

DISAVOWED:

The Government's Unchecked Retaliation Against National Security Whistleblowers



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National Security Whistleblowers Risk Everything to Shine Light on Government Misconduct

EXECUTIVE SUMMARY

Imagine you work for the government. For an agency tasked with protecting the nation's security – the CIA, the NSA, the FBI. You love your job and you love your country. You have a duty to uphold the law and the Constitution. The government trusts you with secrets – you've signed a secrecy agreement and work with classified information. And then you uncover something deeply troubling. Maybe you've learned about a surveillance program that violates the law and the Constitution. Or your agency is ignoring a serious security problem. Or you've watched others torture a detainee during interrogation. Or you know the government is holding someone in a secret prison outside of any legal system. Do you stay silent or do you speak up? Who do you tell? Do you have any legal protection?

Whether a government employee decides to speak out is intensely personal – but almost all national security whistleblowers decide to disclose wrongdoing because they believe they have a patriotic duty to do so. They believe they are acting in the best interests of national security. The vast majority of whistleblowers start by reporting wrongdoing up the chain of command and go public (i.e. make disclosures to Congress or the press) only as a last resort.

Many employees in national security agencies blow the whistle at their peril. They find no protection in the vast patchwork of laws designed to protect whistleblowers. Whistleblowers often find themselves sidelined, without a security clearance, without a job, discredited, the victim of a smear campaign, investigated, labeled crazy, a bad team player, a liar, isolated.

There is a disturbing and systematic pattern of government retaliation against employees who uncover weaknesses or abuses in our national security apparatus. This pattern of retaliation hurts not only the whistleblowers retaliated against, but the American public. The public has a right to know about government wrongdoing and security breaches. Though limited secrecy may be necessary to protect national security, secrecy is all too often used as a shield to hide illegal or embarrassing government conduct. Overclassification of information makes it all the more important that we establish clear protections that allow national security whistleblowers to come forward. The public needs to know when our government is doing something wrong – and we will never know without whistleblowers. Whistleblowers deserve our gratitude, not scorn and mistreatment.

It is important to keep in mind that without government whistleblowers we would never have learned about the shocking abuse of prisoners at Abu Ghraib or that the NSA was engaged in warrantless surveillance of our phone calls and emails. Only an informed public can make smart electoral choices and correct bad policy judgments. We need to know what government officials are doing so that we can hold them accountable when they commit illegal or unconstitutional acts, abuse our trust, or waste our tax dollars.

This report aims to highlight the lack of real legal protection for national security whistleblowers. The whistleblowers profiled in this report serve as concrete, real-life examples of what happens when national security whistleblowers are left unprotected from retaliation. The following flaws in whistleblower protection law are discussed in this report:

- **Most national security whistleblowers are not protected by the Whistleblower Protection Act.**
- **National security whistleblowers who disclose abuses related to classified matters are unprotected.**
- **National security whistleblowers can be retaliated against even for disclosing wrongdoing to Congress.**
- **When an agency retaliates against a national security whistleblower by taking away her security clearance, there is little the whistleblower can do to save her job.**
- **Secrecy can be used all too easily as a weapon to silence national security whistleblowers and prevent them from finding legal help or obtaining justice in court.**
- **National security whistleblowers often find themselves improperly the subject of retaliatory internal investigations.**
- **National security whistleblowers who are lucky enough to be covered by the Whistleblower Protection Act are not provided any real protection.**
- **National security whistleblowers receive little protection from the First Amendment.**

National security and intelligence agencies should not be trusted to police themselves, and should not be able to retaliate against whistleblowers with impunity. For this reason, the ACLU recommends that Congress act immediately to:

→ **Protect whistleblowers in national security agencies from retaliation:**

- Make legal protection real and meaningful.
- Protect national security whistleblowers from retaliation for disclosing classified information to Congress and others authorized to receive classified information.
- Protect national security whistleblowers from security clearance-related retaliation.
- Protect whistleblowers against retaliatory investigations.
- Require the agencies to provide guidance and training about making whistleblower complaints.
- Permanently codify existing anti-gag provisions that prohibit interference with employees' ability to speak with Congress.

→ **Limit the government's ability to use secrecy as a weapon to defeat whistleblower court cases – particularly the government's ability to use the state secrets privilege.**

→ **Fix the Whistleblower Protection Act:**

- Restore a reasonable definition of "any disclosure" and restore normal standards of proof.

- Get rid of court-imposed hurdles to successful Whistleblower Protection Act claims.
- Impose time limits and require jury trials where government watch-dog agencies fail to act on whistleblower disclosures and complaints.
- Get rid of the Federal Circuit monopoly over whistleblower claims.

→ **Fix the Inspector General process and make Inspectors General more independent from the agencies they investigate.**

Many of these reforms are already encompassed in pending legislation before both Houses of Congress – legislation that could be strengthened even further. Polls show the American public overwhelmingly supports congressional action to institute stronger laws protecting government employees who report waste or corruption. Employees working to protect our nation deserve the best whistleblower protection Congress can give them.

Michael German

Michael German became an FBI Special Agent in 1988, immediately after graduating from law school. “Joining the FBI was a childhood dream,” German recalled, “and I wanted to do it all.”

German threw himself into his work, repeatedly volunteering for some of the most dangerous and difficult assignments the FBI had to offer. He twice went undercover to infiltrate domestic terrorist groups, solving a number of bombings and preventing other planned acts of terror by helping to win convictions against individuals who were producing illegal weapons. German was frequently recognized, both inside the Bureau and out, for his intelligent and valiant work.

“After the terrorist attacks on September 11, 2001 I expected the FBI to put my counterterrorism experience to use,” German said. He did not have to wait long. In early 2002 German was asked to assist in an FBI counterterrorism investigation that started when the FBI caught on tape a secret meeting between a member of a domestic terrorist organization and a supporter of an overseas Islamic terrorist organization. The purpose of the meeting was to try and develop operational ties between the two groups. “This attempt was a potential nightmare,” German said, “where violent extremists already in the U.S. would be doing the bidding of a foreign terrorist group.”

Unfortunately, when German was briefed on the case he became aware of serious problems in the way the case was being handled, problems so serious that they could have resulted in the exclusion of crucial evidence from any future prosecution. When German reported the problems to the FBI managers responsible for the investigation, he was told they were going to just “pretend it didn’t happen.” German knew such misconduct would cripple the investigation, so he reported this and other problems with the case directly through his chain of command to the Special Agent in Charge of the Tampa Division and the Assistant Director of the FBI Counterterrorism Division.

Rather than respond to these problems, the Tampa Division managers engaged in a cover-up. They initiated a large-scale effort to falsify and backdate FBI records relating to the investigation. German was blocked from participating in the investigation of the terrorist groups, even though it essentially meant that the terrorist groups would go uninvestigated. Incredibly, the FBI went so far as to hide the tape recording of the critical meeting between the two terrorist groups, and to deny in official FBI reports that the meeting ever happened. The FBI also altered investigatory documents – sloppily using white-out.

When German discovered the Tampa managers’ deception he brought his copy of the transcript of the taped meeting to the Department of Justice Inspector General and the FBI Office of Professional Responsibility. They immediately notified the Tampa officials and allowed them to amend their reports.

While the amended reports now admitted that the FBI had indeed monitored a meeting between the two groups, it falsely characterized the nature of the meeting by omitting any mention of terrorism.

Meanwhile, senior FBI officials took concerted steps to retaliate against German for blowing the whistle. Overlooking his previous success, the Unit Chief of the Undercover Unit at FBI Headquarters told his staff that German would “never work undercover again.” When an agent working an unrelated terrorism case attempted to use German in an undercover role, he was prevented from pursuing the investigation for almost a year because FBI Headquarters refused to submit the case for approval. A second terrorism investigation was allowed to wither on the vine all for the sake of punishing German for whistleblowing. To German, the most lamentable thing was that “the benefit of my experience in infiltrating terrorist groups was lost to other FBI undercover agents because I was barred from providing training at FBI undercover schools.”

German endured the FBI’s retaliation for nearly two years. During that time, the Inspector General never stepped in to prevent the retaliation, and the FBI refused to address the potential threat to national security. In the spring of 2004, German finally decided to report everything to Congress and to resign from the FBI in protest. The public exposure finally drove the Inspector General to look into the FBI’s conduct, and in January of 2006, four years after the two terrorist groups came together and a year and a half after German resigned, the IG finally issued a report that confirmed many of German’s allegations. The report was hollow vindication, however, because the IG made no recommendations to hold the Tampa Division officials who mishandled the counterterrorism investigation accountable, and made no disciplinary recommendations for the officials that deliberately backdated and falsified FBI records.

The IG report also confirmed that the FBI retaliated against German for reporting the misconduct, but these results did not mean German would be compensated for suffering this abuse. Under the law as it exists today, the FBI is exempt from the Whistleblower Protection Act, and going through the “separate but equal” procedure established by Congress in 1990 would have required German to re-prove that he had been retaliated against in an adversarial proceeding before a group of Department of Justice attorneys. German would have been required to go through the expensive and time consuming process of discovery to seek the very records he gave the IG four years earlier, while the DOJ lawyers deciding the case could deny such requests and refuse to look at evidence at their own discretion. “It was clearly a deck stacked against me,” German said.

Worst of all, however, the IG report repeated the FBI’s claim that the Tampa recording did not reveal discussions relating to terror-

ism, and that the mishandled investigation did not represent a missed opportunity to infiltrate terrorist groups. Fortunately Senator Charles Grassley and the Senate Judiciary Committee demanded to see the transcript and, after two years, the FBI finally turned it over. “[I]t flatly contradicts statements made by Bureau officials trying to downplay the incident and discredit Michael German,” Senator Grassley said in a written statement. He explained that, “[t]he transcript clearly shows a white supremacist and an Islamic militant talking about building operational ties between their organizations.”

Looking back on his ordeal, German said that “what’s important for the public to understand is not what happened to me personally, but how the national security is put at risk when agents who see problems can’t report them for fear of retaliation.”

Most National Security Whistleblowers are Not Protected by the Whistleblower Protection Act

The Whistleblower Protection Act (“WPA”) is a law that was intended – as the name might suggest – to encourage government employees to step forward and disclose wrongdoing within their agencies. The idea behind the law is that strong, comprehensive whistleblower protection will promote good government, reduce government misconduct, and serve the important purpose of a more transparent government.

The WPA prohibits agencies from retaliating against employees who disclose within their agency, to an Inspector General, to Congress, or to the public any information the whistleblower reasonably believes is evidence of a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public

health or safety.¹ The law prohibits certain kinds of retaliatory actions – like harassment, demotion or firing – and provides a process by which whistleblowers can seek independent review of any alleged retaliatory employment action. In order to find any recourse in the WPA, a federal employee must:

- Be an employee covered by the law;
- Make a disclosure covered by the law;
- Disclose to the right people; and
- Suffer the kind of retaliation that is covered by the statute.

Most whistleblowers who work in the national security agencies fail at the first step: *the law does not cover most national security whistleblowers*. The law specifically excludes the employees of most agencies involved in intelligence and

national security, including the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA), the uniformed military, government contractors, and airport baggage screeners.² The law does cover, among others, some employees in the Department of Homeland Security, the Department of Energy, and civilian, non-intelligence employees of the Department of Defense (DoD).

Government contractors working on national security projects are also unprotected by the WPA. Contractors are increasingly playing important quasi-governmental roles in places like Iraq and Afghanistan – places where we also need whistleblowers.

Frank Terreri

Frank Terreri had already spent over fifteen years in the field of law enforcement when, following 9/11, he decided to become a Federal Air Marshal. The position meant flying five days a week on the flights deemed to be the most high-risk for a terrorist attack, and required a constant state of alertness to any danger on board. The hours were long and erratic, but “I had a patriotic duty to serve this country the best I could and I felt the best way to do that was to be an air marshal,” Terreri explained.

During Terreri’s first year with the Federal Air Marshal Service (FAMS), the agency brought in a new Director, Thomas Quinn. Quinn quickly began implementing a series of radical policy changes. One of the earliest involved a new dress code. While such a policy may seem innocuous, to the marshals it was clearly problematic. “When we first started as air marshals, the biggest thing we were told is ‘don’t look like a police officer.’ Under Quinn’s policy, we had to cut our hair, be clean shaven, and basically stand out like a sore thumb whenever we went anywhere,” Terreri remarked. The crucial secrecy of the marshals’ identity was further jeopardized by another of Quinn’s policies. He required marshals to display their credentials in plain view of the regular passengers. There were also predictable seating patterns for marshals on board aircraft, as well as a hotel policy requiring all marshals to stay at the same hotel.

As President of the FAMS branch of the Federal Law Enforcement Officers Association, Terreri knew many marshals were growing concerned. The increased conspicuousness of the marshals at the airport and on board flights seemed to undermine their very purpose. Terreri understood their frustration. “The kind of people who take this job are the kind of people who gave up a lot to do this,” he explained. He added that, “They wanted to stop terrorist activity, and then what we were doing was negligible because we were so easily outed.” Terreri began going through his chain of command to address the problems. At the instruction of his direct supervisor, he wrote a letter to Quinn. After waiting several weeks with no reply, he wrote again. Again, he received no reply.

On October 13, 2004, a day he was not scheduled to work, Terreri used his home computer to email two other marshals about an article he had seen in *People* magazine. The piece was about “a day in the life of an air marshal,” and the marshal being chronicled divulged detailed information about the procedures, tactics, and weaponry used by marshals. In the email to his colleagues, Terreri described the marshal in the article as a “sellout” for sharing such sensitive information with the public.

Once he sent his email, Terreri did not give it another thought. “I was very well aware that every email went directly to management,” Terreri said, “so obviously I wasn’t going to send anything that I thought would get me into trouble.” Several hours later, he received a call from a supervisor, inquiring whether he would be home later in the afternoon. When Terreri asked why, his supervisor said that

some agents were coming out to his house, but would not explain why. Terreri was baffled. Then several marshals arrived at his house to strip him of his gun and badge. They also informed him that he was being placed on restricted email access and paid administrative leave, and that the Department of Homeland Security was launching a full investigation into his conduct. And then Terreri was told why: “I was told the reason was for an email I wrote. I had no idea what they were talking about.”

After three weeks on administrative leave, Terreri was called back into the office to perform secretarial work, which he continued to do for seven months. Meanwhile, Quinn had come up with new allegations against Terreri, ranging from the “misuse of business cards” to “disclosure of sensitive security information,” and demanded that a full investigation be conducted into each charge. Terreri, who did not initially see himself as a whistleblower, was receiving a crash course in the kinds of retaliation that whistleblowers face.

At first Terreri believed that everything could be resolved through a simple meeting with his supervisors. “I thought they would want to work it out because we are all on the same team,” he explained. However, as the months dragged on and he realized that this wasn’t to be the case, Terreri contacted the ACLU of Southern California. Attorney Peter Eliasberg agreed to represent him. The ACLU held a press conference on Terreri’s case on April 22, 2005. Within three hours of the conference, Terreri received a call from FAMS to notify him that he had been reinstated to duty. In fact, Terreri learned that he had been cleared for active flight duty weeks before, but none of his supervisors had bothered to notify him.

Terreri returned to work and to his position as President of FLEOA-FAMS, to the delight of his colleagues who had supported him throughout his ordeal. He noted that “even when I was going through retaliation, it was never at an office level. Everybody knew how ridiculous it was – I’ve never been in trouble in seventeen years, and now all of a sudden there are four investigations in a year?” Terreri also learned the results of those investigations, thanks to a Freedom of Information Act request he filed. Of the three possible results in such investigations – substantiated, unsubstantiated, or unfounded – every one of the charges against him was held to be unfounded.

Terreri is optimistic about the future of FAMS. Many of Quinn’s policies have been revoked since his resignation in February 2006, and “the new management is really open to ideas and suggestions” from the air marshals, according to Terreri. However, he is still angry about his ordeal and the impact it could have had on his family: “It’s worth it in the end, because everything’s safer, but you pay a very big personal toll. It puts you in a bad position, worrying about receiving a paycheck,” Terreri said. He explained, “My eight-year-old son has autism, and my wife doesn’t work because of that. What my wife and son had to go through... there is a lot on the line here, and this director knew that, and yet he continued with that retaliation.”

SPECIAL PLAYERS IN THE WHISTLEBLOWER PROTECTION WORLD

Inspectors General (IG) - Inspectors General were established to serve as independent investigators and watchdogs, working to combat waste, fraud, and abuse within an agency. With respect to whistleblowers, IGs receive complaints of agency wrongdoing, investigate the problem, and issue findings and recommendations. Some IGs also investigate whether whistleblowers have been retaliated against by the agency. Some IGs have, in fact, issued reports condemning retaliation. For example, the DOJ IG issued a report finding the FBI had improperly retaliated against Sibel Edmonds when it fired her primarily for blowing the whistle (see below).

However, there are some real flaws with the IG system. IGs are often unable to maintain a whistleblower's confidentiality because the IG is often required to report complaints to the agency head. While IGs are supposed to be independent, most IGs are nominated by and serve at the pleasure of the President. IGs also report directly to the head of the agency. Where

IG reports involve classified information, it is the agency, not the IG that determines what information in an IG report can be released to the public. Some have questioned the amount of real independence these IGs have. Additionally, IGs have no power to force the agency to fix problems – the results of their investigations are not binding. Finally, agencies sometimes use IGs to *retaliate* against whistleblowers – by initiating IG investigations *about* whistleblowers.

Merit Systems Protection Board (MSPB) – the MSPB is an administrative board that hears whistleblowers' complaints about retaliation. The MSPB can order corrective action, such as reinstating the whistleblower to the position she had before the retaliation, issuing back pay to the whistleblower, and covering any medical costs and/or attorney's fees that resulted from the retaliation. Generally, the MSPB can only hear complaints from employees protected by the WPA – it cannot hear complaints from most national security whistleblowers.

United States Office of Special Counsel (OSC) – The OSC is an independent agency that investigates, among other things, complaints of federal whistle-

blower retaliation. It is also an entity to which certain whistleblowers can make disclosures about agency wrongdoing. OSC investigates retaliation complaints and has the power to bring a case on a whistleblower's behalf before the Merit Systems Protection Board. Through these cases, the OSC can seek corrective action to help whistleblowers, such as seeking reinstatement or back pay. The OSC can also try to get the Merit Systems Protection Board to discipline retaliators. OSC cannot, however, investigate or act on retaliation complaints by employees who are not covered by the WPA. Thus, OSC is of no help to most national security whistleblowers. OSC has been the target of harsh criticism as of late for its long delays and its perceived failure to help whistleblowers.

Federal Circuit Court of Appeals – The Federal Circuit Court of Appeals is the only federal appeals court authorized to hear appeals of MSPB rulings. Unfortunately, the Federal Circuit almost never rules in favor of whistleblowers. The Court is known traditionally to be hostile to whistleblower claims. From 1995 through 2005, only one whistleblower claimant out of ninety-six prevailed on the merits of her appeal.³

OTHER WHISTLEBLOWER PROTECTION LAWS

Some employees not protected by the WPA are covered by other whistleblower protection laws. For example, members of the armed services may be covered by the Military Whistleblower Protection Act.⁴ There is also a separate law that prohibits retaliation against FBI whistleblowers who make disclosures directly to the Attorney General (which is an unlikely scenario).⁵

These separate schemes also have their inadequacies and may even be more lim-

ited than the WPA. For example, the FBI's system is a recipe for failure. Rather than getting a hearing before an independent arbiter, FBI whistleblowers are allowed to bring their case only to a group of DOJ attorneys in the Office of Attorney Recruitment and Management (OARM) who are not truly independent from the agency they work for. Even where the Inspector General has found in favor of the whistleblower – and even where all of the evidence is already in the hands of the Department of Justice – the whistleblower is forced to bear the cost of discovery and re-prove her case to the OARM attorneys.

Whistleblowers Who Disclose Abuses Related to Classified Matters are Unprotected

Whistleblowers who disclose agency violations of law or abuses of authority that involve classified information are unprotected. Employees with classified knowledge of wrongdoing are faced with an impossible choice: disclose classified evidence to bring a problem to the public's attention or stay quiet so as not to risk criminal prosecution, administrative sanctions, loss of security clearance, or firing. Government agencies routinely use their monopoly over classification to hide embarrassing or incriminating information.

While some laws create mechanisms by which national security whistleblowers – many of whom have classified knowledge of wrongdoing or abuse – can disclose classified information through special channels, none of these mechanisms provide any *legal protection* for a whistleblower if she is retaliated against for going through even the authorized complaint channels.

Whistleblowers who disclose classified information risk criminal prosecution. A series of laws (part of the Espionage Act) make it a crime for federal employees to disclose most kinds of national defense or classified information under most circumstances.⁶ Some of these laws punish federal employees who disclose the information with the *intent* to harm national security but some laws may arguably punish disclosure regardless of intent. As there have not been many prosecutions under these statutes, the courts have not determined whether a whistleblower disclosing classified information that showed government abuse or illegality would be subject to prosecution under these laws. It is certainly arguable that a whistleblower seeking to disclose government misconduct for the good of the nation is *not* acting with the intent to harm national security, but the case law is

unclear. Because of the uncertainty, a whistleblower must make a choice of conscience and decide that alerting the public to illegal government actions or an abuse of government authority is worth risking criminal prosecution.

Some laws allow “channels” for disclosing classified information about government wrongdoing to certain people or bodies, but provide no actual legal protection if retaliation results from using one of those channels.

The WPA does not protect against retaliation for disclosing classified information. Disclosures of classified information to anyone other than an IG or the OSC are not protected disclosures under the Whistleblower Protection Act.⁷ The WPA does not protect most national security whistleblowers, even if the whistleblower is disclosing only unclassified information.

The Intelligence Community Whistleblower Protection Act gives only the appearance of

protection. In 1998, Congress passed the Intelligence Community Whistleblower Protection Act (ICWPA) in an effort to encourage employees and contractors in the intelligence agencies to report government misconduct to parts of Congress – even if the misconduct involved classified information. The law allows employees in the CIA, parts of the Department of Defense (DoD), the NSA, and FBI, among others, to notify their agency's Inspector General that they intend to report a matter of “urgent concern” to Congress.⁸ But, even if whistleblowers use this legal channel and then are retaliated against, the whistleblower has no remedy – she cannot go to a court or administrative body to complain. All the law does is create a process for disclosure of information. It does not prohibit retaliation for that disclosure. In addition, the process under the law usually means a whistleblower's boss is alerted about the disclosure, which is an invitation to retaliation.

SMOKE AND MIRRORS: SPECIAL PROBLEMS WITH THE INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION ACT

Whistleblowers have to tell the agency IG before they can talk to Congress directly. If the IG takes a whistleblower seriously, the head of the agency will always be informed about the whistleblower's complaint before she is even allowed to talk to Congress.

Whistleblowers cannot talk to just any member of Congress; in fact, they cannot even talk to their own members unless those members are on the intelligence committees.

The law does not create any rights that a whistleblower could enforce in a court or before an independent review body. If a whistleblower follows the process but is retaliated against anyway, she is on her own.

The agencies can try to stop a whistleblower from talking to Congress, and often do so by claiming Congress is not authorized to hear what the whistleblower has to say.

Sibel Edmonds

In the immediate aftermath of the 9/11 terrorist attacks, Sibel Edmonds went to work for the Federal Bureau of Investigation's translation unit. The FBI had a substantial backlog of foreign language intelligence that needed to be translated into English. As a Turkish American fluent in three Middle Eastern languages, Edmonds was well placed to help her adopted country in a time of need.

Edmonds heard news reports that the FBI did not have enough qualified translators. "I saw it as an opportunity to do something to contribute," she said. "I knew it was something I can do, and they said that they really needed it," she added.

The timing was inconvenient. Edmonds was busy with plans to pursue a master's degree. But she decided to accept a job offer anyway. "This horrifying event had taken place, there may be more attacks," Edmonds said, recalling the mood shortly after 9/11. After such a horrific event, she said, "you just wonder, what can I do to help?"

Edmonds was not on the job long before she realized that the FBI's translation unit was dangerously dysfunctional. One of her responsibilities was verifying the work of other translators. She realized that some of them lacked the language skills necessary to accurately translate foreign intelligence into English. "I was horrified," Edmonds said. "I thought that the bad translations might cause us to miss important information about the next terrorist attacks," she added.

Flawed translations quickly became the least of Edmonds' worries. Edmonds learned that one of her colleagues, also a translator, had a close relationship with an organization the FBI was actively monitoring. "I was afraid that she was helping to protect them," Edmonds said. Her suspicion deepened when the colleague insisted on translating all wiretaps of that organization. Edmonds double-checked some of her colleague's work. The colleague "had marked as 'not pertinent' some text containing important information that the agents should have," Edmonds reports.

Edmonds shared her concerns about shoddy translations and her colleague with her supervisor. When he failed to act, she reported her concerns up the chain of command. Her claims were dismissed at every level.

The FBI began to retaliate against Edmonds as she continued to draw attention to problems within the translation unit. In February 2002, FBI agents seized her home computer. A month later, agents asked Edmonds to take a polygraph test, and she agreed. Investigators asked probing questions about whether she had improperly disclosed classified information. She passed the test. Soon after, the FBI fired her anyway. As she was escorted out of the office building by security agents, one told her that she "would never step foot in the FBI again."

Edmonds believed that the FBI fired her for revealing unpleasant truths about its failings. Not content to go down without a fight, Edmonds approached members of Congress to share what she

knew. They took interest. Senators Charles Grassley and Patrick Leahy arranged for the FBI to hold two unclassified briefings for congressional officials about Edmonds' claims. They also requested that the Department of Justice's Office of the Inspector General investigate the FBI's handling of Edmonds' allegations.

Edmonds also sued the FBI to get back her job. She asserted that the FBI unfairly fired her in retaliation for bringing to light serious problems with the FBI translation unit. Rather than deny the truth of Edmonds' statements, the government invoked the "state secrets" privilege to argue that Edmonds' case raised such sensitive issues that the court was required to dismiss it without even considering whether her claims had merit.

In an apparent attempt to bolster its state secrets argument, the government then retroactively classified its two-year old briefings to Congress. When the Office of the Inspector General completed its report, the FBI immediately classified it so that it was never made public. The judge accepted the government's arguments and dismissed Edmonds' case. She appealed.

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its report. The summary vindicated Edmonds. It explained that "many of [Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services." The Inspector General urged the FBI to conduct a thorough investigation of Edmonds' allegations. It stated that "the FBI did not, and still has not, conducted such an investigation."

In the appeals court, the government continued to argue that the state secrets privilege deprived the judiciary of the right to hear Edmonds' claims. In fact, the appeals court closed the arguments for the case to the press and general public. Even Edmonds and her attorneys were forbidden from hearing the government present part of its argument. In a one-line opinion containing no explanation for its decision, the appeals court agreed with the government and dismissed Edmonds' case. Edmonds asked the Supreme Court to review her case, but it declined.

Edmonds took her loss as a call to action. She reached out to other whistleblowers. Together, they formed the National Security Whistleblowers Coalition. "If you're a private citizen and you witness a crime, what do you do?" Edmonds asked. "The first thing a good Samaritan would do is call 911," she said. The situation is far different if you are an FBI employee. "Who do you call? You can't call 911. Based on existing law you can't go to Congress. You can't go to court. Whistleblowers don't have a 911."

For Edmonds, the main beneficiaries of whistleblower protections are members of the public. "It's not about some whistleblower's career," Edmonds explains. "It's about the public's right to know."

Whistleblowers Can Easily be Retaliated Against Even for Talking to Congress

One of Congress' most important jobs is to monitor and oversee what the executive branch is doing, particularly with respect to intelligence, terrorism, and national security-related matters. The congressional intelligence committees exist specifically to address national security related matters. All members of Congress (but not all staffers) can receive classified information. In order to fulfill its oversight function, Congress needs information about what the executive branch is doing and whistleblowers are a critical source of information. The Supreme Court has recognized that Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or to change; and where the legislative body itself does not possess the requisite information – which is not infrequently true – recourse must be had to those who do possess it."⁹

Sometimes Congress gets the information it needs through reports the executive branch is required to file with Congress, or from testimony from an executive branch official. When the executive branch refuses to share information with Congress, whistleblowers are a critical source of information.¹⁰

A series of laws give the impression that employees cannot be retaliated against for

disclosing wrongdoing to Congress. As a result, most employees imagine that even if they have no rights to speak to the public about a problem, they can always make a disclosure to their Congressperson. Wrong. While a patchwork of laws give the appearance that whistleblowers can make disclosures to members of Congress without fear of retaliation, for national security whistleblowers, it is not that simple.

The WPA appears to protect whistleblowers who disclose wrongdoing to Congress, but, again, national security whistleblowers are not protected by that law.¹¹

The Lloyd-LaFollette Act is a law that says the right of federal employees to petition Congress or provide information to Congress "may not be interfered with or denied."¹² But it is unclear whether this law provides any real remedy for whistleblowers retaliated against for speaking to Congress. The law originated in 1912 in response to gag orders issued by Presidents Theodore Roosevelt and Taft that prohibited executive branch employees from communicating directly with Congress without agency permission, even if Congress asked for information.

Anti-Gag Statutes. Each year, Congress passes an "anti-gag" statute as part of its funding bill for the intelligence agencies. This statute prohibits intelligence agen-

cies from paying employees who retaliate against whistleblowers for communicating to Congress. Similarly, each year Congress passes a law that says agency money cannot be used to enforce non-disclosure agreements against employees who communicate with Congress. The anti-gag statutes simply control how agencies can spend their money, but they do not provide any mechanism for whistleblowers to enforce the statute.

The Intelligence Community Whistleblower Protection Act provides a *process* through which national security whistleblowers can make disclosures to Congressional intelligence committees. It does not provide whistleblowers with the right to make disclosures of wrongdoing to *any* member of Congress, and it does not actually prohibit or protect against retaliation for using the ICWPA process.

In fact, it is often easy for an agency to retaliate against an employee, or to block the employee from talking to Congress in the first place. The agency can also claim that information is too sensitive to be shared with Congress. If this happens, none of the laws give the whistleblower any real protection.

MEMBERS OF CONGRESS KNOW THEY NEED WHISTLEBLOWERS

"The Congress finds that—

(1) national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President;

(2) the principles of comity between the branches of Government apply to the handling of national security information;

(3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community;

(4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community;

(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and

(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting."¹³

There is bipartisan recognition that Congress needs whistleblowers to step forward:

-Sen. Patrick Leahy, D-VT: "Protecting whistleblowers is vital to the security of our nation. People who literally risk everything to point out waste, fraud, and abuse in our government deserve a reasonable guarantee that they will not suffer retaliation for their patriotism. Unfortunately, current whistleblower protection laws have been interpreted so narrowly that such a guarantee does not exist."¹⁴

-Sen. Chuck Grassley, R-IA: "It's whistleblowers who often serve as the check against the wrongdoings of the federal government. Whistleblowers in the executive branch have helped me to do my job of oversight. It's simply not fair, nor is it good governance for Congress to enact whistleblower protections on other branches of government without giving its own employees the same considerations."¹⁵

-Rep. Bruce Braley, D-IA – "We need to send a strong message that protecting the rights of whistleblowers is not a Democratic issue, it is not a Republican issue, it is an issue that impacts the lives and the safety of every American citizen."¹⁶

-Rep. Todd Platts, R-PA – "I would like to thank the courageous citizens who have blown the whistle on waste, fraud, and abuse in the Federal Government. If we truly want to eliminate waste, fraud, and gross mismanagement throughout the

Federal Government, then we need to empower and protect our Federal employees who are on the frontlines of government operations and best positioned to witness [these abuses]."¹⁷

-Rep. Henry Waxman, D-CA – "Protecting whistleblowers is a key component of government accountability. Federal employees are on the inside. They can see where there is waste going on or if there is corruption going on. They can see the signals of incompetent management, and what we want is to enable them to let us know, those of us in Congress, about these kinds of problems."¹⁸

-Rep. Christopher Shays, R-CT – "The use of expansive executive authority demands equally expansive scrutiny by Congress and the public. One absolute essential source of information to sustain that oversight is whistleblowers."¹⁹

-Rep. Sheila Jackson-Lee, D-TX – "All employees should feel free to tell the truth. All employees should be protected, particularly Federal employees, particularly in the backdrop of 9/11... the whistleblower protections will allow us to run this country in the right way, save lives, and have employees that are Federal Government employees give us the facts so we can do the right thing."²⁰

Russ Tice

Russ Tice began his career in U.S. Intelligence shortly after finishing college and doing some post-graduation travel through Europe in 1985, but he entered the field by chance. Since boyhood, Tice had dreamed of flying F-15 fighter jets for the U.S. Air Force, only to find out during a flight physical that he was too tall to fly an F-15, leaving him “crushed.” Tice, however, still wanted to work for the Air Force, so when a representative pointed out that his technical and geo-political background made him a perfect candidate for intelligence work, he decided to give it a try. Over the next two decades he worked as a high-level intelligence analyst for the Air Force, Office of Naval Intelligence, Defense Intelligence Agency (DIA), and National Security Agency (NSA).

In April 2001, Tice wrote to his superior officials at the DIA with his suspicions about a female coworker possibly engaging in espionage activities for China. His concerns, expressed both in his letter and in follow-up emails, were brushed aside by DIA counterintelligence officials. In 2002, Tice took a new job with the NSA, a position which required that he undergo a polygraph exam and psychological testing, both of which he passed.

Retaliation began in the spring of 2003, and took an unexpected and humiliating form. Expressing concern over Tice’s letter regarding his DIA coworker from nearly two years before, NSA security ordered him to undergo a second round of psychological testing, nine months after passing the first exam. Although the results of his April 23, 2003 tests came back normal, the Defense Department psychologist conducting the exam diagnosed Tice as having psychotic paranoia. Tice tried to fight the diagnosis. “I got a third NSA psychologist to tell NSA’s security office I was normal and I also went to an independent psychologist who said I was normal, just like every other psychological evaluation I ever had in my career,” he said. Nevertheless, Tice’s security clearance was suspended in June 2003.

As a result of his security clearance suspension, Tice was unable to conduct the intelligence work he had been performing for nearly two decades, and he was instead assigned to a series of menial tasks. “I was forced to work in the NSA motor pool, then forced off all NSA property and forced to work in a warehouse lifting very heavy furniture, which resulted in a back injury that caused nerve damage in one of my legs,” he said. Few of Tice’s coworkers offered him support during this period. “The rank and file is terrified to be around a whistleblower for fear they will pay a price for it. I was told that people in my office were ordered not to contact me and when I called the office, I could tell they were very nervous and that as soon as I hung up the phone they would call the NSA’s security office to inform on everything I had spoken to them about,” he explained.

In spite of this treatment, Tice stayed on with the NSA. “I was very angry and I was not going to give them the satisfaction of forcing me to resign,” he said. “If they wanted me out, I was going to force their hand.” In the meantime, Tice attempted to speak with members of Congress about his situation. “By that time, I knew my career was

over,” he explained. He was ultimately fired in May 2005 when his clearance was formally revoked and his appeals of that decision were unsuccessful.

After the *New York Times* broke the story about the NSA’s surveillance program in December 2005, Tice went back to Congress to attempt to disclose other information about NSA surveillance activities. According to Tice, “The decision to go all the way to Congress with this information was tearing me up. I was weighing the potential compromise by Congress of the information, and the potential loss to national security if it were to get leaked from the Hill, versus the price the American people would pay in terms of the loss of their liberties.” After all of this grappling with his decision, though, the NSA successfully blocked Tice from speaking with any members of Congress about these issues. “The NSA said that no one on the intelligence committees in Congress had a high enough security clearance to hear what I wanted to tell them,” he explained. “The Intelligence Community Whistleblower Protection Act is set up to allow intelligence officers to go directly to the intelligence committees in Congress but to this day these committees are not allowed to hear what I have to tell them.”

If Employers Retaliate by Attacking an Employee's Security Clearance, There Is Almost Nothing a Whistleblower Can Do to Save Her Job

One of the easiest (and most common) ways for agencies to retaliate against a national security whistleblower is to suspend or revoke her security clearance. Without a clearance, whistleblowers in national security agencies cannot do their jobs. Without a clearance, these whistleblowers can be marginalized, given menial work, and eventually fired with little or no recourse. Without a security clearance – or with a record of a clearance being suspended or revoked – whistleblowers often find themselves informally blacklisted and unable to get jobs within their fields. When it comes to security clearance-related retaliation, employers can basically retaliate with impunity.

No WPA Protection. The WPA provides no protection for retaliation through security clearance suspension or revocation.²¹ This means that even if an employee is covered by the WPA, the employee is unprotected if an agency retaliates not by suspending or firing the employee outright but by first revoking her security clearance and then firing her because she no longer has a clearance.

There is no independent court or administrative body that can review whether a suspension or revocation of a security clearance is retaliatory. Because security clearance retaliation is not covered by the WPA, the MSPB cannot hear com-

plaints about security clearance retaliation. Even if a whistleblower could get into a regular federal court to complain about security clearance retaliation, the courts are notoriously deferential to clearance-related decision-making. Instead, employees who blow the whistle and find themselves without a clearance literally have nowhere else to turn but to the retaliator itself – the agency. Many employees can contest security clearance decisions within an agency process, but in this process the agency is the accused, the judge, and the jury. As you would expect, most employees are not vindicated through this process.

Secrecy Can Be Used as a Weapon to Silence a Whistleblower

The more information a government keeps secret, the more important it is that whistleblowers feel safe stepping forward to disclose wrongdoing. Secrecy is a tool that the government can use to shield embarrassing and even criminal information. In the past few years, the government has aggressively argued that national security prevents disclosure of information pertaining to torture and abuse of detainees, NSA warrantless wiretapping, the CIA's practice of kidnapping people and sending them to third world countries for torture and interrogation, and the FBI's use of the Patriot Act's expanded surveillance powers. Secrecy has also been used as a weapon to silence whistleblowers, to discredit and isolate them, and to leave them without a remedy when they are retaliated against. The government should not be allowed to use secrecy as a tool to avoid accountability for its wrongdoing.

Non-disclosure agreements. Employees who work in national security agencies

often have to possess a security clearance and sign a secrecy (non-disclosure) agreement as a requirement of their employment. These agreements prohibit whistleblowers from publicly disclosing classified information. Some agencies have policies that prevent employees from disclosing even unclassified information about agency matters without prior approval. Employees can be disciplined or fined for failing to abide by these agreements and policies. Employees are still bound by the secrecy agreements even after they leave the federal service.

Threatening prosecution. The agency can use the threat of prosecution under the criminal Espionage Act statutes discussed above to effectively silence whistleblowers.

Using classification to bar employees from talking to Congress. The agency can claim information a whistleblower wants to disclose is so sensitive that not even members of Congress can hear

about it. Even when whistleblowers are allowed to disclose classified information to members of Congress, it is difficult to get access or get a member of Congress to pay attention. Most complaints get filtered up to a member of Congress through the member's staff, but staff members *don't necessarily have security clearance*. This means that, in many cases, a whistleblower can only disclose information directly to a member of Congress. When the information is particularly sensitive, it has to be shared in a controlled environment which simply adds to the hurdles facing a whistleblower. As Representative Carolyn Maloney has said: "Our system, when we classify things, it's supposed to be used for national security, not to punish whistleblowers or cover up a 'mistake' possibly in an agency... every single [government] agency that may have a whistleblower that they want to silence or whatever can just sit there and classify everything about that person so they can't even express their situation."²²

Impairing full and frank discussions with a lawyer. Federal employees with classified knowledge often find it quite difficult, if not impossible, to get legal advice or representation when retaliation occurs. A whistleblower cannot share classified information with an attorney unless the attorney has a security clearance and the government thinks the attorney has a “need to know” the classified information. This is a substantial obstacle for employees who simply want to learn whether they have the right to blow the whistle or want to learn precisely what the risks may be. There are not many attorneys with security clearance that work on behalf of whistleblowers and the government has a great deal of control over what can and cannot be shared. It is not enough that the government has granted a lawyer a security clearance in the past. An attorney must ask for clearance for

each new case. Unless a lawyer has security clearance, national security whistleblowers cannot tell their lawyers the full story – they must omit important aspects of what happened to them. This makes it quite difficult for a whistleblower to convince an attorney that her case is worth taking. Whistleblowers will need to find a lawyer who can get security clearance for their case or trust a lawyer to represent them ably despite that the lawyer may partially be in the dark.

Shutting cases down on secrecy grounds. The government often uses different forms of secrecy to get cases brought by whistleblowers thrown out of court. As of late, the government’s favorite secrecy weapon is the state secrets privilege. The state secrets privilege, when used properly, permits the government to block the release of evi-

dence in a lawsuit that, if disclosed, would cause harm to national security. However, the government is increasingly using the privilege to dismiss entire lawsuits at the outset – by telling a court at the very beginning of the case that the subject of the suit is *so* secret that not even a court should consider it, or that the parties cannot litigate the case without harm to the nation. The government has recently invoked the privilege to stop a retaliation suit brought by a national security whistleblower. It has also used the privilege in an effort to evade review of the NSA’s warrantless wiretapping program, claims brought by men kidnapped and tortured by the CIA, and even a federal employee’s race discrimination claim. This once-rare tool is being used not to protect the nation from harm, but to cover up the government’s illegal actions and prevent further embarrassment.

TOO MUCH SECRECY – NOTORIOUS OVER-CLASSIFICATION OF INFORMATION

- “I have long believed that too much material is classified across the federal government as a general rule” *Donald Rumsfeld, Former Secretary of Defense*²³

- “[W]e overclassify very badly. There’s a lot of gratuitous classification going on” *Porter Goss, Former Director of the CIA and Former Chair of the House Intelligence Committee*²⁴

- “It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principle concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another.” *Erwin N. Griswold, former Solicitor General who fought to keep the Pentagon Papers secret and who later admitted that he had never seen “any trace*

*of a threat to the national security” in the Pentagon Papers case.*²⁵

- “Each intelligence agency has its own security practices, outgrowths of the Cold War. We certainly understand the reason for these practices But the security concerns need to be weighed against the costs. Current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency’s incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information. No one has to pay the long-term costs of overclassifying information, though these costs—even in literal financial terms—are substantial. There are no punishments for not sharing information.” *9-11 Commission Report.*²⁶

When a National Security Whistleblower Asks for an Investigation of Agency Wrongdoing, She May Be Subjected to Retaliatory Investigations of Her Own Conduct

Investigating the whistleblower. Sometimes, when a national security whistleblower speaks up – maybe to a boss, to the IG, or to Congress, the agency will respond by starting an investigation into the whistleblower, in an effort to harass, intimidate, or discredit her. The whistleblower often finds herself on the *other* side of an official investigation. A whistleblower may make a complaint to the agency’s IG about an internal agency problem and then the agency might ask the IG to investigate whether the whistle-

blower has improperly disclosed sensitive information or failed to follow agency procedures. Whistleblowers often face intense scrutiny from managers and bosses after they blow the whistle, with managers and bosses waiting for the whistleblower to make one tiny mistake that may justify reprimand, demotion, or firing.

Broken investigatory mechanisms – the protectors failing to protect. Whistleblowers report problems to the IG or OSC or to their bosses because they want to see a problem

investigated and fixed. Often, however, IGs end up investigating whether a whistleblower has been retaliated against, but they do not investigate *the underlying problem the whistleblower is trying to report*. Delays and inaction are also rampant problems. Many whistleblowers wait months and years for agencies to act on their complaints.

WHISTLEBLOWER CASE STUDY

Bogdan Dzakovic

Like so many Americans, Bogdan Dzakovic was devastated by the 9/11 terrorist attacks. He was not, however, surprised by them. As a Team Leader for the Federal Aviation Administration (FAA)’s Red Team, Dzakovic had spent six years orchestrating undercover tests of airport security, and warning FAA authorities about widely known security weaknesses. Despite these warnings, the FAA failed to act.

Dzakovic joined the FAA as an air marshal in 1987 and later served as a Team Leader. In 1995, Dzakovic became a Team Leader of the Red Team. Created by Congress in 1990, the Red Team simulated various types of terrorist attacks at airports to gauge effectiveness at preventing terrorist attacks. Dzakovic chose to join the Red Team because rather than “picking up the pieces after something happens, it made more sense to prevent disasters.”

Dzakovic quickly learned that airport security was in disarray. He said, “We smuggled simulated bombs, and did a lot of surveillance at airports, breaching security on the various doors in and out of the terminal and airport perimeter.” His agents were able to get simulated explosives through security and onto aircraft over 90% of the time.

At first, Dzakovic trusted that the FAA, shocked by his reports, would promptly correct the situation. Yet by 1997, Dzakovic had still seen no improvement. In fact, his FAA supervisors seemed irritated by his findings and sought to undermine the team. For example, the agency began notifying airports in advance of an “undercover” test by the Red Team, thus undermining the whole program. After conferring with colleagues, Dzakovic confirmed that the deplorable quality of security had remained essentially unchanged since 1990.

This was the final straw. Dzakovic began a tireless effort to convince

the FAA to fix its most egregious security problems. Dzakovic worked up the chain of command. In 1998, after his direct supervisors failed to act on his complaints, Dzakovic sent a 13-page memo to the Administrator of FAA. The Administrator never responded. He also sent a memo detailing the FAA’s inaction to the Secretary of Transportation. The Secretary forwarded the memo on to FAA officials, “noting that these are some concerns you might want to look into,” said Dzakovic, paraphrasing the Secretary’s response, but there was no follow up on the Secretary’s part. Dzakovic subsequently wrote to the Department of Transportation’s Office of the Inspector General (“DOT IG”) (where he was told by a senior manager that “unless you give me a dead body and a smoking gun, there is nothing I can do against the managers in FAA”), and the General Accounting Office. Dzakovic then turned to Congress. He even personally delivered a videotape documenting numerous security breaches at Logan airport to Sen. John Kerry’s office in May 2001. Dzakovic’s efforts were consistently met with either protests of powerlessness against the FAA or complete indifference. Nevertheless, he continued to meet with members of Congress to brief them on the situation; his last meeting on Capitol Hill was just a month before 9/11.

After 9/11, Congress and the general public now shared Dzakovic’s outrage. Dzakovic’s quest for FAA accountability for its security lapses continued. Within a month of 9/11, Dzakovic filed a Whistleblower Disclosure with the Office of Special Counsel (OSC). Dzakovic could have filed his report anonymously, and thus have avoided any potential repercussions. He declined. Dzakovic said, “they told me it would carry more weight if I had my name attached to it. At this point, with 3,000 people dead, I thought, what am I going to lose in comparison to what they lost? So I said go ahead, put my name on it.”

Shortly after filing his report, and without any sort of an explanation, Dzakovic was removed as Team Leader and promptly relieved of all Red Team duties and responsibilities. His bosses told him, “when we want you to do something, we’ll let you know.” Out of boredom, Dzakovic volunteered to help colleagues with tasks such as assembling binders, orientation packets, and other clerical chores. This sort of menial work is all Dzakovic has done since he was removed from the Red Team.

Why does Dzakovic remain with the TSA? Partly out of necessity: after twenty-five years of government service, Dzakovic would lose his retirement benefits if he were to quit. But he also feels compelled by a sense of duty. He explained, “In my federal career, I had to take an oath of office three different times, and in that oath, we are sworn to protect the Constitution, and we are sworn to protect this country from all enemies, foreign and domestic. I took my oath of office seriously, and I still do.”

The IG completed a report about Dzakovic’s whistleblower allegations in 2003. According to him, the report reached the baffling conclusion that, while his allegations were correct and the Red Team had uncovered systemic problems, no one was responsible. Dzakovic was even more troubled when he saw that none of the materials he had sup-

plied to the IG – documentation, written statements, testimony from witnesses – had been incorporated into the report. The report has never been made public, however, despite its being unclassified.

In the face of such tremendous discouragement, Dzakovic continues to demand FAA accountability for the tragedy of 9/11 and to try to improve aviation security today. On May 22, 2003 he appeared before the 9/11 Commission to testify as a witness. Upon the release of the Commission’s report, he joined with fellow government whistleblowers in a press conference to criticize the report for its failure to assign blame to any government officials.

Dzakovic still receives a wide variety of reactions to his whistleblowing activities. He said, “Some people despise me. But I’ve actually had a number of people, people who I’ve never even met before, they actually shook my hand and congratulated me for what I did.” He is unsure, though, whether his experiences would encourage other government employees to blow the whistle. “There are a lot of decent people in this field, but they are afraid, because of the way our government operates,” Dzakovic said. “Given how many billions of dollars we have lost, and the lives lost, it is mind-boggling that Congress doesn’t do more to protect whistleblowers.”

National Security Whistleblowers Who Are Covered by the Whistleblower Protection Act Receive Little Real Protection

Even those few national security whistleblowers who are lucky enough to be covered by the WPA often get no protection in fact. Congress has forcefully and repeatedly stated its intent that the WPA is meant to *actually* protect whistleblowers, to encourage reporting of waste, fraud, abuse, and illegality. The MSPB – the administrative body that adjudicates whistleblower claims – and the Federal Circuit – the only federal court to which whistleblowers can turn when they lose before the MSPB – have consistently disregarded the will of Congress, interpreting the WPA as narrowly as possible and erecting barriers for whistleblowers that Congress never intended. Congress has already amended the WPA at least twice to correct Federal Circuit narrowing interpretations of the law.

“Any disclosure” does not mean any disclosure. The WPA is supposed to protect *any* disclosure a whistleblower “reasonably believe[s]” is a violation of law or abuse of authority.²⁷ However, the

Federal Circuit has interpreted the WPA to exempt certain kinds of disclosures. For example, the Federal Circuit has ruled that disclosures to a supervisor about a supervisor’s own wrongdoing are not protected because “the purpose of the [WPA] is to encourage disclosures that are likely to remedy the wrong [and] the wrongdoer is not such a person.”²⁸ Because of this ruling, an employee who first seeks to address a problem by going through the chain of command, rather than directly to an Inspector General or to Congress, is not protected under this interpretation of the WPA. Similarly, the court has decided that whistleblowers who have a duty to report wrongdoing are not protected by the WPA for disclosures made in the course of their job. The court has also ruled that there is no WPA protection if the whistleblower is not the first to disclose a particular problem.

Unreasonable standards of proof. The Federal Circuit has decided that whistle-

blowers can win WPA claims only if there is “irrefragable proof” of retaliation. The dictionary definition of “irrefragable” is “irrefutable.” Thus, an agency is presumed to act in good faith unless the whistleblower presents irrefutable proof – an impossible standard to meet.

Federal Circuit monopoly over whistleblower cases. The Federal Circuit Court of Appeals has a reputation for being hostile to whistleblowers, yet it is the only court that hears WPA appeals. Whistleblowers cannot appeal MSPB losses anywhere else.

No jury trials. Whistleblowers with WPA claims cannot present their stories to a jury of their peers. WPA claims are generally adjudicated by administrative judges.

No real penalties for retaliating against whistleblowers. There are no civil or criminal penalties for retaliating against whistleblowers in violation of the WPA. Often, retaliators do not even get reprimanded.

National Security Whistleblowers Receive Uncertain Protection from the First Amendment

Whistleblowers cannot count on their constitutional rights to protect them from retaliation. The Supreme Court has held that the First Amendment rights of government employees are more limited than those of ordinary citizens.²⁹ But that is not the only obstacle. Another complication is that it is difficult to tell in advance whether a particular disclosure will be protected.

The Supreme Court has held that only employee speech on a matter of “public concern” is entitled to First Amendment protection.³⁰ It is not always clear whether speech is about a topic important enough to be of public concern.

Determining that speech relates to a matter of public concern is not the end of the matter. The Supreme Court requires that courts then go on to balance the value of the employee’s speech against the government’s interest in censoring speech, for example to maintain office discipline. This standard is very subjective. Only if the court decides that the employee’s speech is more important will the employee enjoy the benefit of First Amendment protection.

Even if a whistleblower’s speech is protected by the First Amendment, courts will not grant relief for retaliation unless the whistleblower can show that there is a substantial relationship between her disclosure and an adverse employment action.³¹ If the whistleblower can make this showing, then the burden shifts to the employer to demonstrate that it would have taken the same employment action even in the absence of the whistleblowing activity. Only if the government is unable to make this showing will the whistleblower prevail.

Unfortunately, in 2006 the Supreme Court added a new wrinkle to the law

that makes it even harder for whistleblowers to claim First Amendment protection. In *Garcetti v. Ceballos*, an attorney in the Los Angeles County District Attorney’s Office believed that a deputy sheriff had misstated the facts in order to secure a search warrant. He argued that his office should dismiss a pending criminal case because of the sheriff’s misconduct.³² Instead of dropping the case, the attorney’s employers retaliated against him. He sued, arguing his First Amendment rights had been violated.

The Court rejected the attorney’s claim. It wrote that “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Because it was part of the attorney’s job description to report misconduct, he was ineligible for First Amendment protection for doing so.

Recommendations

National security and intelligence agencies should not be trusted to police themselves and should not be able to retaliate against whistleblowers without fear of being held accountable. Congress should act immediately to grant national security whistleblowers meaningful protections, to fix the Whistleblower Protection Act, and to actively oversee and limit the ability of executive agencies to misuse national security as a pretext to silence whistleblowers.

PROTECT WHISTLEBLOWERS IN NATIONAL SECURITY AGENCIES FROM RETALIATION

Federal employees and contractors working in law enforcement, intelligence and homeland security are our frontline protection against threats to our national security and they need and deserve the right to say something when they see something that impairs the efficient and effective operation of their agencies. Congress should grant meaningful whistleblower protection to all employees and contractors working for our national security agencies.

→ **Protect whistleblowers from retaliation for disclosing classified information to Members of Congress and others authorized to receive classified information.** By virtue of their election to office each Member of Congress has the right to receive information about the functioning of our government. Whistleblowers should safely be able to disclose *any* information to a Member of Congress or to an agency Inspector General without fear of retaliation and without the agency being tipped off about the whistleblower's complaint. National security whistleblowers should be able to turn to a court or an independent agency body if they are retaliated against for making any disclosures to IGs or Congress.

→ **Protect whistleblowers from security clearance-related retaliation.** Security clearance retaliation should be flatly prohibited. Whistleblowers who believe the agency is revoking or suspending a security clearance in retaliation for good-faith

whistleblowing should be protected and should have an independent forum – a court or truly independent administrative body – that will review the security clearance action.

→ **Protect whistleblowers against retaliatory investigations.** While employees who suffer illegal discrimination enjoy protection against retaliatory investigations, whistleblowers do not have such protection. Prohibiting retaliatory investigations is crucial because such investigations are usually the first step.

→ **Require national security and intelligence agencies to give their employees guidance on how to properly make a whistleblower complaint involving classified information.** Federal employees and contractors working in national security shouldn't have to become experts in the intricacies of whistleblower protection laws in order to make a good faith complaint and receive protection from retaliation. Agencies should be required to provide the proper guidance to their employees and contractors so they will know how to report their complaints within the law. Employees should also be able to receive confidential advice on how to report waste, misconduct or abuse that threatens our national security so they can make an informed decision regarding whether and how to make a complaint.

→ **Limit the government's ability to use secrecy as a weapon to defeat whistleblower retaliation cases – particularly the state secrets privilege.** In most cases the information national security whistleblowers report reveals agency failures and

misconduct that negatively impact our national security, but the government has been increasingly relying on the state secrets privilege to suppress whistleblower lawsuits. Hiding the waste, misconduct and abuse that hinders the ability of these agencies to fulfill their important missions does not protect the national security. Congress should neutralize the government's use of the state secrets privilege to ensure that problems within these agencies are exposed and corrected.

FIX THE WPA

→ **Restore a reasonable definition of "any disclosure" and impose a normal standard of proof.** The plain language of the WPA extends protection for "any disclosure" regardless of the setting of the disclosure, the form of the disclosure or the person to whom the disclosure is made, but hostile case law from the Federal Circuit has bent the definitions of critical terms within the WPA to create unreasonable hurdles, frustrating this clear legislative intent. Whistleblowers should not have to face unreasonable expectations and impossible evidentiary burdens. Whistleblowers should be protected for any disclosure, and be able to overcome the presumption that government acts lawfully with "substantial evidence" of retaliation.

→ **No penalty for talking to the boss or fellow employees.** Disclosures of wrongdoing should be covered regardless of whether those disclosures were made to a supervisor or colleague.

→ **No penalty for being the second or third person to disclose the wrongdoing.** There should be no rule that a whistleblower must be the first person to ever disclose the scandal in order to receive protection under the WPA. Whistleblowers should be protected regardless of whether the whistleblower was the first, third, or tenth person to disclose the wrongdoing.

→ **Codify the anti-gag provision.**

Government agencies should be banned from implementing or enforcing any nondisclosure policy, form or agreement that does not contain specified language preserving open government statutes such as the WPA, the Military Whistleblower Protection Act, and the Lloyd Lafollette Act.

→ **Time limits and jury trials where government watchdog does not act.**

Whistleblowers should not have to rely solely on the OSC or IG to investigate a retaliation claim. There should be strict deadlines on how long OSC or the IG has to fully investigate a whistleblower's complaint and correct the problem. If the agency watchdog does not act in a certain period of time, the whistleblower should be able to file a lawsuit (and seek a jury trial) to address the problem. This is the kind of system already in place to deal with discrimination claims.

→ **Get rid of the Federal Circuit monopoly over whistleblower claims.**

Case law from the Federal Circuit Court of Appeals has gutted the protections Congress intended to give federal employees who make good faith efforts to report waste, fraud, abuse and misconduct in government. Congress should break the Federal Circuit monopoly.

Improve the IG process and make IGs more independent from the agencies they investigate.

Agency Inspectors General have proven themselves ineffective defenders of whistleblower rights. Even where retaliation is found through an IG investigation, it is often too little and too late to help a whistleblower who finds her career in tatters after making a good faith complaint. Congress should exercise its oversight authority and require the Inspectors General from the federal law enforcement, intelligence, and homeland security agencies to report when whistleblower complaints are made, what action has been taken to stop the retaliation, and whether disciplinary action has been taken against those found to be retaliating against whistleblowers. Congress should have full access to IG investigative files to make an

independent determination that IG conclusions regarding whistleblower retaliation are consistent with the facts and not colored by their allegiance to the agencies they work with.

On March 15, 2007 the U.S. House of Representatives approved by a vote of 331-94 the Whistleblower Protection Enhancement Act of 2007 (H.R. 985), a comprehensive whistleblower protection reform bill that would implement many of these recommendations. The Senate has an opportunity to improve upon the House bill by incorporating provisions from H.R. 985 into the Federal Employee Protection of Disclosure Act (S. 274), which was reintroduced in the Senate with strong bi-partisan support on January 11, 2007. Polls show the American public overwhelmingly supports congressional action to institute stronger laws protecting government employees who report waste or corruption. Those conscientious employees working within our law enforcement, intelligence and homeland security agencies are doing their best to protect our national security, and they deserve the best whistleblower protection Congress can give them.

Notes

¹ 5 U.S.C. § 2302(b)(8)(A).

² 5 U.S.C. § 2302(a)(2)(C)(iii)-(iii).

³ Project on Government Oversight (POGO) Report, "Homeland and National Security Whistleblower Protections: The Unfinished Agenda," April 28, 2005, at 8. *Available at* <http://www.pogo.org/m/gp/wbr2005/WBR-04282005.pdf>.

⁴ 10 U.S.C. § 1034.

⁵ 5 U.S.C. § 2303(a).

⁶ *See, e.g.*, 18 U.S.C. § 793(d); 18 U.S.C. § 793(e); 18 U.S.C. § 798(a).

⁷ 5 U.S.C. § 2302(b)(8)(A)-(B).

⁸ 5 U.S.C. App. 3, §8H(a)(1)(A).

⁹ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

¹⁰ *See* Louis Fisher, "National Security Whistleblowers," CRS Report for Congress, Dec. 30, 2005.

¹¹ 5 U.S.C. § 2302(b)(8) ("This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.")

¹² 5 U.S.C. § 7211.

¹³ Pub.L. 105-277, Title VII, § 701(b), Oct. 20, 1998.

¹⁴ Press Release, Sen. Patrick Leahy, "Leahy Whistleblower Measure Advances in Senate," (Oct. 10, 2002), *available at* <http://leahy.senate.gov/press/200210/101002a.html>.

¹⁵ Press Release, Sen. Chuck Grassley, "Grassley Works To Provide Whistleblower Protections To Legislative Branch Employees," (Feb. 7, 2007), *available at* http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=5266&Month=2.

¹⁶ Whistleblower Protection Act of 2007, H.R. 985, 110th Congress (2007), *available at* <http://thomas.loc.gov/cgi-bin/query/C?r110:./temp/~r110lwfM87>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* 5 U.S.C. § 2302(a)(2)(A) [security clearance actions *not* listed as prohibited personnel actions]; *see also Heese v. Dep't of State*, 217 F.3d 1372 (Fed. Cir. 2000) (finding security clearance retaliation unprotected under the WPA).

²² *Id.*

²³ *War of the Worlds*, Wall Street Journal, July 18, 2005 at A12.

²⁴ Remarks Before the Nat'l Comm. on Terrorist Attacks upon the United States (9/11 Commission), May 22, 2003, *available at* http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

²⁵ *Secrets Not Worth Keeping: The Courts and Classified Information*, Washington Post, Feb. 15, 1989 at A25.

²⁶ The 9/11 Commission Report, July 22, 2004, *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

²⁷ 5 U.S.C. §2302 (b)(8)(A).

²⁸ *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1350 (Fed. Cir. 2001)

²⁹ *Pickering v. Board of Education*, 391 U.S. 563 (1968)

³⁰ *Id.*

³¹ *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274 (1977).

³² *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).