally have been legally protected for disclosing air and water pollution by their employers under federal statutes, but not for revealing shipments of contaminated poultry or diseased beef. Other structural flaws are equally troubling: corporations can violate with impunity rulings by Department of Labor Administrative Law Judges to produce witnesses or information, for example, because they do not have subpoena authority

under current law.

This arbitrary, patchwork approach to private-sector whistleblower protections has drawn fire from various sources, including a 1987 report of the Administrative Conference of the United States. Attempts to reform the system, however, have been few and largely unsuccessful.

Former Senator Howard Metzenbaum (D-OH) repeatedly introduced legislation in the late 1980s to introduce coherence and consistency and to close the gaps in private-sector whistleblower protection for all federal health and safety laws. The bills sought to: 1) introduce more reasonable statutes of limitations to replace unrealistic 30-day deadlines in most current laws; 2) require corporate employers to produce witnesses and otherwise obey basic procedural rules for Department of Labor legal hearings; 3) extend the new Whistleblower Protection Act legal burdens of proof for civil service employees to corporate whistleblower cases; and 4) introduce a system to investigate evidence of public policy misconduct exposed by the whistleblower—so that the wrongdoing is not overlooked or overshadowed by the reprisal dispute.

Although these efforts to win broad-based reform were unsuccessful, awareness of the problem has gradually expanded. In 1992, for example, former Representative Pat Williams (D-MT) held congressional hearings during which even some industry witnesses agreed that the current incoherence of these protections is counterproductive for both labor and management. Also in 1992, through the Energy Reorganization Act, Congress adopted legislation that reflected a capsulized version of Senator Metzenbaum's proposed reforms.

To date, however, the initiative for consistent, comprehensive private-sector whistleblower rules has stalled. Neither party in Congress has displayed a willingness to take on big business by working toward a comprehensive whistleblower protection law for employees in the private sector. Piecemeal reform may emerge from three favorable—if limited—trends.

Perhaps the most promising opening wedge for private-sector

for whistleblower protection is a 1993 initiative by Representative John Dingell (D-MI). Dingell successfully proposed a Commission on Research Integrity as a little-known provision in a larger bill to fund universities, medical schools and laboratories receiving Department of Health and Human Services (HHS) grants. The bill also required HHS to issue regulations creating an arbitration forum for scientific whistleblowers in biomedical research, with burdens of proof similar to those in the Whistleblower Protection Act. In a November 1995 report, the Commission unanimously recommended that grant recipients be required to protect scientific integrity through implementing a "Whistleblower Bill of Rights" (see Appendix E). Whistleblowers and others in the scientific community confirm that this mechanism for scientific accountability is sorely needed, particularly in ongoing research into such serious and high-profile health threats as cancer, AIDS, and Alzheimer's disease. To date, however, HHS has held off even proposing regulations.

Time will tell whether the Department of Health and Human Services adopts credible regulations for implementing these reforms. The HHS Office of Research Integrity (ORI), located within the National Institutes of Health, does not have a strong track record of defending whistleblowers. In November 1995, however, ORI took a promising step. The Office issued "voluntary guidelines" for universities, hospitals and other grant recipients to resolve whistleblower disputes internally through mediation and alternative disputes resolutions. The Commission on Research Integrity endorsed the guidelines as one way to implement the Whistleblower Bill of Rights. The incentive provided to universities and hospitals was that if they adopted the guidelines, they would be spared traditional ORI investigative oversight of alleged whistleblower retaliation. To date, few institutions have taken ORI up on this offer.

A second important trend in strengthening protections for private-sector employees has emerged in individual initiatives taken by some regulatory agencies to protect whistleblowers working for government contractors. Developments in the Depart-

ment of Energy (DOE) under former Secretary Hazel O'Leary are perhaps the most striking example. O'Leary met with some 30 DOE whistleblowers—most of whom worked for private government contracting firms in the DOE's vast nuclear weapons complex—at a 1993 whistleblower conference sponsored by GAP and PFER. After the meeting she announced a five-point Whistleblower Initiative designed to encourage and reward whistleblowers, instead of silencing and punishing them.

The Energy Department's efforts have yielded some successes. Regulations for security clearance appeals were modified to specifically permit evidence of whistleblower reprisal as a factor for the hearing officer to consider. Managers found guilty of attempting to manipulate the security clearance process are subject to discipline. The agency also has ended the practice of routinely reimbursing contractors' litigation costs in whistleblower cases when the contractor loses: the DOE now reserves the right to review and decide for itself whether costs will be reimbursed, a fundamental change from DOE's prior practice of automatically reimbursing legal fees regardless of how the whistleblower case turned out, or how high the fees incurred by the contractor.

Secretary O'Leary also ordered the formation of site-wide employee concerns offices, with a central office at DOE headquarters to oversee the field programs. In response to a GAP petition, moreover, the Department of Energy created an administrative law unit for whistleblowers, called the Office of Contractor Employee Protection (OCEP). Although procedural rights are limited, the Office applies the favorable Whistleblower Protection Act legal burdens of proof. The initial results were promising: according to OCEP, whistleblowers won 70 percent of hearings decided on the merits from 1992-94. By 1995 the success rate on the merits had stabilized at 50 percent. Further, 37 percent of whistleblowers who filed claims obtained relief through settlements. OCEP was moved into the Energy Department's Office of Inspector General in 1995, however, and its credibility has declined. It no longer keeps systematic reports on win-loss records, and whistleblowers have expressed frustration at delays in re-

ceiving any hearing at all on their cases.

Third and finally, agencies are experimenting with indirect whistleblower protection for private-sector employees. This trend is based in part on the need to defend the free flow of information for law enforcement. The U.S. Department of Agriculture's Hazard Analysis Critical Control Points (HACCP) regulations, designed to modernize food safety through microbial testing and laboratory examination of meat and poultry, indirectly protect whistleblowers by forbidding obstruction of USDA oversight efforts. Further, if they are interpreted as contractual commitments with the government, HACCP provisions could trigger the whistleblower protection clause of the False Claims Act. Similarly, one of the recommendations of the Commission on Research Integrity was that the Department of Health and Human Services expand the definition of scientific professional misconduct by outlawing obstruction of investigations, specifically including whistleblower retaliation.

THE MILITARY WHISTLEBLOWER PROTECTION ACT

In an effort to give military whistleblowers the reprisal defenses offered to civilians, Congress in 1988 passed the Military Whistleblower Protection Act, first introduced by Senator Barbara Boxer (D-CA) when she was a member of the House of Representatives. The law is found at 10 U.S.C. sec. 1034. Most significant, it reaffirmed and restored—at least on paper—the basic right to communicate with Congress for members of the armed services. The law also established formal procedures for handling harassment claims within the services.

Military personnel now have the right to an immediate investigation by the Department of Defense or relevant armed service Inspector General and a hearing by their particular service's Board for the Correction of Military Records (BCMR) if they are harassed for blowing the whistle on fraud, waste, and abuse. Subsequent amendments established due process protections

against psychiatric retaliation. An earlier and unsuccessful military whistleblower bill introduced in 1986 provided for an appeal to a civilian court if the whistleblower was dissatisfied with the BCMR ruling. Unfortunately, the provision was dropped in the 1988 version of the bill, and replaced with a final appeal to the Secretary of Defense; this made the Act little more than a rhetorical statement of military whistleblower rights. The law's effectiveness is further undercut by the fact that the enforcing agencies are the Offices of Inspectors General and the BCMR, agencies that have long been viewed by military whistleblowers as indifferent or hostile to whistleblowers.

The track record for the Military Whistleblower Protection Act is largely unknown. None of the Service Boards of Correction for Military Records has yet held a hearing on alleged violations. To date, action under the law has involved informal investigations by the Department of Defense Office of Inspector General, or by armed service Inspectors General at the Army, Navy, Marines and Air Force.

The Department of Defense Office of Inspector General does not have data on final outcomes for whistleblowers seeking relief under the Act. Although the outcomes are unknown, the various IG offices report filing recommendations that substantiate whistleblower reprisal charges as often as many administrative boards or the courts. In fiscal year 1996, for example, the Pentagon Inspector General substantiated 13 whistleblower cases and closed 58. In cases investigated by service IGs during 1996, 30 were substantiated and 90 closed. In FY 1995, the Pentagon Inspector General substantiated 23 retaliation claims and closed 58, while the service IGs compiled a 17-67 record. In FY 94, the Pentagon IG substantiated 5 cases and closed 44, while the armed service IGs substantiated 13 and closed 68 cases.

The Military Whistleblower Protection Act gives service members the right—on paper—to communicate with members of Congress. Until and unless the law is strengthened, however, GAP recommends that service members do not depend on the Act to provide effective protection from reprisals when they exercise that right.

WHISTLEBLOWING WITH A SECURITY CLEARANCE

Security clearances pose a special problem for whistleblowers. For roughly three million civil service and government contract employees performing national-security-related tasks, a clearance is a prerequisite for holding their jobs. This makes suspending or revoking a security clearance a common tactic of retaliation—and one that allows employers to make an "end-run" around most existing legal protections for whistleblowers.

Under a Supreme Court decision, *Navy v. Egan*, constitutional protections do not apply to the substantive issues raised by security clearance decisions. Employees are limited to the rights provided by Congress, which has largely deferred to the national security agencies in setting procedures for security clearance decisions. The result is that security clearances have been a gaping loophole in whistleblower protection rights. Historically, whistleblower laws have offered little protection when an employer revokes a security clearance as a way of functionally firing or blacklisting an employee without ever formally proposing his or her termination.

As discussed above, there are signs that this is beginning to change. The legislative history for the 1994 amendments to the Whistleblower Protection Act seeks to close the legal loophole that had permitted security clearance retaliation. The history is consistent with a general trend to expand protection for employees holding clearances, by clarifying that clearance status is not to be used as a form of harassment. Cases in the Department of Labor, the Department of Energy, and the Equal Employment Opportunity Commission, for example, have established precedents challenging security clearance reprisals under existing employee protection laws.

Unfortunately, protection for employees holding security clearances remains very tenuous. One of the best ways employees can protect themselves is to understand how security clearance status

has been used against whistleblowers in the past—and to take this into account in devising a strategy for blowing the whistle.

The cases of two whistleblowers from the "Star Wars" missile defense program are in many respects typical; after drawing public attention, the cases paved the way for Congress to begin closing this national security loophole. For years, the U.S. Army's Space and Strategic Defense Command (SDC) sought to eliminate employees who exposed mismanagement in the Star Wars program by revoking their security clearances. Repeatedly, the agency chose to pull the employee's clearance rather than fire him or her because dismissal would trigger free speech and due process rights under the law.

The standard operating procedure was simple. The agency would open an investigation into the activities of a whistleblowing employee over alleged wrongdoing for which s/he had previously been investigated and cleared—without any new evidence. In the case of top scientist Aldric Saucier, the agency: 1) tore off the cover sheet concluding that Saucier had been cleared of alleged wrongdoing dating to 1968; 2) forwarded the charges as "new" for a fresh security clearance investigation; 3) suspended his clearance in the meantime; and 4) contacted the media in an effort to encourage press attacks based on the outdated charges.

An SDC intelligence officer described the only new "misconduct" alleged in the Saucier case in frank terms: contrary to agency policy, Saucier publicly blew the whistle, using unclassified but "sensitive" information. The SDC lawyer did not dispute that if Saucier had been fired, this explanation would have been a direct admission of violating the Whistleblower Protection Act. But as he pointed out, the Act did not apply to security clearances.

The case of Thomas Golden, Deputy to SDC's Assistant Chief of Staff for Intelligence, was equally disturbing. After he was offered and had accepted a job as Inspector General for the Air Force Intelligence Command—and had sold his home and prepared to move—Golden learned that his security clearance had been suspended. He was interrogated about earlier disclosures of information to Congress about the Star Wars program and in-

formed in writing by SDC's chief that he was being investigated for the disclosures.

After congressional protests, the agency's formal rationale for suspending Golden's clearance shifted, focusing almost entirely on charges for which he had already been investigated and cleared, sometimes more than once. A Defense Criminal Investigative Service (DCIS) memorandum acknowledged that the agency was acting against Golden through his security clearance, due to doubts that it could make normal discipline stick. Even the Office of Special Counsel agreed this was a case of whistleblower reprisal, but concluded internally that nothing could be done to reverse the security clearance actions without congressional authorization. Golden painstakingly rebutted the charges with affidavits and documentary evidence. The Army responded first by shifting to new charges—and then by simply letting the case sit. While Golden was twisting in the wind, unable to obtain even a written Army response to his latest detailed rebuttal, the Air Force filled the position with someone else. Golden's experience is not unique: the General Accounting Office has reported that employees frequently must wait years even to receive notice of why their clearances have been suspended.

One of the most common problems confronting employees with security clearances involves the use of gag orders. Potential whistleblowers should know the political and legislative history behind various efforts to impose gag orders as a condition of obtaining or retaining security clearances, and how to protect themselves. The most serious effort to restrict whistleblowers through gag orders arose in 1983, when President Reagan introduced Standard

"Despite the fact that the Department of Energy itself admitted that the suspension of my security clearance was retaliatory, I have never been reimbursed for the tens of thousands of dollars it took to regain my clearance, and I still have to fight during these periodic reinvestigations to retain it."

—Department of Energy whistleblower

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Forms 189 and 4193 in an apparent attempt to prevent whistleblowers from leaking information about government fraud and waste. Known as non-disclosure agreements, the controversial forms demanded secrecy pledges from all government employees with access to classified information: Form 189 was for any employee with a security clearance; Form 4193 was for employees with clearance for access to particularly sensitive information.

The forms served, in essence, as contracts between the government and the employee. They stated that if the employee released any "classified" or "classifiable" information, s/he breached the agreement, for which the employee agreed to loss of security clearance and criminal prosecution. "Classified" information is clearly defined: by statute and executive order, it means original records that are marked secret, or a conversation that is identified as secret at the time. The term "classifiable," on the other hand, meant all information that could or should have been classified—or "virtually anything," in the words of the federal official responsible for its enforcement. It left open the option for after-the-fact classification and liability, which would deprive employees of prior knowledge that information is secret.

Both forms also prohibited disclosures to "unauthorized" recipients. This barred release unless the agency that created the documents agreed the proposed recipient had a "need to know" the information—even if that person also had a security clearance and chaired a congressional oversight committee. The net impact was that all whistleblowing disclosures involving information which could be classified under some circumstances had to be submitted for prior review. Because few agency managers guilty of wrongdoing would agree that Congress had a need to know about their misconduct, this was a formula for cover-ups. Moreover, the forms flatly violated the Lloyd-Lafollette Act of 1912, found at 5 U.S.C. sec. 7211, which provides that "the right of employees to petition Congress... or to furnish any information to either House of Congress... may not be interfered with or denied."

Originally, the Reagan Administration proposed a campaign to solicit voluntary signatures for SF 189. In November 1986,

however, just as the Iran-Contra scandal was breaking, it issued regulations making the agreement a mandatory condition for all relevant employees—some three million workers—to keep or obtain their security clearances. Some 1.7 million employees signed the agreement, before Pentagon whistleblower Ernie Fitzgerald "just said no." The Pentagon threatened to revoke his clearance, but paused—and then blinked—after his refusal sparked a political backlash in Congress and the press. Federal employee unions filed suit challenging the gag orders' legality, and Senator Grassley went so far as to call SF 189 an effort "to gag public servants" and "place a blanket of silence over all information generated by the government."

In response, Congress passed section 630 of Public Law 100-202, which prohibited the use of any federal funds for fiscal year 1988 for the implementation of SF 189 or any similar nondisclosure forms. An identical or similar section has been included in the continuing resolution for every fiscal year since.

The battle did not end there, however. Even after Congress eliminated funds for the implementation of SF 189 in December 1987, the Administration collected 43,000 signed nondisclosure forms—triggering a lawsuit by seven members of Congress and the American Foreign Service Association challenging the Administration's refusal to obey the law. A decision by District Court Judge Oliver Gasch conceded that the law had been violated, but also found that Congress had acted unconstitutionally in passing it. Judge Gasch reasoned that as Commander in Chief the President has a monopoly on power to restrict the disclosure of information sensitive to national security. The judge further held that Congress' only constitutional authority is to pass penalties punishing those who violate the President's powers. Despite the fact that it threw out the statute, the District Court in a related decision found the term "classifiable" to be unconstitutionally vague.

The Administration, meanwhile, issued new "modified" but equally problematic nondisclosure forms—Standard Form 312 to replace SF 189, and Standard Form 4355 to replace SF 4193.

These forms replaced the ban on unapproved disclosures of "classifiable" information with a gag on release of information that is "classified but unmarked." The distinction was meaningless, as neither concept had a legal basis in statute or executive order. Both versions effectively blocked an employee's ability to blow the whistle confidentially, because the only way the employee could be assured that s/he was complying with the order was to ask a supervisor whether the information was classified before releasing anything. This whistleblower identification scheme creates a troubling "Catch 22": whistleblowers either would be exposed to reprisal for asking, or would decide to keep quiet instead of challenging bureaucratic misconduct.

In a 1989 decision, *American Foreign Service Association v. Gorfunke*, the Supreme Court added to the confusion by unanimously overruling Judge Gasch's decision that Congress acted unconstitutionally in passing the anti-gag statute. Unfortunately, the Court did not decide Congress had the authority to maintain open disclosure channels for whistleblowers. Rather, the justices found the District Court had not adequately supported its conclusion that SF 312 still violated the statute. The Supreme Court said that until the issue was resolved, any rulings on constitutionality were premature.

Congress bypassed the constitutional conflict and has temporarily resolved the nondisclosure issue through a revised congressional restriction, passed each year in appropriations legislation. The modified law does not directly forbid the government from issuing nondisclosure agreements or setting analogous policies. Instead, it outlaws pending to implement or enforce any nondisclosure policy, form or agreement that does not contain a congressionally-drafted addendum spelling out that in the event of a conflict, it is superseded by the constitution, the Whistleblower Protection Act, statutes requiring prior specific designation before information can be classified, and similar statutes. In short, it is illegal to spend any federal funds implementing or enforcing gag orders unless they have specific qualifiers affirming the supremacy of free speech and other "good government" laws.

This means that these and similar government gag orders throughout the bureaucracy have been neutralized for the time being—if only on a year-to-year basis. Potential whistleblowers with security clearances should be aware of this history, and should review the model addendum tracking the anti-gag statute's language (see Appendix G). Employees may find this language useful if they wish to modify previously-signed nondisclosure agreements or are ordered to sign one under threat of forfeiting their security clearances. The addendum specifies that the signature does not mean the employee is agreeing to waive any of his or her free speech rights.

Employees should also know that the anti-gag statute is not limited to classified information. It applies to all federal spending, and to any gag order—not just those involving security clearances. Whistleblowers have used the statute successfully at the Departments of Agriculture, Justice, and Health and Human Services. In principle, it is a strong shield against excessive secrecy. Unfortunately, the law is little known, and must be re-passed each year; it is at best an annual reprieve in the appropriations law. Further, it does not explicitly give employees access to court, which may make the law a "right without a remedy" in many situations. These problems will only be resolved by a permanent anti-gag statute enforceable through direct access to court.

CHAPTER SIX

The Need for Reform

The primary purpose of this handbook is to provide employees with information and guidance they may find useful in blowing the whistle on wrongdoing. In explaining the obstacles to ethical action in the workplace, however, the question of reform inevitably arises: what would a better system look like?

The principles for reform are no mystery—but resistance to the necessary systemic changes is powerful. GAP has identified six basic principles that we believe are needed for any meaningful system of whistleblower protection and corporate and government accountability. Whistleblowers must:

1. have a legal right to protection against discrimination for challenging illegality or violations of the public trust through lawful disclosures, without having to obtain advance permission, as well as the same protection for refusing to violate the law;
2. have access to courts in which the decisionmakers have judicial independence from the political process, and be entitled to a jury trial;
3. have remedies that hold individual harassers personally liable and subject to discipline, so that an employer or supervisor has something to lose by retaliating;

4. gain access to legal shields for following government or professional codes of ethics;

5. have the ability to go on the attack against lawlessness by restoring citizen standing to challenge fraud and enforce the law; and

6. restore substantive and procedural due process rights for all violations of constitutional rights, even when the government asserts a conflict with national security.

These principles would lock in the public's right to know, and maintain the free flow of information to Congress and other elected officials responsible for overseeing government bureaucracies.

The question of how to transform these principles into meaningful reforms is a political and strategic issue. One possible model for legislative reform is through a "Citizen Enforcement Act" (see Appendix F). Legislators could issue a mandate expanding the False Claims Act private attorney general model to cover not just fraud, but violations of any law. The goal would be to enable citizens to help enforce the law against government and corporate wrongdoing. In its most modest version, a citizen could obtain injunctive relief against an imminent threat, and take his or her case to a jury of peers to decide whether the law has been violated. The most effective approach would permit actual and punitive damages against individual and institutional wrongdoers, whether public or private. This would provide a market incentive for well-heeled law firms to decide there is more profit to be made from defending the public than from protecting lawless but wealthy institutions. A Citizen Enforcement Act could be adopted at the national, state or local level, for both public and private sector employees.

Equally important to meaningful reform of the current system is alternative models for effective, "win-win" problem-solving. One approach is to explore the use of mediation or alternative dispute resolution (ADR) alongside more traditional adversarial methods. The limits to adversarial models in addressing whistleblower disputes are obvious. Even when whistleblowers "win" in court or elsewhere, they often find that

they cannot easily return to their previous positions or to hostile supervisors. At a minimum, hard feelings remain and they must always be on guard. Worse, employers who lose in litigation often engage in continued (if subtle) harassment efforts to make an example of victorious whistleblowers. To keep dissent from spreading, many employers strive to demonstrate that even whistleblowers who win in court inevitably will lose when they return to their jobs.

In some cases, mediation or ADR could provide a constructive approach to resolving conflicts between employers and former whistleblowers (as well as other employees). These methods could be applied either to alleged retaliation, to the alleged wrongdoing an employee challenges by blowing the whistle, or both. They could be used in isolation, as an alternative, or as an extra dimension to conventional litigation, either under existing laws or new models such as the Citizens Enforcement Act. The goal would be to replace the "win-lose" dynamic of litigation with more constructive approaches to long-term problem-solving.

The current system is beginning to develop incentives and precedents for this approach. For example, the credibility of an institution's internal system of acting on employee concerns is a factor in federal sentencing guidelines for corporate misconduct. Internal mediation could provide a constructive alternative for corporate compliance programs, more credible with some employees than agency self-investigations based on hotline calls.

The federal government is experimenting with mediation and alternative dispute resolution for both government agencies and contractors. The HHS Office of Research Integrity, which already has adopted the no-fault mediation model as a voluntary option in the reprisal context, is considering it for resolution of more generic disputes about alleged scientific misconduct. The Merit Systems Protection Board is testing ADR approaches for civil service reprisal cases.

One of the most promising experiments, developed at Washington state's Hanford Nuclear Site in response to the filings of over a dozen whistleblower cases, involves a mediation process

dubbed the Hanford Joint Council. The Joint Council grew out of a study by the University of Washington, and has a unique characteristic: the contractor at Hanford has agreed to implement the independent Council's advisory recommendations, which are developed by consensus among the Council members.

The goal of the Council is the full, fair and final resolution of whistleblower cases that come before it, ideally at an early enough stage that the warring factions can be separated and the truth ferreted out. The Council members consist of two management representatives, two public interest representatives, two independent representatives, and an ex-whistleblower. The Joint Council is still in an experimental phase, but all who participate on it agree that it has been effective at addressing both specific and site-wide cultural issues that work against the free disclosure of safety, health and environmental problems at the site. After only 18 months of operation, several cases had been resolved, and several more were pending. Over a dozen cases had been referred to existing processes and were being monitored by the Council. As a mediation tool, the Hanford Joint Council has been a qualified success. It should be studied as a possible model for other facilities and agencies.

As the Hanford example suggests, the possibilities for addressing and realizing the six principles identified above are numerous. They can be pursued by concerned citizens at the local, state, and national levels. Even at the international level, the precedents for whistleblower protection exist. Enforcement mechanisms to protect against violations of human rights and child labor standards have been adopted as elements of domestic trade legislation; similar provisions could be incorporated for whistleblower protection and the freedom to dissent in the workplace. These principles can and should be built into domestic legislation and international trade or human rights conventions alike in the effort to increase accountability and protect ethical action on the job.

CONCLUSION

The tragedy is that this handbook is necessary. Our warnings and advice are drawn from the lessons learned by public servants who told the truth and paid a bitter price. The good news is that the lessons can be learned. Whistleblowing does not have to be synonymous with professional suicide. And despite the high personal risk, whistleblowers can and do make a difference. In many instances, they have prevented disasters from occurring by acting as modern-day Paul Reveres issuing public warnings.

We hope that your eyes are open to the full range of risks that come with the territory. If we have scared you from blowing the whistle, perhaps you weren't ready. If you are still determined to go ahead, we hope that this handbook will empower you to do the right thing for the public while trying to protect your career and your personal life. Good luck.

About the Government Accountability Project

The Government Accountability Project (GAP) was created to help whistleblowers who—through their individual acts of conscience—serve the public interest. Since 1977, we have provided legal and advocacy assistance to thousands of citizens who have blown the whistle on lawlessness and threats to public health and the environment.

GAP was created in direct response to the growing need for support for ethical employees. In the wake of the Pentagon Papers scandal, the Institute for Policy Studies in Washington, D.C. hosted a conference for whistleblowers in June 1977, with a focus on those within national security agencies. Conference participants overwhelmingly signaled the need for organizational support of whistleblowers across government agencies. As a result, the Institute for Policy Studies launched GAP as a project.

In 1984, GAP was incorporated as an independent tax-exempt organization. Two years later, the double disasters of the Challenger explosion and the Iran-contra scandal brought public awareness to a new level and led to a dramatic increase in the number of individuals willing to risk their jobs and careers to challenge wrongdoing and threats to public health and safety.

Now in our twentieth year, GAP has expanded to a 16-person staff. Hundreds of whistleblowers contact us each year. In addition to direct calls to our intake coordinator, many are referred to us by other public interest groups, members of Congress and news reporters. While each caller receives help, often including legal advice and referrals, our resources limit us to accepting only a fraction of these cases for legal representation by GAP attorneys.

The public interest concerns raised by the whistleblowers who contact GAP span a wide range of issues. Over time, our staff has developed in-house expertise in five broad program areas, which currently constitute the majority of our work. The deeper knowledge base developed through dozens of investigations and education and organizing campaigns makes us particularly strong advocates in these areas. These key policy areas are: strengthen-

ing the rights and protections of whistleblowers, ensuring a safe and cost-effective clean-up at nuclear weapons facilities, increasing food safety, enforcing environmental protection laws, and curtailing national security abuses.

To assist whistleblowers, GAP's attorneys and organizers collaborate with the news media, grassroots citizens organizations, private attorneys, and the broader public-interest community to reveal, publicize, and galvanize a public response to the issue. We also help whistleblowers take their evidence of wrongdoing to select government agencies, congressional committees, and others on Capitol Hill to investigate, expose, and rectify the problems. The results of GAP's efforts over the past two decades show the power of the truth through legal and advocacy campaigns brought before the court of public opinion as well as the court of law.

Resources for Whistleblowers: Public Interest Organizations

In addition to the Government Accountability Project, the following public interest organizations may be of assistance to whistleblowers:

Project on Government Oversight

2025 Eye Street, NW Suite 1117
Washington, DC 20006-1903
(202) 466-5539 / Fax: (202) 466-5596
E-mail: pogo@mnsinc.com
Internet: www.mnsinc.com/pogo

The Project On Government Oversight (POGO) is a non-partisan, non-profit organization that has been working as a government watchdog since 1981. POGO's mission is to investigate, expose and remedy abuses of power, mismanagement and government subservience to special interests. The organization's methods include networking with government investigators and auditors whose findings have received little attention, working with whistleblowers inside the system who risk retaliation, and performing independent investigations into problematic issues.

Public Employees for Environmental Responsibility

2001 S Street, NW Suite 570
Washington, DC 20009
(202) 265-PEER / Fax: (202) 265-4192
E-mail: info@peer.org
Internet: <http://www.peer.org>

Public Employees for Environmental Responsibility (PEER) works with public employees to advocate for the protection and enhancement of the environment. Organized in 1992 by Jeff DeBonis, a former U.S. Forest Service employee, PEER represents employees of state and federal resource management and

environmental protection agencies. In particular, PEER supports employees who seek a higher standard of environmental ethics and scientific integrity within their agencies.

American Civil Liberties Union

National Taskforce on Civil Liberties in the Workplace

166 Wall Street
Princeton, NJ 08540
(609) 683-0313 / Fax: (609) 683-1787
E-mail: malthyclu@aol.com
Internet: <http://www.aclu.org>

The ACLU's Workplace Rights Taskforce seeks to advance civil rights and civil liberties for all employees, whether in the private or public sector. The Taskforce's primary strategies are to conduct public education and to pursue selected court cases. The Taskforce also guides the ACLU's state affiliates with respect to workplace issues. These issues range from drug testing and electronic monitoring to whistleblowing and lifestyle discrimination. For assistance, contact your local ACLU chapter.

Taxpayers Against Fraud

1220 19th Street, NW Suite 501
Washington, DC 20036
(202) 296-4826 / Fax: (202) 296-4838
Internet: <http://www.taf.org>

Taxpayers Against Fraud (TAF) is a non-profit, public-interest organization dedicated to combating fraud against the federal government through the promotion and use of the *qui tam* provisions of the False Claims Act. Established in 1986, TAF serves to collect and evaluate evidence of fraud against the federal government and facilitate the filing of meritorious False Claims Act *qui tam* suits; work in partnership with *qui tam* relators, private attorneys and the government to effectively prosecute *qui tam* suits; and advance public, legislative and government support for *qui tam*.

Resources for Whistleblowers: A Select Bibliography

Based on a bibliography prepared by Joyce Rothschild, Ph.D., Professor of Sociology, Virginia Polytechnical Institute

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Resources for Whistleblowers: An Internet Index

The following is a brief list of sites on the World-Wide Web that may be of assistance or interest to whistleblowers.

**The Government Accountability Project's
Homepage for Whistleblowers**
<http://www.whistleblower.org/gap>

**American Civil Liberties Union National
Taskforce on Civil Liberties in the
Workplace**
<http://www.aclu.org>

**Department of Labor:
Whistleblower Decisions**
<http://www.oalj.dol.gov/libwhist.htm>

**Department of Energy
Hearings and Appeals:
Whistleblower Decisions**
<http://www.oha.doe.gov/>

Qui Tam Information Center
<http://www.quitam.com/>

Good Government Groups
<http://www.fas.org/pub/gen/ggg/>

**Chris Griffith's Whistleblower
Home Page/Australia**
<http://www.powerup.com.au/~chris>

**Disgruntled: The Business Magazine for
People Who Work for a Living**
<http://www.disgruntled.com/dishome.html>

Guide to Clarion Calling: Association of Forest Service Employees for Environmental Ethics (AFSEEE)

<http://www.afsee.org/Publications/Reports/Clarion.Calling/Clarion.html>

Integrity International

<http://www.nicom.com/~helpline>

Jim D'Elia's Whistleblower Home Page

<http://members.aol.com/jidelia2667/whistle.htm>

Jobs with Justice: A national coalition fighting for the rights of working people

<http://www.igc.apc.org/jwj>

LawMall: Self-help pamphlets for dealing with legal problems

http://www.lawmall.com/lm_pamph.html

Merit Systems Protection Board website

<http://www.access.gpo.gov/mspb/>

Office of Special Counsel website

<http://www.access.gpo.gov/osc/>

Project on Government Oversight (POGO)

<http://www.mnsinc.com/pogo>

Public Employees for Environmental Responsibility (PEER)

<http://www.peer.org>

Taxpayers Against Fraud: Information on the False Claims Act

<http://www.taf.org>

Whistleblowing Outlets

<http://www.reporter.org/hillman/courage/outlets.html>

**Responsible Whistleblowing:
A Whistleblower's Bill of Rights**

Excerpted from *Integrity and Misconduct in Research*, Report of the Commission on Research Integrity (U.S. Department of Health and Human Services, 1995)

a. Communication: Whistleblowers are free to disclose lawfully whatever information supports a reasonable belief of research misconduct as it is defined by Public Health Service policy. An individual or institution that retaliates against any person making protected disclosures engages in prohibited obstruction of investigations of research misconduct as defined by the Commission on Research Integrity. Whistleblowers must respect the confidentiality of sensitive information and give legitimate institutional structures an opportunity to function. Should a whistleblower elect to make a lawful disclosure that violates institutional rules of confidentiality, the institution may thereafter legitimately limit the whistleblower's access to further information about the case.

b. Protection from retaliation: Institutions have a duty not to tolerate or engage in retaliation against good-faith whistleblowers. This duty includes providing appropriate and timely relief to ameliorate the consequences of actual or threatened reprisals, and holding accountable those who retaliate. Whistleblowers and other witnesses to possible research misconduct have a responsibility to raise their concerns honorably and with foundation.

c. Fair procedures: Institutions have a duty to provide fair and objective procedures for examining and resolving complaints, disputes, and allegations of research misconduct. In cases of alleged retaliation that are not resolved through institutional intervention, whistleblowers should have an opportunity to defend themselves in a proceeding where they can present witnesses and confront those they charge with retaliation against them, except when they violate rules of confidentiality.

Whistleblowers have a responsibility to participate honorably in such procedures by respecting the serious consequences for those they accuse of misconduct, and by using the same standards to correct their own errors that they apply to others.

d. Procedures free from partiality: Institutions have a duty to follow procedures that are not tainted by partiality arising from personal or institutional conflict of interest or other sources of bias. Whistleblowers have a responsibility to act within legitimate institutional channels when raising concerns about the integrity of research. They have the right to raise objections concerning the possible partiality of those selected to review their concerns without incurring retaliation.

e. Information: Institutions have a duty to elicit and evaluate fully and objectively information about concerns raised by whistleblowers. Whistleblowers may have unique knowledge needed to evaluate thoroughly responses from those whose actions are questioned. Consequently, a competent investigation may involve giving whistleblowers one or more opportunities to comment on the accuracy and completeness of information relevant to their concerns, except when they violate rules of confidentiality.

f. Timely processes: Institutions have a duty to handle cases involving alleged research misconduct as expeditiously as is possible without compromising responsible resolutions. When cases drag on for years, the issue becomes the dispute rather than its resolution. Whistleblowers have a responsibility to facilitate expeditious resolution of cases by good-faith participation in misconduct procedures.

g. Vindication: At the conclusion of proceedings, institutions have a responsibility to credit promptly—in public and/or in private as appropriate—those whose allegations are substantiated.

Every right carries with it a corresponding responsibility. In this context, the Whistleblower Bill of Rights carries the obligation to avoid false statements and unlawful behavior.

Text for a Model Citizen Enforcement Act

WHEREAS: Citizens have been frustrated that they have not been empowered with meaningful control of their lives through expensive, cumbersome government regulatory agencies; and

WHEREAS: The public interest requires that it be illegal to discriminate against government or private employees who make disclosures responsibly challenging violations of law, because they are invaluable to law enforcement, to the public's right to know, and to prevent or minimize the consequences from institutional misconduct.

THEREFORE BE IT RESOLVED:

SECTION 1: JURISDICTION AND PROCEDURE: Any citizen may challenge violations of law through a jury trial under the procedures available in the False Claims Act (31 U.S.C. sec. 3729 *et seq.*), unless the parties mutually consent to alternative disputes resolution procedures such as mediation or arbitration.

SECTION 2: RELIEF: A jury may award injunctive relief to stop ongoing illegality, as well as actual or exemplary damages, as it deems appropriate.

SECTION 3: EMPLOYEE PROTECTION:

(A) IN GENERAL—No employee or other person may be harassed, prosecuted, held liable, or discriminated in any way because that person has: made or is about to make disclosures not prohibited by law or executive order; commenced, caused to be commenced or is about to commence a proceeding; testified or is about to testify at a proceeding; assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes, functions or responsibilities of this Act; or (2) is refusing to violate or assist in the violation of this Act.

(B) **PROCEDURES**—Cases of alleged discrimination shall be governed by the procedures of the False Claims Act (31 U.S.C. sec. 3730(b)), unless the parties mutually consent to alternative disputes resolution procedures such as mediation or arbitration.

(C) **BURDENS OF PROOF**—The legal burdens of proof with respect to prohibited discrimination under subsection (A) shall be governed by the applicable provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. sec. 1214 and sec. 1221).

SECTION FOUR: CONFLICTS: No funds may be spent to implement or enforce any nondisclosure policy, form or agreement without explicit provision that, in the event of a conflict, any restrictions on protected activity are superseded by this Act.

Model Anti-Gag Statute and Addendum

No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Form 312 and 4355 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with or otherwise alter the employee obligations, rights or liabilities created by the Constitution, Executive Order 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 3230(h) of Title 31 (governing disclosures challenging fraud in government contracts); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(5) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); section 3729 *et seq.* of title 31, United States Code, as amended by the False Claims Act (governing disclosures challenging fraud in government contracts); the Intelligence Identities Protection Act of 1982 (50 U.S.C. sec. 421 *et seq.*) (governing disclosures that could expose confidential Government agents), and the statutes which protect against disclosure that may compromise the national security, including sections *504 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. sec. 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling."

Code of Ethics for Government Service

Authority of Public Law 96-303, unanimously passed by the Congress of the United States on June 27, 1980, and signed into law by the President on July 3, 1980.

Any Person in Government Service Should:

- I. Put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.
- II. Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.
- III. Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.
- IV. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
- V. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.
- VI. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
- VII. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

VIII. Never use any information gained confidentially in the performance of governmental duties as a means of making private profit.

IX. Expose corruption wherever discovered.

X. Uphold these principles, ever conscious that public office is a public trust.

