

# CQ Researcher

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## Protecting Whistleblowers

*Do employees who speak out need better protection?*

**F**rom prisoner abuse at Abu Ghraib prison to fraud at Enron, some of the most dramatic revelations of corporate and government wrongdoing have come from insiders. The Whistleblower Protection Act and other laws are designed to shield employees who reveal wrongdoing from retaliation by vengeful bosses. But federal employees who claim they were harassed after blowing the whistle lose their cases far more often than they win. They lose so often, in fact, that some whistleblower advocates urge potential whistleblowers to become anonymous sources for reporters instead. National-security employees are in an especially delicate position, because what they want to disclose may involve secret information. Several bills now before Congress aim to strengthen protections for whistleblowers, including those in intelligence agencies.



*Bunnatine H. Greenhouse, a U.S. Army Corps of Engineers contracts supervisor, was demoted in 2005 after challenging Iraq war contracts awarded to a subsidiary of the Halliburton Co.*

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Cover: Bunnatine H. Greenhouse, a U.S. Army Corps of Engineers contracts supervisor, was demoted in 2005 after challenging Iraq war contracts awarded to a subsidiary of the Halliburton Co. She is contesting her demotion. (Getty Images/Chip Somodevilla)

# Protecting Whistleblowers

BY PETER KATEL

## THE ISSUES

When Sgt. Samuel Provance learned U.S. forces at Abu Ghraib prison near Baghdad were abusing Iraqi prisoners, he knew he had to do something. But there was pressure to remain silent, he testified before the House National Security Subcommittee on Feb. 14, sitting ramrod straight at a gleaming, wooden witness table.

"I was told that the honor of my unit and the Army depended on either withholding the truth or outright lies," he said.<sup>1</sup>

Nonetheless, Provance informed his superiors, and then reporters, that Military Intelligence officers had directed the abuses — contrary to official claims that rogue troops were responsible. In response, the Army revoked his security clearance and demoted him.

The Defense Department presented no witness to contradict Provance's account. Nor were other witnesses' allegations of reprisals disputed. They told of being harassed, fired or forced to resign for revealing a number of national security foul-ups, including the alleged cover-up of early discoveries concerning the Sept. 11, 2001, terrorists; a botched FBI terrorism investigation; foreign infiltration of the top-secret National Security Agency (NSA) and poor security at U.S. nuclear power plants.

"We need national-security whistleblowers to tell us when things go wrong," said Subcommittee Chairman Christopher Shays, R-Conn. "But those with whom we trust the nation's secrets are too often treated like second-class citi-



Getty Images/Linda Spillers

*Former FBI translator Sibel Edmonds, at her home in Alexandria, Va., was dismissed by the FBI after exposing alleged wrongdoing and incompetence. The U.S. Supreme Court refused to hear her case after government lawyers said they couldn't argue against her lawsuit without revealing state secrets.*

zens when it comes to asserting their rights to speak truth to power."

In recent years, whistleblowers have exposed wrongdoing or incompetence hidden behind walls of corporate or government secrecy, from the financial fraud that led to the Enron collapse to the tobacco industry's lies about the cancer-causing nature of cigarettes.

In the process, whistleblowers often become media heroes. In 2002, FBI agent Colleen Rowley was named one of *Time* magazine's "Persons of the Year" for revealing FBI incompetence before the Sept. 11, 2001, terrorist attacks. Also named were two corporate whistleblowers — former Enron Vice President Sherron Watkins and WorldCom auditor Cynthia Cooper.<sup>2</sup>

Today, with the war in Iraq beginning its fourth year and debate intensifying over the government's counterterrorism tactics, national-security whistleblowers increasingly have come in conflict with government efforts to control information affecting the country's safety.

"When they go out and talk to the public about a highly classified program, they harm the national security of this country," Attorney General Alberto R. Gonzales told the Senate Judiciary Committee on Feb. 6.

But whistleblowers and their defenders contend that government officials often use secrecy rules to stifle politically embarrassing truths. "New whistleblower protections should immediately be established for members of the executive branch who report evidence of wrongdoing — especially where it involves . . . the sensitive areas of national security,"

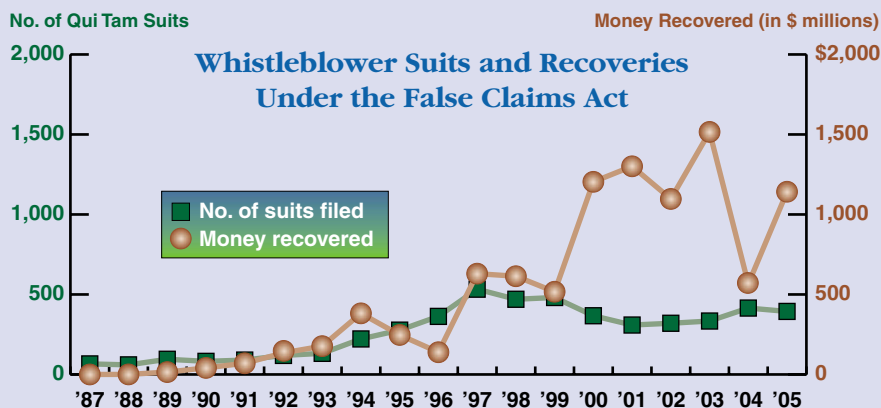
former Vice President Al Gore said in a January speech.<sup>3</sup>

Sen. Frank Lautenberg, D-N.J., has introduced a bill to prevent government officials from claiming secrecy when whistleblowers try to denounce wrongdoing or prove retaliation. And Rep. Todd R. Platts, R-Pa., and Sen. Daniel Akaka, D-Hawaii, introduced whistleblower-protection bills last year. The Senate Homeland Security and Governmental Affairs Committee approved the Akaka bill, and the House Government Reform Committee OK'd Platts' proposal, but neither bill has moved to the full Congress.

The bills were introduced against the backdrop of high-stakes court battles between whistleblowers and the executive branch. Last November the

## Whistleblower Suits Recovered \$9.6 Billion

More than 5,100 “qui tam” (whistleblower) suits have been filed against companies allegedly cheating the federal government since the False Claims Act was updated in 1986 to offer more protection and financial incentives to whistleblowers. During the same period, more than \$9.6 billion was recovered.



### What Is a Qui Tam Suit?

The False Claims Act allows citizens and organizations with evidence of fraud against the government to sue the wrongdoer on behalf of the government. Such actions are known as qui tam, or “whistleblower” lawsuits. Qui tam is part of a longer Latin phrase (qui tam pro domino rege quam pro se ipso in hac parte sequitur) that means “he who brings an action for the king as well as for himself.” The person filing a successful suit receives 15-30 percent of the money recovered.

Sources: Taxpayers Against Fraud; Project on Government Oversight

U.S. Supreme Court refused to hear an appeal by former FBI translator Sibel Edmonds, who claims she was fired for exposing alleged wrongdoing and incompetence. However, the justices refused to hear Edmonds’ appeal after government lawyers said they couldn’t argue against her lawsuit without revealing state secrets — an argument lower court judges had accepted.<sup>4</sup>

But the justices have agreed to decide whether government employees have a constitutionally protected free-speech right to report wrongdoing. The case involves a Los Angeles deputy district attorney who contends his rights were violated when he was demoted for denouncing a search warrant that

contained inaccurate information. Justice Department lawyers have filed a brief in the case, arguing that the First Amendment doesn’t cover public employees who speak out in the course of their jobs.<sup>5</sup>

Stephen Kohn, a Washington lawyer specializing in representing whistleblowers, calls the government’s position “outrageous” and potentially disastrous for employees who try to report wrongdoing.

Even if the court determines the First Amendment doesn’t always protect public employees from reprisals, they still are shielded by the federal whistleblower-protection system established by Congress about 30 years ago.

The system for intelligence-community whistleblowers largely revolves around the inspectors general offices attached to — but independent of — the various federal agencies. But inspectors’ powers are limited. For example, a report by the Justice Department’s inspector general concluded that Edmonds did have legitimate grounds for voicing suspicions about a colleague’s possible ties to a foreign intelligence service. “Edmonds had her case reviewed by the FBI, which did not, and still has not, adequately investigated these allegations,” said the January 2005 report, noting the bureau also failed to prove that Edmonds’ firing was justified.<sup>6</sup> In response, the FBI launched a new investigation of her allegations.<sup>7</sup>

A separate law, the Intelligence Community Whistleblower Protection Act of 1998, allows intelligence-service employees to report wrongdoing of “urgent concern” to Congress.<sup>8</sup> “Exercising one’s rights under this act is an appropriate and responsible way to bring questionable practices to the attention of those in Congress charged with oversight of the intelligence agencies,” CIA Director Porter Goss wrote just before Shays held his hearing. “And it works.” As House Intelligence Committee chairman in 1998, Goss was one of the law’s authors.

But intelligence analyst Russell Tice, who was fired by the NSA last year after warning that a colleague might be a foreign spy, told Shays’ subcommittee the agency had barred him from reporting his concerns to Congress on the grounds that House and Senate Intelligence Committee members didn’t have the security clearances required to hear about certain NSA and Defense Intelligence Agency operations. But a Jan. 9 letter from the agency did tell Tice that no members or staff of the Intelligence committees were “cleared to receive the information” concerning “Special Access Programs” that Tice wanted to disclose. The letter added

that Tice had to inform the Defense Department and NSA of what he wanted to say, and be directed by them how to deal with the congressional committees.

No one disputes that national-security whistleblowing raises legitimate worries about the country's safety. Even former CIA and Defense Department analyst Richard M. Barlow, whose career was shattered after he spoke up, says he was troubled by *The New York Times'* disclosure of the NSA's warrantless electronic spying on U.S. citizens.<sup>9</sup> (See sidebar, p. 276.)

"I can understand how White House people are concerned that this stuff ended up in *The Times*," says Barlow, an expert on Pakistan's nuclear-arms program. "This is not good."

Barlow conjectures that if NSA employees had had a reliable channel to pass information about wrongdoing to Congress — and if lawmakers had been more receptive to whistleblowers — the revelations might never have wound up in the headlines. Critics like Barlow point to Abu Ghraib whistleblower Provance as proof that those who step forward become sitting ducks for pay-back by their superiors.

Still, a Defense official suggested that Provance hadn't taken full advantage of the whistleblower-protection system. Under questioning by Shays, Jane Deese, director of military-reprisal investigations for the Pentagon's inspector general, called Provance's account "disturbing" but added that he had never filed a complaint.

After the hearing, one of Provance's lawyers, Deborah Pearlstein of Human Rights First, said Provance had likely concluded on the basis of what he'd already suffered that he would worsen his situation by filing a retaliation complaint.

Asked by Rep. Henry Waxman, D-Calif., how his superiors had reacted to his accounts of detainee abuse, Provance said their responses made clear that "anything that I had to say was just going to be avoided or ignored."

## Before You Blow the Whistle . . .

*Employees should consider the following checklist before becoming whistleblowers, according to three whistleblower advocacy groups.*

- 1. Consult your loved ones** — *This is a family decision, and you want to have your spouse, family and/or close friends on your side.*
- 2. Check for skeletons in your closet** — *Is there a peccadillo or something in your past that could be used against you?*
- 3. Document, document, document** — *Keep records of important documents; your access to agency documents might be denied after whistleblowing.*
- 4. Do not use government resources** — *Do not use agency resources, such as phones and fax machines, when engaging in whistleblowing.*
- 5. Check to see who will support your account** — *If you can't count on co-workers or others to defend your case, consider waiting.*
- 6. Consult an attorney early** — *Seek legal advice before you intervene.*
- 7. Choose your battles** — *Don't fight personnel issues, because the advantage is with the employer, not the employee.*
- 8. Identify allies** — *Share your knowledge with others at the agency that might have interest in your evidence.*
- 9. Have a plan** — *Create a step-by-step action plan, including how the agency will respond and how you will counter its response.*
- 10. Get career counseling** — *Consider where your actions will leave you in a year, two years, five years.*

Sources: "The Art of Anonymous Activism: Serving the Public While Surviving Public Service"; Project on Government Oversight, Government Accountability Project, Public Employees for Environmental Responsibility

Trained as an intelligence and computer expert, Provance says that since being demoted from sergeant to specialist he has been relegated to "picking up trash and guard duty and things of that nature."

As the fight over whistleblower protection heats up again, here are some of the leading issues in debate:

### **Are federal whistleblowers adequately protected?**

Whistleblower expert Kohn says some 40 laws protect federal whistleblowers — at least in theory. They include a little-known 2002 statute that makes job retaliation a crime when directed at someone who provided truthful information about the

"commission or possible commission" of a federal crime.<sup>10</sup>

"That is an extremely powerful tool," says Kohn, who has written five books on whistleblowing. "It prohibits the gagging of federal employees, even those involved in highly sensitive national-security issues. They can go to federal law enforcement under this law." Kohn says the law has not been used much, but he expects lawyers to begin invoking it in whistleblower cases.

Dozens of states have enacted laws providing varying degrees of protection to government whistleblowers. In the federal system, the extent of protection varies by agency. For instance, employees who work in fields affecting public health and safety, such as nuclear power,

aviation, trucking and environmental protection, can take complaints of retaliation directly to the Labor Department and, depending on the response, directly to federal District Court.

Those employees and most other federal employees — except national-security workers — fall under the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). Whistleblowers can take cases of alleged serious retaliation — such as firing or suspension — to the board. Complaints of transfers, blocked promotions and the like can be reported to the OSC if the alleged reason was retaliation or another prohibited practice. If the OSC doesn't act within 120 days, employees can bring their cases to the MSPB. The OSC can also conduct preliminary disclosures of serious misconduct in agencies and require full-scale investigations by the agencies themselves if the allegations seem to be well-founded.

If the OSC concludes an employee has been improperly treated, it can ask the MSPB to postpone the personnel action about to be taken against the worker. But if the MSPB rejects that request, the OSC cannot appeal that decision.<sup>11</sup> The Court of Appeals for the Federal Circuit, created in 1982, has exclusive jurisdiction over appeals of board decisions.

But Kohn and other experts advise whistleblowers to sue in federal District Court — alleging violations of their First Amendment free-speech rights, for

example — rather than going to the MSPB and the OSC. “If you enter that box, you will get a ruling from somebody that says you are not a real whistleblower, which undermines your ability to go to Congress and the press and get your issues addressed,” he says.

For instance, of the 120 Federal Circuit rulings on the merits of whistleblower appeals between 1994 and 2005, only one went in favor of the employee, according to Thomas Devine, legal director of the Government Accountability Project. And of the 52 whistleblowers that took their cases to the MSPB from 1999 to March

13, 2006, only two prevailed, Devine says.<sup>12</sup>

Board General Counsel Martha Schneider does not dispute the figures. But she says the board works within limits set by the Federal Circuit and the 1987 Whistleblower Protection Act (WPA). The court set a key precedent in 1999 when it ruled that in order for whistleblowers to sustain their cases, a “disinterested observer” would have to agree that misconduct had occurred. “The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct,” the court said.<sup>13</sup> Since that ruling, a single witness on behalf of a government agency has been enough to knock down employees' cases.

And, Schneider says, the WPA statute itself is “fairly narrow” in its definition of the kinds of activities that whistleblowers get protected for reporting — a violation of law, regulation or gross mismanagement; gross waste of funds; abuse of authority; or a “substantial and specific danger” to public health or safety. Given those limits, Schneider says, it is “harder for whistleblowers to prevail.”

In reality, some whistleblower advocates say, the board has long been hostile to employees who appear before it. In 1994, the House Committee on Post Office and Civil Service reported that it had heard “extensive testimony at hearings that the MSPB and the Federal Circuit have lost credibility with the practicing bar for civil service cases.”<sup>14</sup>

Devine says members of the three-member board are traditionally “minor-



*Time tapped three whistleblowers as its “Persons of the Year” in 2002: auditor Cynthia Cooper, who revealed phony accounting practices at WorldCom; FBI agent Colleen Rowley, who documented bureau failure to follow-up leads before the 9/11 terrorist attacks; and Enron Vice President Sherron Watkins, who warned about massive financial irregularities at the now bankrupt firm.*

Time, Inc.

league political appointees who know they won't rise up the political food chain by helping people who challenge abuses of power by the president or his political appointees." Board Chairman Neil A. G. McPhie, a former Virginia senior assistant state attorney general, did not respond to a request for comment.

Whistleblower advocates direct even harsher criticism at the Office of Special Counsel, headed by Bush appointee Scott J. Bloch. Bloch draws criticism for both his handling of whistleblowers and personnel issues in his own agency. A complaint filed against Bloch by whistleblower advocacy groups and others charges he issued an illegal gag order, transferred employees he considered disloyal and disposed of cases often without interviewing the employees who filed the complaints. (See sidebar, p. 278.)

**Is the Bush administration hostile to whistleblowers?**

No contemporary president has generated much enthusiasm among whistleblower advocates.

"Every administration's Justice Department has objected to every whistleblower bill since the [1978] Civil Service Reform Act," a Democratic congressional aide says, asking not to be named. "They have an institutional bias, because they would always be defending an agency against a whistleblower. So any bill that helps a whistleblower means they might lose cases."

Indeed, in an April 12, 2005, letter to Congress on Akaka's proposed bill, Assistant Attorney General William E. Moschella cited strong opposition by the Clinton administration in 1998 to a proposal to extend whistleblower protection to employees whose reports of alleged wrongdoing included classified information.

Even so, President Bush stands out for his insistence on controlling government information, say whistleblower advocates. "The Bush administration is

**Backlog of Whistleblower Cases Reduced**

*In an effort to clear out its large backlog of whistleblower cases, the Office of Special Counsel (OSC) closed nearly three times as many cases in 2004 as it did in 2003. Only eight of the 18 cases alleging government fraud, mismanagement or abuse were substantiated in 2004. In 2005, however, despite a caseload half as large, twice as many cases were substantiated.*

**OSC Disposition of Whistleblower Disclosures**

	FY2003	FY2004	FY2005
Total cases pending	1,091	1,262	583
Referred to agency for investigation	11	18	19
Substantiated by agency	13	8	16
Processed and closed	401	1,154	473

*Source: Office of Special Counsel, fiscal 2007 Congressional Budget Justification and Performance Budget Goals*

much more aggressive in regard to whistleblowers [in its] secrecy policies, which creates more possibilities for retaliation and creates a chilling effect," says Beth Daley, an investigator with the Washington-based Project on Government Oversight.<sup>15</sup>

The administration has created a new category of "sensitive but unclassified" information that agencies are prohibited from disclosing — though a definition of the category has yet to be hammered out. So far, prohibited data include information on shipments of hazardous materials, injury rates among workers at the Portland, Ore., airport and plans for a liquefied natural gas power plant on Long Island Sound.

Bush has ordered National Security Director John D. Negroponte to come up with a governmentwide definition of "sensitive but unclassified" information in order to enhance information sharing "amongst those entities responsible for protecting our communities from future attack," said Negroponte spokesman Carl Kropf.<sup>16</sup> Negroponte's office declined to discuss the effect of the classification on national-security whistleblowers.

Taken alone, a new category of classified information might not sound alarming in post-9/11 America. But the policy worries the whistleblower-protection network, particularly in view of other recent efforts by the federal government to either withhold information from the public or retaliate against those who reveal irregularities.

For instance, the government has secretly reclassified more than 55,000 intelligence and diplomatic documents in the National Archives that had been publicly available for years, some dating back to the Korean War. The reclassification began under President Clinton in 1999, when the CIA and other agencies objected to the unsealing of what they considered secret information following a 1995 presidential declassification order. The reclassification intensified under Bush.<sup>17</sup>

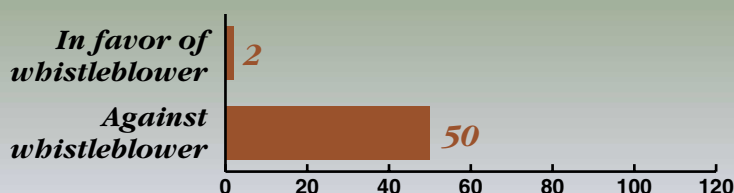
After disclosure of the program prompted outrage from historians, Allen Weinstein, director of the National Archives, announced a halt, pending talks with the spy and military agencies. He also asked the agencies to do their best to restore to public access as many of the newly reclassified files as possible.<sup>18</sup>

## Only Three Whistleblowers Won Their Cases

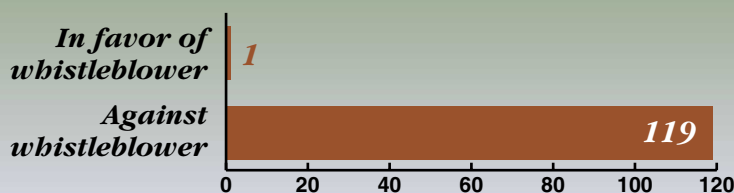
Only three out of 172 employees in recent years won their cases after claiming employers retaliated against them for revealing problems. Under the 1999 Whistleblower Protection Act, retaliation claims can be filed with either the Merit Systems Protection Board or the Court of Appeals for the Federal Circuit.

### Status of Whistleblowers' Retaliation Claims

#### Rulings of Merit Systems Protection Board (From June 1999 to March 13, 2006)



#### Rulings of Court of Appeals for the Federal Circuit (From 1994 through March 2006)



Source: Government Accountability Project, March 2006

In 2005 the U.S. Army Corps of Engineers demoted Bunnatine H. Greenhouse, a contracts supervisor who challenged Corps contract awards to Kellogg Brown & Root — a subsidiary of Halliburton (formerly headed by Vice President Dick Cheney), which received more than \$10 billion in contracts for work in Iraq. The Corps said it was not retaliating against Greenhouse, but her lawyer argued that was the only explanation, given her stellar track record before the Halliburton issues arose.<sup>19</sup> Greenhouse's challenge of her demotion is pending.

Medicare actuary Richard Foster was threatened with dismissal in 2003 if he told Congress that a prescription-drug reimbursement plan (since enacted) would cost \$100 billion more than ad-

ministration officials had claimed. The inspector general of the Health and Human Services Department (HHS) later concluded that Foster's boss did not act illegally because Foster had no independent right to inform Congress.<sup>20</sup>

HHS' position reflected a May 21, 2004, memo to the department from then-Assistant Attorney General Jack L. Goldsmith, who concluded that government officials' powers include control of what information Congress gets to see. "Executive privilege," he wrote, referring to the doctrine of presidential secrecy, "applies governmentwide, and is not limited to presidential decision making. . . . Presidents George [H.W.] Bush, Bill Clinton and George W. Bush each asserted executive privilege against congressional

committees to protect intra-agency deliberative materials prepared for senior officers in executive departments."<sup>21</sup>

Goldsmith was disputing a Congressional Research Service (CRS) memo declaring that Congress' right to information trumps any gag orders on employees. "Congress has a clear right and recognized prerogative . . . to receive from officers and employees of the agencies and departments of the United States accurate and truthful information regarding the federal programs and policies," wrote Jack Maskell, a CRS legislative attorney.<sup>22</sup>

In 2004 U.S. Park Police Chief Teresa Chambers was fired after telling reporters that her officers were unable to patrol Washington-area parks because of a new policy that they maintain a bigger presence at national monuments. A Merit Systems Protection Board judge upheld the dismissal, saying she had broken the chain of command by going public.<sup>23</sup>

Jeff Ruch, executive director of Public Employees for Environmental Responsibility, said the Chambers case cast an especially big shadow because the police chief didn't see herself as a whistleblower but as the agency's spokesperson. "Now the line between whistleblowing and simply telling the truth is increasingly blurred," Ruch says. "A lot of times, the people we work with don't realize they're whistleblowing by being inconveniently candid."

Consciously or not, however, the employees are colliding with the Bush administration doctrine that high-ranking officials — not their subordinates — decide what information to release. A "fundamental principle" of presidential authority, Goldsmith wrote in his memo on the Medicare matter, is that "his subordinates must be free from certain types of interference from the coordinate branches of government."<sup>24</sup>

Whistleblower advocates argue that with both the executive branch and Congress controlled by Republicans, the normal checks and balances — specifically

congressional oversight — do not exist. “The Republicans are not going to do any oversight of themselves,” says Kris J. Kolesnik, who helped draft the 1989 Whistleblower Protection Act (WPA) as an aide to Sen. Charles Grassley, R-Iowa. Kolesnik, also a Republican, is now executive director of the National Whistleblower Center.

Administration officials say they support whistleblower-shield systems. Last April, as the administration prepared to establish a new

personnel system for civilians at the Pentagon — the National Security Personnel System (NSPS) — then-Navy Secretary Gordon England (now deputy secretary of Defense) told the Senate Armed Services Committee that the new system “will not remove whistleblowing protections.”

But an official of the American Federation of Government Employees, which opposes the system, says the NSPS would wreck whatever protections exist. Mark Roth, the union’s general counsel, points to an appeal system in which the Merit Systems Protection Board would be able to overturn a boss’ personnel action only if it were found “totally unwarranted,” which would mean that any infraction by an employee would be enough to sustain a demotion or disciplinary move.

On Feb. 27, U. S. District Judge Emmet G. Sullivan accepted the union’s arguments in barring the Pentagon from putting most of the NSPS into operation. “The appeals system is the antithesis of fairness,” the judge wrote.<sup>25</sup> England said he expected his department to appeal the ruling.<sup>26</sup>



*Tobacco industry whistleblower Jeffrey Wigand, right, who revealed that Brown & Williamson officials knew cigarettes caused cancer, joins New York City Mayor Michael Bloomberg as he announces his Smoke-Free Air Act on Oct. 9, 2002.*

Getty Images/Adam Rountree

***Should civil servants anonymously leak information to reporters instead of becoming whistleblowers?***

The firings and demotions experienced by some government whistleblowers discourage others from going through official channels to reveal wrongdoing. Instead, some insiders protect their jobs by leaking information anonymously to the press.

The consequences of whistleblowing can be even more serious for workers at intelligence agencies, where both law and workplace culture demand observance of secrecy rules. At the least, their security clearances can be revoked — effectively ending their careers. In some cases, they can be prosecuted for revealing state secrets. Thus, it was not surprising that the recent press reports about warrantless NSA domestic spying were based on anonymous sources.

“All reporters know that the very best stories — the most important, the most sensitive — rely on them,” wrote reporter James Risen, who broke the domestic-spying story in the *Times*

and authored a new book about the intelligence community and the war in Iraq. Without information from “current and former officials from the Bush administration, the intelligence community and other parts of the government,” the book couldn’t have been written.<sup>27</sup>

But CIA Director Goss has little tolerance for leakers. “Those who choose to bypass the law and go straight to the press are not noble, honorable or patriotic,” Goss wrote. “Nor are they whistleblowers. Instead, they are committing a criminal act that

potentially places American lives at risk.”<sup>28</sup>

Goss told a Senate Intelligence Committee hearing in February that reporters writing stories based on NSA leaks should be hauled before a grand jury and “asked to reveal who is leaking this information.”<sup>29</sup> In fact, the Bush administration has instigated a criminal investigation that could end in just that.<sup>30</sup>

Rather than leak to the press, FBI whistleblower Rowley worked within the system, sending a 13-page letter to FBI Director Robert S. Mueller III and copies to two members of the Joint Intelligence Committee.

Nevertheless, Rowley acknowledges that exceptional circumstances justify extraordinary measures, citing the notorious 1968 massacre of Vietnamese civilians at My Lai by U.S. troops and FBI Assistant Director Mark Felt’s leaks — as “Deep Throat” — to *The Washington Post* during the Watergate scandal. “When your bosses are destroying evidence and outright lying — then, yes, you actually have to go outside the chain of command.” (Rowley

retired from the FBI and is running as a Democrat for a U.S. House seat in Minnesota.)

Still, given the potential risks of whistleblowing, some whistleblower advocates encourage employees to leak information about misdeeds. "We talk people out of blowing the whistle, says Ruch of Public Employees for Environmental Responsibility (PEER). If you think about it, if an agency is forced to confront the issue directly and can't blame it on a disgruntled employee, that's very good terrain to be on."

"The Art of Anonymous Activism," published by the Project on Government Oversight (POGO), the Government Accountability Project and PEER, advises employees on how to leak information. "Throwing away your entire career, particularly if there are other ways to ventilate the problem, is imprudent and counterproductive," the booklet argues.

But lawyer Kohn argues that even anonymous leakers can endanger their careers. For one thing, he says, while bosses and co-workers usually can figure out an anonymous source's identity, a leaker who suffers retaliation might not be able to prove that his boss has identified him.

But Rep. Shays responds that when whistleblowers follow the official chain of command it often leads to a dead end: "Leaks happen because whistleblowers are not getting heard."

Administration officials show little sympathy for that argument — or for leakers. Attorney General Gonzales told the Senate Judiciary Committee on Feb. 6 the Intelligence Community Whistleblower Protection Act protects employees wanting to report misconduct. "The danger or problem of going to the media as an initial matter is that you have some people . . . whose motivation . . . can be questioned in terms of why are they doing that," Gonzales said. ■

## BACKGROUND

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### Civil War Abuses

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When Civil War contractors were discovered selling the Union Army gunpowder cut with sawdust and other shoddy supplies, Congress authorized civil servants and citizens to sue cheaters on the government's behalf and share any money recovered with the government.<sup>31</sup>

Although the 1863 False Claims Act was groundbreaking legislation, it only dealt with whistleblowers reporting abuses by private contractors. It did not address insider accounts about public servants. President Theodore Roosevelt set the stage for such legislation when he barred employees in 1902 from contacting Congress on their own.<sup>32</sup>

The dispute over lawmakers' access to direct information from the executive branch agencies simmered through 1912, when Congress passed the Lloyd-Lafollette Act, which prohibited the firing of employees who contacted Congress.<sup>33</sup>

The early laws provided the only legal backing to civil servants reporting improper conduct until Congress took a comprehensive look at whistleblowing in 1978.

In 1972, journalist-historian Taylor Branch defined whistleblowers as political descendants of the turn-of-the-century journalistic crusaders known as muckrakers, who specialized in exposing corporate and government corruption.<sup>34</sup>

Muckraking's heyday had faded by the time insiders began blowing the whistle on government and corporate misdeeds during the government-reform movement of the 1960s. Ralph Nader, an advocate of corporate accountability and government trans-

parency, immediately saw whistleblowers' value in arousing the public as well as politicians.

On Jan. 30, 1971, Nader organized a Conference on Professional Responsibility, which kicked off a campaign for legislation encouraging employees to tell Congress about government misdeeds while protecting them from retaliation. "The willingness and ability of insiders to blow the whistle is the last line of defense ordinary citizens have against the denial of their rights and the destruction of their interests by secretive and powerful institutions," Nader wrote.<sup>35</sup>

Nader and his allies had been inspired by four young staffers for Sen. Thomas J. Dodd, D-Conn., the father of today's Sen. Christopher J. Dodd, D-Conn. In 1965, they gave investigative reporter Jack Anderson copies of documents from Dodd's files that indicated he was pocketing campaign contributions. Anderson's articles led to Dodd's 1967 censure by the Senate for misusing political funds.<sup>36</sup>

Dodd's downfall notwithstanding, most government whistleblowing has been centered on the executive branch. In 1968, shortly after the Dodd exposé, a civilian Air Force financial analyst, A. Ernest Fitzgerald, told a congressional subcommittee that the cost of developing the C-5A transport plane was \$2 billion over budget. Fitzgerald was forced out of his job but challenged his ouster in court and was reinstated in 1982.

In 1987, Fitzgerald made news again when he forced the Reagan administration to back down from requiring employees to take a secrecy pledge aimed at keeping government information out of the hands of Congress and the press.<sup>37</sup>

Fitzgerald's stand against wasteful military spending became a national news story, but he remained an inside-the-Beltway Washington figure. Defense analyst Daniel Ellsberg,

*Continued on p. 276*

# Chronology

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## **1960s-1970s**

**Whistleblowers reveal government misdeeds during Vietnam War and Watergate scandal.**

### **1968**

Pentagon fires A. Ernest Fitzgerald for revealing cost overruns in developing the C-5A transport plane. He was reinstated in 1982.

### **1971**

Consumer advocate Ralph Nader launches drive for whistleblower-protection laws.

### **1973**

Prosecutors drop charges against former Pentagon analyst Daniel Ellsberg for leaking the "Pentagon Papers" to *The New York Times*.

### **1978**

Congress passes first, comprehensive whistleblower legislation, the Civil Service Reform Act.

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## **1980s** *Congress strengthens the new statute.*

### **1984**

Merit Systems Protection Board finds most employees are still fearful of reporting wrongdoing.

### **1987**

Congress passes Whistleblower Protection Act (WPA), but Republican President Ronald Reagan vetoes it the next year, claiming it would be a vehicle for the merely disgruntled.

### **1989**

President George H.W. Bush signs a toned-down version of the WPA.

## **1990s** *New generation of whistleblowers makes sensational disclosures of corporate and government wrongdoing.*

### **1992**

Congress halts mental health exams for military whistleblowers and restores cash awards to whistleblowers who save the government money.

### **1993**

Democratic Vice President Al Gore encourages whistleblowers as part of the Clinton administration's "Reinventing Government" effort.

### **1994**

Congress strengthens WPA, allowing whistleblowers to challenge agency decisions to alter their working conditions or order them to undergo psychiatric testing.

### **1995**

Former tobacco-industry scientist Jeffrey Wigand reveals the cover-up of smoking hazards by Brown & Williamson Tobacco Co.

### **1996**

Aircraft maker McDonnell-Douglas pays fines for accounting fraud revealed by whistleblowers.

### **1997**

Internal Revenue Service auditor Jennifer Long tells Congress the IRS targets lower-income taxpayers seen as easy targets. . . . On Oct. 24, a federal District judge in Houston rules the False Claims Act is unconstitutional; Supreme Court later overturns the decision.

### **1998**

FBI agrees to pay large settlement to former crime laboratory official Frederic Whitehurst, who revealed manipulation of FBI lab results.

## **2000s** *National-security whistleblowers face retaliation.*

### **2002**

FBI agent Colleen Rowley reveals FBI's pre-9/11 incompetence.

### **2003**

Medicare actuary Richard Foster is threatened with dismissal after threatening to tell Congress the Bush administration is low-balling cost estimates for its prescription-drug reimbursement plan.

### **2004**

Army Sgt. Samuel A. Provance is reduced in rank after revealing abuses at Abu Ghraib prison in Iraq.

### **March 2005**

Bills introduced by Sen. Daniel Akaka, D-Hawaii, and Rep. Todd R. Platts, R-Pa., would close loopholes in the whistleblower law.

### **Aug. 28, 2005**

Army Corps of Engineers demotes contract specialist Bunnatine H. Greenhouse after she complains of irregularities in Iraq war contracts.

### **Nov. 28, 2005**

U.S. Supreme Court refuses to hear appeal by FBI whistleblower Sibel Edmonds.

### **Feb. 14, 2006**

Sen. Frank R. Lautenberg, D-N.J., introduces bill aimed at shielding national-security whistleblowers. . . . House National Security Subcommittee holds hearings on whistleblowers.

### **Feb. 17, 2006**

Supreme Court calls for reargument in case of Los Angeles prosecutor Richard Ceballos, who was demoted after revealing that a warrant contained false information.

## The Downfall of Richard M. Barlow

**P**raise for his skills, friends in high places and four years of high-level national-security work — Richard M. Barlow can claim it all. What he lacks is a career.

Barlow was forced out of his job at the Defense Department in 1989. He's been trying to get it back ever since — along with his pension — with help from powerful supporters.

"As a message to whistleblowers, Rich's case is chilling," says former Assistant Secretary of State Robert Gallucci, dean of Georgetown University's School of Foreign Service, who is trying to persuade Congress to restore Barlow's retirement pay.

Barlow's adversaries tended to criticize him for being too rigid — and not a team player. His supporters said he was honest — and accurate — to a fault. Indeed, Victor Rostow, a former director of negotiations policy at the Pentagon, said Barlow's views "may have been absolutely right, but in the atmosphere of the creation of policy, being absolutely right is sometimes a hindrance. . . . There's a point at which you have to back off."<sup>1</sup>

Barlow's downfall began in 1987 at a closed-door briefing for the House Subcommittee on South Asian Affairs on Pakistan's nuclear weapons program. Barlow, then a brash, young CIA specialist, had the temerity to contradict testimony by Gen. David Einsel, a top National Intelligence Council official.

At the time, the Reagan administration wanted to keep aid flowing to Pakistan, which had been helping the United States oppose the Soviet Union's takeover in Afghanistan. But after the outlines of Pakistan's nuclear program surfaced, Congress had imposed two conditions on aid: The president was forced to certify that Pakistan wasn't building a nuclear weapon. And no aid could go to any country that was illegally obtaining U.S. materials of any kind to build a nuke.<sup>2</sup>

Years later, after Barlow sued to get his job back, a Court of Claims judge conceded, "We can safely assume that General Einsel's testimony was materially incorrect."<sup>3</sup>

Yet, abrasiveness aside, Barlow had delivered his testimony under orders from his bosses at the CIA, which months later awarded him a "certificate for exceptional accomplishment." Nonetheless, the episode effectively ended Barlow's agency ca-

reer, and he quit and joined the Defense Department as a proliferation specialist in 1989.

Again, he clashed with a superior over Pakistan, this time after learning the CIA was still misinforming Congress about Pakistan's nuclear weapons in order not to jeopardize the \$1.4 billion sale of F-16 fighters by the U.S. to Pakistan. Barlow had reported to his bosses that the planes were being modified to carry nuclear weapons. Told he'd be fired, Barlow quit.<sup>4</sup>

Over the years, as more details surfaced about Pakistan's weapons program — including black-market sales of nuclear technology by A. Q. Khan, then the director of Pakistan's nuclear weapons program, — Barlow's accuracy was confirmed.<sup>5</sup> But the Defense Department refused to rescind its actions against him, even when a General Accounting Office (now the Government Accountability Office) report called the Pentagon's case against Barlow legally unsupported. The 1997 report noted that even the Pentagon did not accept an account by Barlow's boss, Gerald Brubaker, that Barlow had threatened to contact Congress over the matter on his own.<sup>6</sup>

By 1998, it was clear that even Barlow's influential lawyer, former Assistant Defense Secretary Paul C. Warnke, had failed. Although Warnke had persuaded congressional leaders from both sides of the aisle to pressure the Pentagon to rescind its personnel actions, it wouldn't budge.<sup>7</sup> Then, Sen. Jeff Bingaman, D-N.M., introduced a "private relief bill" to obtain for Barlow the equivalent of the \$1.1 million retirement pay he had forfeited when he was forced out of government.<sup>8</sup>

The bill never got out of committee. Instead, the Senate in 1998 sent Barlow's case to the U.S. Court of Claims, which designates a judge to act as a hearing officer for Congress.<sup>9</sup> Four years later, Senior Judge Eric G. Bruggink concluded that Defense had acted within the law. In doing so, he accepted an account that Barlow had threatened to contact Congress about Pakistan's nuclear weapons on his own — a conclusion previously rejected by the Defense Department itself. "Mr. Barlow was a probationary employee who was terminated because of performance deficiencies and personality conflicts," Bruggink wrote.<sup>10</sup>

*Continued from p. 274*

on the other hand, achieved international fame in 1971 for leaking the secret Defense Department history of the Vietnam War known as the "Pentagon Papers." Ellsberg was arrested weeks after *The New York Times* began publishing the long account, but charges that he had violated the Espionage Act were dropped after government agents illegally tapped his phone.<sup>38</sup>

### Legal Shields

**T**he men who monitored Ellsberg's calls — and also broke into his psychiatrist's office in search of damaging information — became infamous when they were caught breaking into the Democratic National Committee's offices at the Watergate Hotel.<sup>39</sup> The resulting cover-up and Watergate scandal led to President Richard M. Nixon's resignation.<sup>40</sup>

After Watergate, lawmakers and the public viewed administration officials bent on secrecy as villains and whistleblowers as heroes. In 1978, Congress responded to the popular mood by including whistleblower-protection measures in the Civil Service Reform Act. "These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation," said a Senate report on the legislation. The law cre-

Bruggink's decision ignited a delayed behind-the-scenes dispute centering on the decision to bow to the government's wishes on excluding evidence. Aides to Sens. Susan Collins, R-Maine, chairwoman of the Senate Homeland Security and Governmental Affairs Committee, and Joseph I. Lieberman of Connecticut, the committee's ranking Democrat, told Barlow that Bruggink's report was the last word. But the staffers agreed to meet with Gallucci, Joseph Ostoyich, who took over the case from Warnke, and Louis Fisher, then a senior specialist in separation of powers at the Congressional Research Service.<sup>11</sup>

Fisher argued that Bruggink had not been obliged simply to accept the secrecy claim but could have reviewed documents and admitted some of them or sent the case back to the Senate because full evidence was unavailable. As it was, Fisher wrote, the court allowed the government to introduce the evidence it wanted, while denying Barlow the same right.<sup>12</sup> "My pitch was that the court didn't do what it was supposed to do to get at the facts," Fisher says. "The record is pretty clear that the court failed in its duty."

Barlow, for his part, faults congressional lawmakers. "You can hardly blame the executive branch for pushing its power and authority as far as Congress lets them push it," he says. "We're dealing with a Congress that's not been engaging in any checks and balances or oversight — giving the signal that the executive can do whatever it wants."

As for the misinformation about Pakistan's nuclear weapons that Congress received, "There is something to the idea that Congress sort of half-wanted to be misled in the '80s," Gallucci says. "People like Rich were going to force them to look at it in the eye. He really did get screwed."



Richard Barlow

Former Defense Department nuclear-proliferation expert Richard Barlow.

<sup>1</sup> Rostow testified at a 2002 hearing before a Court of Claims judge.

<sup>2</sup> For background on Pakistan's nuclear arms program, see Douglas Frantz, "From Patriot to Proliferator," *Los Angeles Times*, Sept. 23, 2005; Richard Weintraub, "Pakistan Faces Woes From Within, Without; Nuclear Question Threatens Ties to the U.S.," *The Washington Post*, July 28, 1987, p. A10, and Richard Weintraub "Pakistan Denies Connection to any Nuclear-Export Plot," *The Washington Post*, July 22, 1987, p. A1.

<sup>3</sup> See 53 Fed. Cl. 667, 2002 Court of Claims, pp. 4-5; a fuller account of the episode and of its consequences can be found in Seymour Hersh, "On the Nuclear Edge," *The New Yorker*, March 29, 1993, [www.newyorker.com/printables/archive/040119fr\\_archive02](http://www.newyorker.com/printables/archive/040119fr_archive02).

<sup>4</sup> General Accounting Office [now, Government Accountability Office], "Inspectors General: Joint Investigation of Personnel Actions Regarding a Former Defense Employee," July 10, 1997, pp. 2-3.

<sup>5</sup> For background, see Mary H. Cooper, "Nuclear Proliferation and Terrorism," *CQ Researcher*, April 2, 2004, pp. 297-320.

<sup>6</sup> General Accounting Office, *op. cit.*

<sup>7</sup> Warnke, who died in 2001, was also a former director of the Arms Control and Disarmament Agency. Barlow provided to *CQ Researcher* a file of correspondence between Senate Armed Services Committee Chairman Strom Thurmond, R-S.C., other lawmakers, and Defense officials.

<sup>8</sup> 105th Congress, 2d Session, S. 2274, "For the relief of Richard M. Barlow of Santa Fe, N.M.," July 8, 1998; press release, "Bingaman Seeks Compensation for Pentagon Whistleblower," Office of Sen. Bingaman, July 8, 1998. Barlow spent most of the 1990s working under a consulting contract with Sandia National Laboratories in New Mexico.

<sup>9</sup> Louis Fisher, "National Security Whistleblowers," Congressional Research Service, Dec. 30, 2005, pp. 35-38, [www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf](http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf).

<sup>10</sup> Federal Court of Claims, *op. cit.*

<sup>11</sup> Fisher joined the staff of the Library of Congress' law library on March 6, 2006, after 35 years at CRS. See, Yochi J. Dreazen, "Expert on Congress's Power Claims He Was Muzzled for Faulting Bush," *The Wall Street Journal*, Feb. 9, 2006, p. A6.

<sup>12</sup> Louis Fisher, "Congressional Research Service memorandum to: Jennifer Hemingway, Senate Committee on Homeland Security and Governmental Affairs, Nov. 25, 2005."

ated the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to prosecute prohibited personnel practices, such as reprisals against whistleblowers.

But the protection process was complicated and fraught with limitations, and few employees used it. Fear of reprisals grew stronger during the early years of the Reagan administration. Indeed, the percentage of employees keeping quiet about

official misconduct doubled between 1980 and 1983, according to an MSPB study.<sup>41</sup>

Acknowledging that reality, Congress passed the Whistleblower Protection Act of 1987, which would have authorized the OSC to appeal MSPB decisions in federal court and made it easier for whistleblowers to claim they were victims of retaliation. But President Reagan pocket-vetoed the bill in 1988, calling it a way for un-

deserving employees to avoid firing, demotion or other action.

The following year, Congress passed and President George H.W. Bush signed a toned-down version of the bill — with the OSC's appeal power removed.

But even the new legal protections proved less than solid. A 1994 MSPB survey found retaliation on the upswing, with 37 percent of respondents saying they had suffered retaliation for exercising their rights — including re-

# Critics Question Agency's Commitment

**W**histblower advocates say the chief federal official charged with protecting whistleblowers who are federal employees is out to sabotage employee rights.

A formal complaint filed by employees and whistleblower-advocacy organizations charges that Scott J. Bloch, who heads the Office of Special Counsel (OSC), issued an illegal gag order and transferred employees he considered disloyal.

"Complainants' allegations against Special Counsel Bloch . . . go to the heart of OSC's credibility and effectiveness as a watchdog of the [federal] merit system," said the Government Accountability Project, the Project on Government Oversight, Public Employees for Environmental Responsibility and Human Rights Campaign. Their initial complaint was filed on March 3, 2005.<sup>1</sup>

Whistleblower advocates say Bloch's personnel practices reflect the OSC's performance in handling whistleblower cases. "This OSC is even worse than the others," says Washington lawyer Stephen M. Kohn, who often represents whistleblowers. While OSCs in previous years filed a couple of cases, he says, "this one does straight-out nothing."

For its part, the OSC reports it referred 19 whistleblower allegations to federal agencies for investigation last year, and that 16 were substantiated.

The complaint against Bloch charges that his methods of trimming the office's case backlog included closing cases "at breakneck speed" — often without even interviewing complainants alleging retaliation.<sup>2</sup>

Bloch, who took office in January 2004, has dismissed the allegations as false — the product of disgruntled employees and administration opponents. "They don't like the success Bush officials are having in dealing with the bureaucracy," he said.<sup>3</sup>

Rep. Tom Davis, R-Va., chairman of the House Government Reform Committee, congratulated Bloch last May for reducing the agency's historically massive backlog of whistleblower and other cases, which had been cited in a critical report by the

General Accounting Office. "We appreciate the professional seriousness with which you . . . reduced the existing backlogs," Davis said, in a letter cosigned by Rep. Jon G. Porter, R-Nev., chairman of the House Federal Workforce Subcommittee. "Unfortunately, this activity, while beneficial to whistleblowers, was regarded with suspicion by activists who claim to work on behalf of whistleblowers."<sup>4</sup>

The whistleblower advocates cited leaked OSC reports, a practice Bloch excoriated. "It's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me," Bloch said.<sup>5</sup> He later ordered that any "official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC" had to be approved by him or his immediate staff, according to the complaint. That directive violated both the First Amendment and a federal law authorizing federal workers to disclose information to Congress, the complaint argues.<sup>6</sup>

Bloch himself told Federal News Radio he is pro-whistleblower. "Any time we can give more protection to whistleblowers and make sure that they understand that they're protected, it's a good thing. . . . They do have an agency that does go to bat for them. It is true that some don't get as much justice as they wish or as quickly as they ought to. We are making significant progress in that."<sup>7</sup>

The interview didn't touch on the charges against Bloch's management of the agency. Loren Smith, the OSC's congressional and public affairs director, says Bloch doesn't want to discuss the complaint until investigators have examined the allegations.

The complaint that received the most attention said Bloch flouted federal law by refusing to pursue cases involving employees who report discrimination based on sexual orientation. Bloch ignited the controversy shortly after taking office by removing references to sexual-orientation discrimination from his agency's Web site. He later said that while discriminating against

porting fraud, waste or abuse — up from 24 percent in 1983. And fewer than 20 percent of employees who filed complaints with the MSBP were successful in their cases.<sup>42</sup>

The OSC's record was even more dismal. A 1994 report by the House Post Office and Civil Service Committee found that the agency had not litigated a single case to restore a whistleblower's job — even though 400 to 500 employees had filed cases with the OSC since its 1979 creation.<sup>43</sup>

Employees also fared badly in the

U.S. Court of Appeals for the Federal Circuit, the only court authorized to hear appeals of MSPB decisions. In one case, the House Post Office panel said a judge violated congressional intent in upholding the firing of a Department of the Army employee who claimed her dismissal was retaliation for whistleblowing. The department had not even been required to prove that the whistleblowing played no part in her firing.

That case helped persuade Congress in 1994 to amend the law, allowing employees to challenge an agency deci-

sion to change their working conditions or order them to get psychiatric testing. The new law also authorized the MSPB to reinstate employees at the same job level they would be occupying if the prohibited personnel practice hadn't occurred and reimburse the employees for attorney's fees and back pay.

## Famous Whistleblowers

**D**espite weaknesses in the protection laws, corporate and gov-

an employee's sexual "conduct" would be illegal, discriminating against an employee's sexual "orientation" might not be.<sup>8</sup>

Following a storm of criticism from gay-rights advocates and administration critics, White House spokesman Trent Duffy said, "The president believes that no federal employee should be subject to unlawful discrimination. That's longstanding federal policy that prevents discrimination based on sexual orientation."<sup>9</sup>

In response, Bloch seemed to adjust his view, announcing he'd concluded after a legal review that his office could investigate claims of discrimination based on sexual orientation when the discrimination was rooted in an assumption about an employee's private conduct.<sup>10</sup> But a month later, he told the Senate Homeland Security and Government Affairs Subcommittee that he didn't have legal authority to defend workers who suffer discrimination simply because they are gay.

Senators of both parties responded by lecturing Bloch on how to treat employees. Rep. George Voinovich, R-Ohio, said he had learned that 10 of the 12 Washington staffers ordered transferred by Bloch had left the agency rather than transfer to offices in Dallas and Detroit. Bloch said he'd had no intention of harming any employees. "Your actions don't comport with your words," Sen. Frank R. Lautenberg, D-N.J., told the counsel.<sup>11</sup>

Beth Daley, senior investigator for the Project on Government Oversight, says she has little hope that the agency assigned to investigate the allegations against the OSC — the



Scott J. Bloch, special counsel, federal Office of Special Counsel.

U.S. Office of Special Counsel

Office of Personnel Management (OPM) — will pursue the case energetically. "We're not holding our breath," she says.

"Depending on the complexity, it could take three or four months," says Norbert Vint, the OPM's assistant inspector general for investigations. As to the complainants' low confidence, Vint says, "I can't comment on their opinion. Our opinion is that we will do a thorough investigation."

<sup>1</sup> Detailed allegations are contained in "Statement in Support of Complaint of Prohibited Personnel Practices Against U.S. Special Counsel Scott J. Bloch," March 3, 2005; "Amended Complaint," March 31, 2005, both available at, <http://pogo.org/p/government/OSCCompendium.html>.

<sup>2</sup> *Ibid.*, p. 22.

<sup>3</sup> Tim Kauffman, "Spotlight; New counsel reviews whistleblower, bias laws," *Federal Times*, March 22, 2004, p. 22.

<sup>4</sup> For background, see, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," General Accounting Office [now, Government Accountability Office], GAO 04-36, March 2004, [www.gao.gov/new.items/d0436.pdf](http://www.gao.gov/new.items/d0436.pdf).

<sup>5</sup> Kauffman, *op. cit.*

<sup>6</sup> "Statement in Support of Complaint," *op. cit.*, pp. 26-28.

<sup>7</sup> "Are whistleblowers protected?" Jan. 1, 2006, available at [www.osc.gov/library.htm](http://www.osc.gov/library.htm).

<sup>8</sup> Tim Kauffman, "OSC to study whether bias laws covers gays," *Federal Times*, March 15, 2004, p. 4.

<sup>9</sup> Jerry Seper, "Bush backs policy against bias; Challenges counsel's decision on sexual orientation," *The Washington Times*, April 2, 2004, p. A6.

<sup>10</sup> Office of Special Counsel, "Results of Legal Review of Discrimination Statute," press release, April 4, 2004, [www.osc.gov](http://www.osc.gov).

<sup>11</sup> Stephen Barr, "Senators Criticize Special Counsel's Treatment of Employees," *The Washington Post*, May 25, 2005, p. B2, and Christopher Lee, "Official Says Law Doesn't Cover Gays," *The Washington Post*, May 25, 2005, p. A25.

ernment insiders continued speaking out in the mid-1990s. In 1996, whistleblowers at the McDonnell Douglas Corp. revealed more than \$1 billion in overruns on development of the Air Force's C-17 cargo jet, triggering a Pentagon investigation, dramatic congressional hearings and the forced retirement of three generals. The company paid a \$500,000 fine to the Securities and Exchange Commission to settle charges it misled stockholders about the C-17 project. In settling, the company neither admitted nor denied wrongdoing.<sup>44</sup>

The year before, in an even more sensational case, Jeffrey Wigand, a former research director for Brown & Williamson Tobacco Corp., testified the company had opposed developing safer cigarettes in order to escape liability for the negative health effects of cigarettes.<sup>45</sup>

Although Brown & Williamson had already fired Wigand, it sued him for breaking a confidentiality agreement. But the firm dropped the suit as a prelude to a massive 1998 settlement between the tobacco industry and a group of

state attorneys general and private lawyers in which major tobacco firms agreed to pay \$206 billion over 25 years to end states' anti-tobacco lawsuits.<sup>46</sup>

Another tobacco whistleblower leaked documents showing that Brown & Williamson executives knew that cigarettes caused cancer.<sup>47</sup> Merrell Williams, a paralegal for a Louisville law firm, secretly photocopied the documents and gave them to a prominent plaintiffs' lawyer, who turned them over to Rep. Waxman, then chairman of the House Health and Environment Subcommittee.

The documents were crucial to the tobacco settlement, and Williams — when his name surfaced — became a hero to anti-tobacco advocates.

In a more public display of whistleblowing, Jennifer Long, an IRS auditor in Houston, and six colleagues — hidden behind screens, their voices disguised — told the Senate Finance Committee that some auditors targeted low-income taxpayers seen as defenseless but didn't cite wealthier citizens for violations because they could afford lawyers to challenge IRS examiners.<sup>48</sup>

Long's bosses took steps to fire her, but they backtracked after Finance Committee Chairman William V. Roth, R-Del., complained to the IRS commissioner and described the attempted firing as "contempt of Congress."<sup>49</sup>

Even as the IRS and tobacco dramas were playing out, complex whistleblower allegations were surfacing from the worlds of law enforcement and national security.

At the FBI, Frederic Whitehurst, a chemist in the explosives library, began telling superiors in the early 1990s that laboratory reports were scientifically flawed and typically slanted against defendants.<sup>50</sup> By 1994, his complaints had prompted an internal investigation. The conclusion: Whitehurst was "an idealist and perfectionist who sees everything as black or white."<sup>51</sup>

Whitehurst demanded an independent investigation, and a Justice Department inspector general concluded he had been largely correct.<sup>52</sup> In 1998, in return for Whitehead's resignation, the FBI agreed to pay the 50-year-old chemist the salary and pension he would have received if he had retired at 57 — a deal worth about \$1.1 million. The FBI also paid \$258,580 of Whitehurst's legal costs. Then, to settle a Whitehurst lawsuit against Justice, the department paid him \$300,000. Typical settlements in such lawsuits were \$5,000, said Whitehurst's lawyer.<sup>53</sup>

Whistleblowing by Richard Nuccio, a State Department official involved in peace talks between the Guatemalan government and left-wing guerrillas, didn't end so happily. In 1995, he reported possible CIA human-rights abuses to Rep. Robert Torricelli, D-N.J., who passed the information to *The New York Times*. After Nuccio was identified as the source, the CIA revoked his security clearance for releasing the information without authorization.<sup>54</sup>

The Senate Intelligence Committee then proposed a new provision in the Intelligence Authorization Act allowing executive-branch employees to disclose classified information to congressional committees or to their own representatives if doing so revealed improprieties or threats to the public.<sup>55</sup> But President Clinton vowed to veto any intelligence bill that contained the provision, and House-Senate conferees removed the whistleblower shield.<sup>56</sup> Without his security clearance, Nuccio lost his job.<sup>57</sup>

He wasn't the only national-security whistleblower involved in sensitive matters. In the late 1980s, former Defense Department and CIA specialist on nuclear proliferation Barlow lost his Defense job after running afoul of U.S. policy toward Pakistan and its nuclear ambitions.<sup>58</sup>

## Post-9/11 Whistleblowing

After the terrorist attacks, whistleblowers focused an often-searing spotlight on the competence of government intelligence officials.

First came FBI agent Rowley, who in 2002 accused top FBI officials of blocking efforts to probe more deeply into Zacarias Moussaoui, whom agents had arrested shortly before 9/11 in Minneapolis, where he'd been taking flying lessons. She also criticized the failure to follow up a Phoenix agent's inquiries about Arab men studying aviation.<sup>59</sup>

Testifying before the Senate Judiciary Committee made Rowley a media superstar. Her prominence may have insulated her from retaliation, but Judiciary Committee members also got Mueller to pledge there would be no reprisals against her. Soon afterward, Rowley and two other whistleblowers became *Time's* "Persons of the Year."<sup>60</sup>

Accompanying her on the magazine's cover were corporate whistleblowers Sherron Watkins, the Enron vice president who had warned Chairman Ken Lay the firm faced financial collapse; and WorldCom auditor Cynthia Cooper, whose accounts of phony accounting practices helped push the telecom giant into bankruptcy.<sup>61</sup>

In the years that followed, however, national-security whistleblowers eclipsed their private-sector counterparts, including Richard A. Clarke, counterterrorism director at the National Security Council under presidents Clinton and Bush. Clarke asked to be reassigned after his pre-9/11 warnings about the al Qaeda terrorist network went — as he saw it — unheeded.<sup>62</sup>

After leaving government in 2003, Clarke described his failed whistleblowing in a 2004 book, *Against All Enemies: Inside America's War on Terror*. When then-National Security Director Condoleezza Rice and other officials challenged his account, Clarke repeated his charges before the bipartisan commission investigating pre-9/11 security breaches.<sup>63</sup>

The Iraq war became a new field for whistleblowers. Corps of Engineers contract supervisor Greenhouse raised questions about contracting irregularities in a series of billion-dollar contracts awarded to the Halliburton subsidiary Kellogg Brown & Root.<sup>64</sup> In 2005, Greenhouse was demoted for allegedly poor job performance, but the Corps' commander said retaliation had not been the motive.<sup>65</sup> She is contesting her demotion. ■

*Continued on p. 282*

# At Issue:

## *Should Congress expand whistleblower rights?*

**THOMAS DEVINE**

**LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT**

FROM A LETTER TO THE U.S. SENATE, MARCH 13, 2006

**t**welve years of hostile court rulings against whistleblowers by the federal Circuit Court of Appeals have effectively rewritten the Whistleblower Protection Act (WPA) — against congressional intent. Since the 1994 vote to strengthen the WPA, whistleblowers have suffered a 1-119 track record there for decisions on the merits.

The federal Circuit Court translated explicit statutory language to provide legal protection for “any” lawful disclosure of wrongdoing to mean “almost never.” This was done through rulings that disqualify whistleblower protection for the most common disclosures of wrongdoing, such as those made to a supervisor or during the course of one’s job duties.

The impact of these and other rulings [has] made the Whistleblower Protection Act the most powerful reason for government workers who witness fraud, waste or abuse to remain silent. We cannot expect public servants to defend our families and our tax dollars if they cannot defend themselves.

A status quo that is bad for whistleblowers is also bad for the taxpayers. Secrecy breeds corruption. In an era of record government spending, we need whistleblowers . . . to guard against waste, fraud and abuse and so that we know the true cost of programs. We need them for homeland security — to allow Congress to act against vulnerability to terrorists caused by bureaucratic negligence at our nuclear weapons facilities, at our airports and elsewhere. We need them to protect the health of America’s families — whether to warn about government-approved painkillers that have killed tens of thousands or government-inspected meat and poultry that have hospitalized hundreds of thousands more.

Genuine rights are long overdue for those who champion accountability within the federal bureaucracy. After the Enron and MCI scandals, Congress gave state-of-the-art whistleblower rights to corporate workers [that are] far stronger than what are available for federal employees. Those defending America’s families need protection against retaliation as much as those defending America’s stock values.

Just before Christmas, United Nations Under Secretary General Christopher Bernham unveiled a whistleblower policy for U.N. employees that is far stronger than the WPA. The new policy is based largely on the best practices of other nations, whose whistleblower protections also have surpassed those in the United States. Mr. Bernham . . . effectively insisted on and won some of the precise protections for U.N. employees that are not available for federal workers in the United States.

**WILLIAM E. MOSCHELLA**

**ASSISTANT ATTORNEY GENERAL  
DIRECTOR, OFFICE OF LEGISLATIVE AFFAIRS,  
U.S. DEPARTMENT OF JUSTICE**

FROM A LETTER TO THE U. S. SENATE, APRIL 12, 2005

**t**he WPA [Whistleblower Protection Act] already provides adequate protection for legitimate whistleblowers. The federal Circuit appropriately has recognized that the purposes of the WPA must be taken into account in determining whether a disclosure is one protected by the WPA. These limitations are reasonable and serve to further the purpose of the WPA to protect legitimate whistleblowers.

The proposed expansive definition [of whistleblower complaints] has the potential to convert any disagreement or contrary interpretation of a law, no matter how trivial or frivolous, into a whistleblower disclosure. Such an increase in the number of frivolous claims would impose an unwarranted burden upon federal managers. Given the expanded definition of disclosure, it would be exceedingly easy for employees to use whistleblowing as a defense to every adverse personnel action.

Nearly every federal employee will, sometime during the course of his or her career, disagree with a statement or interpretation made by a supervisor, or during the course of performing his or her everyday responsibilities report an error that may demonstrate a violation of a law, rule or regulation. Without the ability to take the context — the time, the place, the motive — of the alleged disclosure into account, even trivial matters would become elevated to the status of protected disclosures.

Conceivably, any time a supervisor suspected wrongdoing by an employee and determined to look into the matter, the “investigation” could be subject to challenge. Employees would be able to delay or thwart any investigation into their own or others’ wrongdoing.

The Constitution not only generally establishes the president as the head of the executive branch but also makes him commander in chief of all military forces, the sole organ of America’s foreign affairs and the officer in the government with the express duty (and corresponding authority) to take care that the laws are faithfully executed.

The executive branch remains committed to accommodating Congress’ legitimate oversight needs in ways that are consistent with the executive branch’s constitutional responsibilities. However, a process exists by which this has been and may be done.

The process of dynamic compromise between the branches, whereby each branch seeks an optimal accommodation by evaluating the needs of the other, cannot function where every covered employee of the executive branch is vested with the right to decide for himself or herself — without any official authorization — [what] disclosures are appropriate.

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## CURRENT SITUATION

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### Legislative Potential

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Sen. Lautenberg is proposing the most far-reaching measures to strengthen whistleblower protections. His Whistleblower Empowerment, Security, and Taxpayer Protection Act of 2006 would bring spy-agency workers under the Whistleblower Protection Act. That would guarantee whistleblowers alleging retaliation access to federal District Court, authorize them to ask for special prosecutors to investigate the retaliation and subject bosses to fines for retaliating against whistleblowers.

“Right now, managers who retaliate against whistleblowers get off basically scot-free, even though whistleblower retaliation is against the law,” Lautenberg said in a statement.

But many question whether Congress is in the mood for such a sweeping change. “It would take a miracle for it to pass on its own,” says Devine of the Government Accountability Project. For instance, the bill would have to pass through the Senate Intelligence and Judiciary committees, where objections would be likely. The National Security Whistleblowers Coalition, organized by dismissed FBI translator Edmonds, helped draft the bill, which she says answers a need for sweeping legislation.

Devine and some other whistleblower advocates are pinning their hopes on the measures introduced last year by Sen. Akaka and Rep. Platts. The bills would close loopholes in existing whistleblower law by:

- Ensuring that federal employees could get whistleblower protection even if discovering the wrongdoing they are reporting is part of their job;

- Allowing employees to use classified information to report wrongdoing to Congress;
- Allowing whistleblowers to appeal MSPB decisions to federal Circuit courts for a period of five years, helping to end the Federal Circuit’s monopoly over jurisdiction; and
- Providing a review mechanism for employees whose security clearance is revoked.

Although the administration opposes both measures, they passed their respective committees last year, and the Senate legislation had been approved in committee in two previous years. After an administration official testified the Senate bill could make managing federal employees more difficult, the Senate Homeland Security and Governmental Affairs Committee said in its 2005 report on the bill, “We can take other steps to deter and weed out frivolous whistleblower claims, but we cannot begin to calculate the potential damage to the nation should good-faith whistleblowing become chilled by a hostile process.”

Nevertheless, the bill never reached the floor. Advocates of stronger whistleblower legislation say only public pressure can force congressional leaders to allow legislation to reach the full House and Senate, but more optimistic advocates say the political climate may be changing.

“We are hearing more about people disclosing issues of national concern and getting in trouble for it,” says a Democratic Senate aide. “I think the American people aren’t going to stand for it.”

But Sen. Akaka says his bill’s immobility after committee approval last year has led him to consider tacking it onto other legislation in the form of amendments. Whatever the Bush administration’s attitudes toward whistleblowers may be, Akaka says, lawmakers aren’t leaping to defend them. “The reactions and responses indicate they would rather not touch the issue,” he says. Whistleblowers can affect “a lot of special interests that members have.”

### Free Speech at Work

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A Supreme Court ruling this summer may limit public employees’ whistleblower rights.

The high court last year heard arguments in the landmark case — involving a Los Angeles search warrant containing false information — but revisited it on March 21 after Justice Samuel A. Alito Jr. joined the court.<sup>66</sup>

The case essentially revolves around the following questions: Does the constitutional right to free speech apply to public employees who speak or write as part of their jobs? Can such employees speak or write about corruption or improprieties they witness at their jobs?

The Bush administration argues that the First Amendment doesn’t apply in such cases. “Constitutional rights are personal, and when a public employee speaks in carrying out his job duties, he has no personal interest in the speech,” U.S. Solicitor General Paul D. Clement argues in his brief.<sup>67</sup>

Victory in that argument would be a giant step back for employees, says whistleblower lawyer Kohn. “It would permit you to fire many whistleblowers,” he says. “It’s such a gigantic issue because 98 percent of all whistleblowers go to management first. And the majority would deny to your face that they were whistleblowers; the majority say they were just doing their job. The moment you stop that type of conduct from being protected, you undermine almost all whistleblower cases.”

Furthermore, Kohn contends, existing Supreme Court precedents give public employees on-the-job First Amendment rights on issues of public concern, even if they deal with those issues as part of their jobs.

The high-stakes legal dispute evolved after a deputy Los Angeles prosecutor investigated a defense lawyer’s motion to throw out a search warrant that had

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authorized a search that led to drug and firearms charges.<sup>68</sup> Prosecutor Richard Ceballos concluded that the warrant contained false information and that the deputy sheriff who obtained it may have lied. Ceballos argued to his boss that the criminal charges should be thrown out, and he said as much in court. But after the hearing, he was demoted and transferred to a distant office.

Ceballos sued District Attorney Gil Garcetti and Los Angeles County, claiming the punitive actions taken against him violated his First Amendment right to free speech. A U.S. District Court and the U.S. 9th Circuit Court of Appeals agreed. Garcetti (now out of office) and the county appealed to the Supreme Court, arguing they acted legally against Ceballos because he had no free speech on matters involving his job.

But his lawyers argue that stifling whistleblowing is a bad idea: "It is not in any government agency's best interest 'to fly blind' because its employees are afraid to report corruption or abuse."<sup>69</sup>

While Solicitor General Clement argues that public employees would be protected if they spoke out as citizens instead of as civil servants, his brief warns that any employee whose job duties include reporting wrongdoing is generally "prohibited from speaking to the press about an ongoing investigation without the permission of his employer, [who] may well discipline him for violating the prohibition."

Ceballos' chief lawyer, Bonnie Robin-Vergeer of the nonprofit Public Citizens Litigation Group of Washington, calls the government position "startling and extreme." And as a practical matter, no employee who calls the press as a citizen to report wrongdoing would escape discipline. "It's just what it looks like," she says of the government position. "It means the public employee really can't speak on matters of public concern." ■

## OUTLOOK

### Open Floodgates?

Nothing generates protection for whistleblowers better than scandal, says whistleblowers' lawyer Kohn. After Enron and WorldCom imploded, Congress passed the Sarbanes-Oxley Act of 2002, which gave corporate insiders the right to file federal lawsuits if they suffered retaliation after reporting wrongdoing.<sup>70</sup>

Now, he contends, the Bush administration's policy of controlling information is breeding new cadres of insiders. Inevitably, information about misconduct will surface, he says, generating pressure for more laws.

"Whistleblowers can save our government a lot of grief, a lot of money and correct some of the inequities and problems our government has," Sen. Akaka says. "The whistleblowers who have come forward to disclose security lapses and, in particular, threats to public health and safety since 9/11, have brought renewed attention to those who alert the public to government wrongdoing."

The public has no trouble grasping whistleblowers' role, Kohn says. "If you look at most other areas of employment discrimination, there hasn't been that much movement, but in the whistleblower field they keep passing laws." The public is saying to companies and agencies, he adds, "the more you don't get the message that things have changed, the laws are going to get tougher and tougher."

However, whistleblower protection can mean almost anything, depending on who's talking. "It's become a motherhood issue," says Ruch of Public Employees for Environmental Responsibility. "It's like the environment; no one's anti-environment. So officials will say, we're in favor of whistleblower protection, but we're also in favor of flexibility

— increasing management prerogatives to hire and fire." Flexibility, he says, can become a euphemism for facilitating retaliation against whistleblowers.

Furthermore, as efforts to combat terrorism continue indefinitely, expanded presidential wartime powers pose a danger for whistleblowers, especially given any administration's built-in aversion to whistleblowers. But, says Rep. Shays, "This war against Islamist terror is going to last a long time, so you need to be even more alert that powers aren't abused. With more power there has to be more congressional oversight." And for oversight to be effective, "You need to empower people to speak out when they see wrongdoing — and they need to be protected."

Right now, the level of protection for national-security whistleblowers is "pathetic," he acknowledges. Even Congress provides no whistleblower protection for its own employees, he points out.

Shays insists whistleblowers can help a president stay on top of an issue. "They share things that need to be disclosed, and the sooner they're disclosed, the better."

For her part, FBI whistleblower Rowley is sure that if she were speaking out now, rather than soon after 9/11, she would have paid a price in retaliation. "I think they view me as a big mistake," she says. "I ended up having a certain amount of power. I even criticized [Attorney General John] Ashcroft. I don't think it would happen again. Now they would say, 'Next time, we'll fire whistleblowers from the start.'"

Rowley, however, accepts the validity of the executive branch's "floodgates" argument — that a wave of trivial whistleblower complaints could overwhelm the federal personnel system and Congress. But that should not doom whistleblower protection, says Rowley. "Someone has to be a gatekeeper," she says.

Barlow, the former Defense nuclear-proliferation expert, rejects the "floodgates" argument entirely. "Federal employees do not go marching down to

Congress unless it's something serious," he says. "Whistleblowers are always going to get screwed by their colleagues. It's human nature; you're never going to make that go away." Criminalizing retaliation would help control that behavior, he adds.

Kohn agrees. "The thing that has hurt whistleblowers the most is having former friends and colleagues turn their backs on them," he says, especially since the difference between winning and losing a case "is obtaining evidence and getting witnesses."

Whistleblower advocate and former Senate aide Kolesnik says the solution is to negotiate a good settlement — one that allows a whistleblower to walk away from a job without having doomed his future prospects. Whatever shape protection may take, he says, whistleblowers still must rely on their common sense: "You have to know the law and know what you're doing." ■

## Notes

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<sup>2</sup> For background see James Kelley, "Year of the Whistleblowers," *Time*, Dec. 30, 2002.

<sup>3</sup> A transcript of Gore's Jan. 16, 2006, speech is available at [www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600779.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/01/16/AR2006011600779.html).

<sup>4</sup> Linda Greenhouse, "Justices Reject F.B.I. Translator's Appeal on Termination," *The New York Times*, Nov. 29, 2005, p. A22.

<sup>5</sup> For background see Nat Garrett, "Tomorrow's Argument: *Garcetti v. Ceballos*," Oct. 11, 2005, Scotusblog, [www.scotusblog.com/movable-type/archives/2005/10/tomorrows\\_argum\\_11.html](http://www.scotusblog.com/movable-type/archives/2005/10/tomorrows_argum_11.html); and "Brief for the United States as Amicus Curiae Supporting Petitioners," *Gil Garcetti, et al., v. Richard Ceballos*, Case No. 04-473, [www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-0473.mer.ami.pdf](http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-0473.mer.ami.pdf).

<sup>6</sup> "A Review of the FBI's Actions in Connection With Allegations Raised by Contract Linguist Sibel Edmonds, Unclassified Summary," U.S. Department of Justice, Office of the Inspector General, January 2005, [www.usdoj.gov/oig/special/0501/index.htm](http://www.usdoj.gov/oig/special/0501/index.htm).

<sup>7</sup> "Statement by the FBI Regarding the Office of Inspector General's Report," press release, Jan. 14, 2006, [www.fbi.gov/pressrel/pressrel05/011405.htm](http://www.fbi.gov/pressrel/pressrel05/011405.htm).

<sup>8</sup> Louis Fisher, "National Security Whistleblowers," Congressional Research Service, Dec. 30, 2005, pp. 33-35, [www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf](http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf).

<sup>9</sup> James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers without Courts," *The New York Times*, Dec. 16, 2005, p. A1.

<sup>10</sup> Federal statute 18 USC 1513(e), "Retaliating against a witness, victim, or an informant."

<sup>11</sup> L. Paige Whitaker and Michael Schmerling, "Whistleblower Protections for Federal Employees," Congressional Research Service, updated May 18, 1998, pp. 2-10, <http://whistle20.tripod.com/crswhistle.pdf>.

<sup>12</sup> For background, see earlier Devine testimony, "Statement of Tom Devine," Senate Governmental Affairs Committee, Nov. 12, 2003, [http://hsgac.senate.gov/\\_files/111203devine.pdf](http://hsgac.senate.gov/_files/111203devine.pdf).

<sup>13</sup> *LaChance v. White, Court of Appeals for the Federal Circuit*, 98-3249, <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=fed&navby=case&no=983249>.

<sup>14</sup> House Report 103-769, 103d Cong., 2nd Session, 12 (1994), quoted in Fisher, *op. cit.*, p. 31.

<sup>15</sup> For background on executive branch authority, see Kenneth Jost, "Presidential Power," *CQ Researcher*, Feb. 24, 2006, pp. 169-192.

<sup>16</sup> Lancy Gay, "Government withholds 'sensitive-but-unclassified' information," Scripps-Howard News Service, Feb. 2, 2006, [www.shns.com/shns/g\\_index2.cfm?action=detail&pk=UNCLASSIFIED-02-02-06](http://www.shns.com/shns/g_index2.cfm?action=detail&pk=UNCLASSIFIED-02-02-06).

<sup>17</sup> Scott Shane, "U.S. Reclassifies Many Documents in Secret Review," *The New York Times*, Feb. 20, 2006, p. A1.

<sup>18</sup> Scott Shane, "Archivist Urges U.S. to Reopen Classified Files," *The New York Times*, March 3, 2006, p. A1.

<sup>19</sup> Erik Eckholm, "Army Contract Official Critical of Halliburton Pact is Demoted," *The New York Times*, Aug. 29, 2005, p. A9.

<sup>20</sup> Tony Pugh, "Medicare Drug Costs Ordered Withheld," *The Miami Herald*, March 12, 2004, p. A1, and Tony Pugh, "Concealing Drug Bill Cost Called Legal," *The Miami Herald*, July 7, 2004, p. C1.

<sup>21</sup> Department of Justice, "Authority of Agency Officials to Prohibit Employees From Providing Information to Congress, Letter Opinion for the General Counsel, Health and Human Services," May 21, 2004, [www.usdoj.gov/olc/crsmemoresponses.htm](http://www.usdoj.gov/olc/crsmemoresponses.htm).

<sup>22</sup> Congressional Research Service memorandum To: Hon. Charles Rangel; From: Jack Maskell, April 26, 2004, [www.pogo.org/m/gp/wbr2005/AppendixD.pdf](http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf).

<sup>23</sup> Marty Niland, "National Park Service Fires Chambers," *The Associated Press*, July 9, 2004; Derrill Holly, "Judge Upholds Park Police Chief's Firing," *The Associated Press*, Oct. 8, 2004.

<sup>24</sup> Department of Justice, *op. cit.*

<sup>25</sup> *American Federation of Government Employees AFL-CIO et al. v. Donald H. Rumsfeld*, Civ. No. 05-2183 (EGS), Memorandum Opinion; see also, Christopher Lee, "Court Blocks DOD's New Rules for Workers," *The Washington Post*, Feb. 28, 2006, p. A1.

<sup>26</sup> Tim Kauffman and Mollie Ziegler, "DoD will proceed with NSPS plan, despite adverse court ruling," *FederalTimes.com*, Feb. 28, 2006, <http://federaltimes.com/index.php?S=1565465>.

<sup>27</sup> James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006).

<sup>28</sup> Porter Goss, "Loose Lips Sink Spies," *The New York Times*, Feb. 10, 2005, p. A25.

<sup>29</sup> David Johnston, "Inquiry Into Wiretapping Article Widens," *The New York Times*, Feb. 12, 2006, p. A26.

<sup>30</sup> *Ibid.*

<sup>31</sup> For background see Charles S. Clark, "Whistleblowers," *CQ Researcher*, Dec. 5, 1997,



## About the Author

**Peter Katel** is a *CQ Researcher* staff writer who previously reported on Haiti and Latin America for *Time* and *Newsweek* and covered the Southwest for newspapers in New Mexico. He has received several journalism awards, including the Bartolomé Mitre Award for drug coverage from the Inter-American Press Association. He holds an A.B. in university studies from the University of New Mexico. His recent reports include "Immigration Reform" and "Rebuilding New Orleans."

pp. 1059-1078.

<sup>32</sup> Fisher, *op. cit.*, pp. 3-4.

<sup>33</sup> *Ibid.*

<sup>34</sup> Taylor Branch in Charles Peters and Taylor Branch, *Blowing the Whistle: Dissent in the Public Interest* (1972), pp. 3-31.

<sup>35</sup> Ralph Nader, Peter J. Petkas and Kate Blackwell, *Whistle Blowing: The Report of the Conference on Professional Responsibility* (1972), p. 7.

<sup>36</sup> E.W. Kenworthy, "Censure of Dodd is asked in Ethics Panel's Report for 'Dishonor' of Senate," *The New York Times*, April 28, 1967, p. A1; *Congress and the Nation*, Congressional Quarterly, Vol. II, 1965-68, pp. 900-902.

<sup>37</sup> Nader *et al.*, *op. cit.*, pp. 40-41; Molly Moore, "A. Ernest Fitzgerald: Analyst Who Knows the Price of Exposing Cost Overruns," *The Washington Post*, Feb. 23, 1987; Richard Halloran, "U.S. Drops Threat on Disputed Pledge of Secrecy," *The New York Times*, Aug. 22, 1987, p. A8.

<sup>38</sup> Stuart Taylor Jr., "Disclosing Secrets to the Press: U.S. Calls it Espionage," *The New York Times*, Oct. 8, 1984, p. A13.

<sup>39</sup> Information in this section is drawn from Whitaker and Schmerling, *op. cit.*, except where indicated.

<sup>40</sup> *Congress and the Nation*, *op. cit.*, pp. 989-990; *Congress and the Nation*, Vol. IV, 1973-1976, pp. 948-949.

<sup>41</sup> Cited in, Whitaker and Schmerling, *op. cit.*, pp. 2-3.

<sup>42</sup> U.S. Merit Systems Protection Board, "Working for America: An Update," July 1994, pp. vii, 20-21, [www.mspb.gov/studies/work2.pdf](http://www.mspb.gov/studies/work2.pdf).

<sup>43</sup> *Congress and the Nation*, Vol. IX, 1993-1996, pp. 820-821.

<sup>44</sup> Ralph Vartabedian, "McDonnell Douglas to Pay \$500,000 to Settle Charges on C-17 Program," *Los Angeles Times*, June 25, 1996, p. D1.

<sup>45</sup> Henry Weinstein, "At White House, Red Carpet for Tobacco Whistle-Blowers," *Los Angeles Times*, July 19, 1997, p. D1; Barry Meier, "The Spoils of Tobacco Wars," *The New York Times*, Dec. 22, 1998, p. C1.

<sup>46</sup> *Ibid.* For background, see Kenneth Jost, "High-Impact Litigation," *CQ Researcher*, Feb. 11, 2000, pp. 89-112. Lawyers for anti-tobacco plaintiffs and the industry originally settled on a figure of \$246 billion, but Congress refused to authorize that amount.

<sup>47</sup> Richard Leiby, "Smoking Gun," *The Washington Post*, June 23, 1996, p. F1.

<sup>48</sup> Albert B. Crenshaw and Stephen Barr, "IRS Official Reports Double Standard," *The Washington Post*, April 28, 1998, p. A4.

<sup>49</sup> David Johnston, "On Tax Day, IRS Prepared to Fire Star Whistle-Blower," *The New*

## FOR MORE INFORMATION

**Government Accountability Project**, 1612 K St., N.W., Suite 1100, Washington, DC 20006; (202) 408-0034; [www.whistleblower.org](http://www.whistleblower.org). Founded 28 years ago to represent whistleblowers, among other watchdog duties.

**Merit Systems Protection Board**, 1615 M St., N.W., Washington, DC 20419; (202) 653-7200; [www.mspb.gov](http://www.mspb.gov). Quasi-judicial agency hears cases of alleged retaliation against whistleblowers.

**National Security Whistleblowers Coalition**, PO Box 20210, Alexandria, VA 22320; [www.nswbc.org](http://www.nswbc.org). Aids intelligence and military whistleblowers.

**National Whistleblower Center**, PO Box 3768, Washington, DC 20007; (202) 342-1902; [www.whistleblowers.org](http://www.whistleblowers.org). Runs an attorney-referral service, mounts test-case litigation and provides other services.

**Office of Special Counsel**, 1730 M St., N.W., Washington, DC 20036; (202) 254-3600; [www.osc.gov](http://www.osc.gov). A federal agency that investigates whistleblower reports and other employee allegations.

**Project on Government Oversight**, 666 11th St., N.W., Suite 500, Washington DC 20001; (202) 347-1122; [www.pogo.org](http://www.pogo.org). Investigates alleged government misconduct, works with whistleblowers and advocates on their behalf.

**U.S. Court of Appeals for the Federal Circuit**, 717 Madison Place, N.W., Washington DC 20439; (202) 633-6550; [www.fedcir.gov](http://www.fedcir.gov). Hears federal government whistleblower cases; Web site contains texts of relevant decisions.

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<sup>50</sup> Richard A. Serrano, "1994 Internal FBI Probe Revealed Only Minor Flaws With Crime Lab," *Los Angeles Times*, March 7, 1997, p. A20.

<sup>51</sup> *Ibid.*

<sup>52</sup> David Johnston, "Report Criticizes Scientific Testing at F.B.I. Crime Lab," *The New York Times*, April 16, 1997, p. A1.

<sup>53</sup> "Justice Dept. to Pay Settlement to FBI Whistle-Blower Whitehurst," The Associated Press, March 12, 1998.

<sup>54</sup> Thomas Newcomb, "In From the Cold: The Intelligence Community Whistleblower Protection Act of 1998," *Administrative Law Review*, fall 2001.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Frank del Olmo, "Perspective on the CIA; Blow the Whistle, Get Blown Away," *Los Angeles Times*, Dec. 5, 1996, p. B9.

<sup>58</sup> For background see Seymour M. Hersh, "A Reporter At Large: On the Nuclear Edge," *The New Yorker*, March 29, 1993, [www.newyorker.com/printables/archive/040119fr\\_archive02](http://www.newyorker.com/printables/archive/040119fr_archive02).

<sup>59</sup> James Risen and David Johnston, "Traces of Terror: The Intelligence Reports; Agent Complaints Lead F.B.I. Director to Ask For Inquiry," *The New York Times*, May 24, 2002, p. A1.

<sup>60</sup> Eric Lichtblau, "Bureaucracy is Hobbling the FBI, Rowley Testifies," *The New York Times*,

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<sup>61</sup> *Ibid.*, The Associated Press.

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Jost, Kenneth. "Rethinking the Death Penalty." *CQ Researcher* 16 Nov. 2001: 945-68.

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