House Committee on Oversight and Government Reform

Whistleblower Protection Enhancement Act of 2007

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The term “whistleblower” is connected in the public’s mind to words and phrases used to villainize those who disclose information to the detriment of an organization or betray their associates. "Informants," "snitches," "rats," "tattle-tales," "stool pigeons," "back stabbers," "squealers," "traitors," "turncoats," "double crossers," "narcs," and "finks" all turn on their organizations, associates, or their groups by exposing embarrassing information or evidence of crime. Sometimes the words are doubled up for added emphasis, as in "ratfink" or "back-stabbing traitor." Sometimes simply the names of historical figures instantiate the ideas of organizational apostasy and traitorous acts: "Brutus," "Judas," "Quisling," "Benedict Arnold."

The emotion behind the terms describing those who turn against and undercut their organizations, whether those organizations are as large as a culture or as small as a street gang, is often a combination of loathing and disgust. These informers divest themselves of trust, community, and friends to expose the truth. But the pejorative terms mentioned above originate in the perspectives of those within the organization, those who feel or fear the consequences of the betrayal and have little interest in understanding or plumbing the reasons for the acts. Against these impulses, Americans are famous for transforming “betrayal” of the group into heroism when the well-being of society is served.

Americans frequently deify the person who pursues truth or right against the perverse and illegal actions of a group. In film and literature, those who stand up against the group are usually portrayed as heroic and courageous and emblematic of the ideal citizen. In Serpico, The Insider, Silkwood, and The Pentagon Papers people of rare

courage turn against their corrupt organizations for the benefit of society. Thomas More, Peter Zenger, Jane Addams, John Scopes, Sojourner Truth, Zero Mostel and many others have been immortalized for risking their well-being in the service of truth; in the service of all in society rather than for the few in an organization.

Whistleblowers are those who "commit the truth" to their detriment and for the benefit of society. Whistleblowing is a metaphorical suicide, hence the term "committing the truth." But the effects are anything but metaphorical. If death is a passing to a new life, so too usually is whistleblowing. Their sacrifice for society costs them their careers, skills, friends, families, wealth, and sometimes their sanity. To those who understand sacrifice, the term "whistleblower" connotes rectitude, courageousness, justice, and self sacrifice, while to agency managers whistleblowers are "traitors" or "disgruntled employees." Getting past the term is a job in-and-of-itself, for it imports both negative and positive connotations and spawns ambivalence. Our political leaders, at least, must get past that hurdle and see the reality, see the people, see the pain, see the heroism, and see the patriotism of whistleblowers. Whistleblowers are brutalized by their own government, by other public servants with less fidelity to the United States and its people than to the masters they serve and their career ambitions.

The very people appointed to protect whistleblowers historically have no loyalty to the truth or to the good of society. The Office of Special Counsel, ostensibly the chief mechanism of protection for whistleblowers, is a hopeless failure. From the beginning it has been controlled by the desires of executive agencies and presidents and has never had the objective distance to perform its functions as intended by Congress. Early in OSC's history, one Special Counsel referred to whistleblowers as "severed heads," "uninformed, disgruntled or disaffected," "carrying bags and walking up and down Constitution Avenue," "blackmailers," and "malcontents."[1] That ill-perception continues to this day. I have heard whistleblowers referred to as the "undead," people "staggering toward the graveyard," "dead men (or women) walking."

References to death in describing whistleblowers are ubiquitous. Whistleblowers are isolated, shunned, and "killed" within their organizations. Their friends are warned not to interact with them and management exerts its control over a whistleblower's

[1] Westlaw 131 Cong. Rec.H 6407-02

colleagues by threat and intimidation that they will suffer the same fate as the whistleblower if they do not conform to agency desires. The whistleblower is a spectacle inside the organization, an object lesson put on display but disconnected from organizational functions; he or she becomes an "undead" warning to others not to commit the truth. But if this is what happens to the "average" whistleblower, the fate of the national security whistleblower is even worse.

NATIONAL SECURITY WHISTLEBLOWERS

National security whistleblowers are at even greater danger and with less protection than whistleblowers in other settings. At least in the non-national security setting the federal whistleblower has access to some process and may resort to publication and news media, fully consult counsel, and access evidence relevant to his or her case. But national security employees are ensconced in secrecy. They are hemmed in by security clearances and access, threats of criminal prosecution, and non-disclosure and pre-publication review agreements.

The term "national security" has become talismanic, parting the courts and Congress like Moses did the Red Sea. But the term has become a hopelessly ill-defined, ever-expanding tool of executive branch avoidance of accountability. Sidney W. Souers, the first Director of Central Intelligence, wrote that "'national security' can perhaps best be understood as a point of view rather than a distinct area of governmental responsibility."[2] But it is a "point of view" that Congress has left solely to the President and executive agencies. "National security" has been an engine of modernization and transformation for the presidency, but Congress has not seen a concomitant evolution of its power. Accordingly, concerning national security, Congress remains a 20th Century institution attempting to check the power of a 21st Century presidency.

Over the last several decades, Congress has acquiesced to or helped create new institutional structures in the executive branch under the banner of "national security" without assuring that these changes are subject to effective oversight. These failures merely continue a long-standing habit of Congress to flee from matters of national

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[2] "Policy Formulation for National Security," *The American Political Science Review* 43, No. 3, June (1949): 534-543, at 535.

security. In the first executive order to direct classification procedures concerning national security information, President Franklin Roosevelt drew only on statutory authority.[3] Later presidents relied on their constitutional powers for classification authority, and today President George W. Bush relies on a theory of inherent presidential authority and a unitary theory of the presidency that puts the president before the Congress and the judiciary in constitutional importance.

Now presidents claim that they have plenary, unshared power over classification of information and over the control of access to that information. Congress has all but capitulated to this claim. With the expansion of secrecy and the national security state, this means that the power of the executive branch is aggrandized at the expense of Congress and the courts. Secrecy has become a central axis of executive branch policy and original classification power has been extended by President Bush to agencies historically without such authority. The Environmental Protection Agency, Department of Agriculture, and Health and Human Services, for example, now have original classification power. Such expansion of secrecy is paired with an equal reduction in congressional capacity for oversight.

Ironically, congressional efforts originally intended to exercise accountability over national security agencies are turned against their original intentions. Most notably, the select committees on intelligence, designed for oversight of executive branch activity, are often complicit in efforts by agencies to keep embarrassing matters, criminal activity, and constitutional violations not only from the public but from the rest of Congress. Since Congress has refused to challenge presidents over their claims of unfettered control of classification and access, the oversight function of Congress depends on the largesse of the executive branch. Surely, this is not what the Constitution requires or needs.

One of the few, and often the only, means for Congress to learn about the cloistered world of national security operations is through the whistleblower. Congress relies on whistleblowers to aid in its oversight functions, but has done little to keep those whistleblowers from being torn apart by the system in which they work. As secret government expands, the need for national security whistleblowers increases proportionally. If Congress will claim no power to exercise control over national security,

[3] Executive Order 8381 (1940).

then the least it must do is to encourage those to come forward who are aware of criminal acts, waste, gross incompetence and abuse by agencies. This encouragement can only come in the form of protection against agency retaliation through the creation of credible and efficient means of repair available to the whistleblower. It is dramatic to say, but true, that with developing technology and the amount of injury a few determined people can wreak on our society our survival may well depend on whistleblowers who come forward to help expose serious deficiencies with respect to the security of this nation.

Presently, national security whistleblowers face insurmountable obstacles to righting the wrongs they suffer:

- They may not communicate openly with their attorneys, since most or all of the relevant evidence concerning their cases will be classified
- They will generally not have access to documents necessary to prove elements of their cases, and whatever information whistleblowers may recall will not be allowed into evidence
- The state secrets privilege is used to shut down admission of evidence and to terminate legal action
- Exemption One under the Freedom of Information Act is used to prevent litigants from gaining access to crucial evidence via FOIA
- Non-disclosure agreements are used to threaten and intimidate whistleblowers who file complaints or wish to discuss their cases with the media
- Pre-publication review is used to excise material from writings; ofttimes not for national security concerns but for fear of embarrassment or disclosure of criminal acts
- National security whistleblowers are threatened with criminal prosecution for disclosing classified material, and since material may be classified retroactively a whistleblower can never be sure that the unclassified utterance he or she makes today will not be classified tomorrow. The moving line of classification is controlled at will by executive agencies.
- Computers and other personal property of whistleblowers, their counsel, and even reporters writing about such cases are subject to seizure on the flimsiest of justifications

• Even if a whistleblower gets a case to court, he or she is likely to face a judge who prostrates him or herself before the claim that the case cannot go forward for reasons of "national security"

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007

The proposed legislation as it regards national security whistleblowers is a welcome foray into what is normally an area of unchecked, unaccountable executive power. The legislation is a commendable effort by Chairman Waxman and members of this Committee. It is notable for several reasons.

First, the extension of whistleblower protection to employees in intelligence and counter-intelligence agencies and civilian contractors would substantially aid Congress in its ability to discover and inspect questionable activity in the operations of agencies and the awarding and execution of government contracts. Particularly noteworthy is that demotion, discharge, and other discriminatory acts by agencies in retaliation for national security whistleblower disclosures would be prohibited. Heretofore, intelligence and counter-intelligence agencies have been exempted from complying with statutory whistleblower protection.

Second, the statute prohibits "denying, suspending, or revoking a security clearance" in reprisal for whistleblowing and requires agency action against employees' security clearances to be based solely in legitimate concerns for national security. This is a direct and welcome challenge to one of the main tools intelligence and counter-intelligence agencies employ against whistleblowers.

Likewise, the time requirements for inspectors general and administrators to investigate, report on, and accept or deny complaints of retaliation will help prevent the excessive delay that presently plagues the handling of whistleblower claims.

Finally, the extension of protection to employees in non-covered agencies seeking to disclose wrongdoing that requires divulgence of classified or sensitive information is an important means of preserving Congress' power to inspect, evaluate, and oversee agency conduct.

Despite the virtues described above, the statute has substantial weaknesses that should be remedied before it is introduced. The expansion of the number of committees

and congressional members "authorized" to receive classified information from whistleblowers is a significant move in the right direction. But protection against reprisal for disclosing covered information "to an authorized Member of Congress" is a hollow promise at best and a siren lure to catastrophe at worst. Since Congress has not challenged executive branch power to control access and dissemination of national security information, just what constitutes an "authorized Member of Congress" is wholly at presidential discretion either before or after the fact of disclosure. In any particular case, the president or affected agency may conclude that no member of Congress has the requisite authorization to receive information that would aid Congress in its constitutionally mandated duties of oversight.

Since classified information comes with numerous control caveats and dissemination limitations, it is insufficient to meet the floating standard of "authorized" that a Member of Congress receiving the disclosure merely have a security clearance. An agency may after the fact simply assert that the disclosure was unauthorized and retaliate against the whistleblower. Or, in more ominous fashion, the agency may threaten would-be whistleblowers, intimidating them into silence. Such intimidation frequently frustrates congressional efforts to get at the truth of executive branch misbehavior.

This issue recently arose in respect to the National Security Agency. In a letter to a former NSA intelligence officer and whistleblower, Renee Seymour, Director of NSA Special Access Programs Central Office, wrote that "neither the staff nor the members of the HPSCI or SSCI are cleared to receive the information covered by the SAPs." The letter contained an implicit threat of criminal prosecution if the former employee did not yield in his attempts to make disclosures to members of Congress. There is simply nothing to prevent agency determinations that disclosures will be or have been made to "unauthorized" members of Congress. In this regard, it would be well for the statute to clearly set out Congress' constitutional power to receive information necessary to its oversight functions. It would also be wise if the statute contained a guarantee of immunity against criminal prosecution for the disclosing employee. Language in the statute should direct that, "No covered employee under this provision shall be criminally charged or prosecuted for any disclosure, or attempted disclosure of covered information to a Member of Congress."

Second, the Federal Circuit has had sole jurisdiction over whistleblower appeals, and it has been no friend to whistleblowers. The proposed legislation does not address this problem. As it is now, a single set of judges control a discrete area of law. The leavening effects of all-circuit review would surface continuities and disagreements in law across jurisdictions, providing a richer environment for law to move to agreement through the participation of many skilled judges.

Third, our friends at the National Whistleblower Center rightly point out a problem with the proposed language concerning the state secrets privilege. The draft statute states that, "if the assertion of [the state secrets] privilege prevents the plaintiff from establishing an element in support of the plaintiff's claim, the court shall resolve the disputed issue of fact or law in favor of the plaintiff." This language does not seem to address those cases where the government moves for dismissal of the entire case based on the state secrets privilege. The government may seek dismissal of the action under the mosaic theory, as it did in Sibel Edmonds' case and many other cases. As Mr. David Colapinto of the NWC puts it, "in other words, the language does not address how the government will likely attempt to use the privilege; the government will likely argue that the scope of the privilege is much broader than an element or elements of the plaintiff's claim. For example, what if the government argues dismissal is required to protect the revelation of state secrets privileged information that would be encompassed by the government's affirmative defense, or the plaintiff's rebuttal to the defense." Therefore, one of two possible additions should be made to the proposed statute. The first is suggested by the NWC and the second by the NSWBC:

> 1) "An executive branch agency may not move to dismiss a claim under this provision based on any assertion of privilege, but may request and obtain special procedures from the court in order to protect classified or secret information."

Or

> 2) "If a court finds under this provision that a defendant agency's assertion of privilege is properly raised, and that privilege would otherwise warrant dismissal of the action, then judgment shall be made in favor of the plaintiff."

*The opinions expressed here are those of William G. Weaver and the National Security Whistleblower's Coalition and are not to be construed as reflecting the opinions or policy of the University of Texas at El Paso or any of its component units or personnel.