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# The Legacy of “Deep Throat”: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002

*A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.*

—James Madison<sup>1</sup>

*Woodward had a source in the Executive Branch who had access to information at CRP as well as at the White House. His identity was unknown to anyone else.*

. . . .

*He had never told Woodward anything that was incorrect.*

—Carl Bernstein and Bob Woodward<sup>2</sup>

## INTRODUCTION

Federal employees seeking to blow the whistle on their employer agency’s violations of laws designed to protect human health and the environment may be better off following the lead of their foremost predecessor, the infamous “Deep Throat” of the Watergate scandal than following federal whistleblowing laws.<sup>3</sup> Like Deep Throat, most whistleblowers act alone in exposing a large government entity, yet they do not expect to be heralded as heroes, even though the benefits of their

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1. 9 JAMES MADISON, *Letter to W.T. Barry, Aug. 4, 1822*, in WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

2. CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* 71-72 (1974).

3. The circumstances surrounding Deep Throat’s substantive contributions to the unveiling of the Watergate scandal are inconsistent with a narrow definition of the term “whistleblower.” Where journalists break the news, some would not view the journalists’ source as a whistleblower. See ROBERTA ANN JOHNSON, *WHISTLEBLOWING: WHEN IT WORKS — AND WHY* 3-4 (2003) (defining whistleblowing into four components, including a last component which requires that “the person exposing the agency is not a journalist or ordinary citizen, but a member or former member of the organization”). According to this perspective, it was the journalists Woodward and Bernstein, and not Deep Throat, who exposed the cover up of Watergate scandal.

Because Deep Throat’s role fits the basic profile of a whistleblower supported in this Comment — mainly, an individual working within the Executive Branch who shares information leading to a profound finding of illegal government activity — he was and remains a “whistleblower” by all accounts.

whistleblowing run directly to the public.<sup>4</sup> Instead, like Deep Throat, most whistleblowers seek to effect change by improving government accountability. However, most federal and state whistleblower protection laws follow a labor law model based on a retaliation complaint process that fails to capitalize on a whistleblower's information to improve government accountability. These laws respond to the assumption that whistleblowers fear retaliation and thus, only offer labor law protections from employer retaliation.

In contrast, two federal whistleblower laws correctly assume that whistleblower motivations include a desire to effect change and to improve government transparency and accountability. For example, the forthcoming story of an Army Corps of Engineers whistleblower has demonstrated the potential for whistleblowers to increase governmental accountability under the disclosure provisions of the Whistleblower Protection Act ("WPA"), which takes an information-based approach to legal protections for whistleblowers in contrast to the labor law model followed by most federal and state whistleblower laws. Also, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("No FEAR Act")<sup>5</sup> purports to increase governmental accountability among federal agencies whose employees suffer discrimination or retaliation for blowing the whistle on their employer agencies. In addition, this Comment will consider briefly two additional whistleblowing statutes, namely the False Claims Act and the Lloyd Lafollette Act ("Lafollette Act").

In light of these recent developments in federal whistleblower law, this Comment argues that policymakers' core concern should not be whether whistleblower laws adequately protect the individual whistleblower from employer retaliation, but rather whether legal protections properly capitalize on a whistleblower's information to improve overall governmental transparency, as did Deep Throat. Irrespective of which legal steps prospective whistleblowers take, if any, they occupy a controversial, yet critical, role in U.S. legal history, politics, and society. Indeed, the legacy of Deep Throat demonstrates the direct influence one individual may have over the judicial and legislative processes of a democracy.

Although much has been written about employees in the private sector who report their companies' law-breaking activities,<sup>6</sup> this begs the

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4. See Marci Alboher Nusbaum, *Blowing the Whistle: Not for the Fainthearted*, N.Y. TIMES, Feb. 10, 2002, § 3, at 10.

5. No FEAR Act of 2002, Pub. L. No. 107-74, § 104, 116 Stat. 566 (2002).

6. Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 12 (1995).

question: who oversees the very entities – typically federal agencies – entrusted with the implementation and enforcement of federal law? Whistleblowers in the public sector have played a prominent role in public health and environmental matters. Their goals echo themes that concerned the Founding Fathers who crafted the oldest written constitution of any nation in the world.<sup>7</sup> Specifically, James Madison and the other Framers sought the prevention of tyranny<sup>8</sup> and governmental accountability.<sup>9</sup>

However, if one of the objectives of whistleblowing is the dissemination of information to increase governmental accountability, most legal remedies curtail a whistleblower's potential for success. In large part, current federal whistleblower law rests on a premise, derived from labor law, that fear of retaliation deters whistleblowers. With that in mind, the law attempts to provide remedies to offset such retaliation so that whistleblowers will not be so deterred. Nevertheless, in spite of these remedies, retaliation persists;<sup>10</sup> consequently, this Comment argues that legal protections for whistleblowers are not and should not be limited to a labor law framework that protects whistleblowers from employer retaliation.<sup>11</sup> Rather, the law should capitalize on whistleblower information to improve government transparency and accountability.

Of course, in addition to the constitutional ideals of government accountability, federal legal protections for whistleblowers sit against a highly politicized backdrop of trends regarding the direction of information flow between the government and the public. One significant political consequence of September 11, 2001 is the legitimate concern that

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7. See, e.g., RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONST. L.* § 1.1 (3d ed. 1999).

8. JAMES MADISON, *THE FEDERALIST* NO. 47 (1788), *reprinted in* *THE FEDERALIST* 323 (Jacob E. Cooke ed., 1961). Although primarily concerned with legislative tyranny, Madison's support for the separation of powers concept applies to all branches of government.

9. See, e.g., JAMES MADISON & ALEXANDER HAMILTON, *THE FEDERALIST* NO. 51 (1788), *reprinted in* *THE FEDERALIST* 323 (Jacob E. Cooke ed., 1961). "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *Id.*

Arguably, the objectives of prevention of tyranny and governmental accountability are not mutually exclusive. They resonate in legal, legislative, and political forums of debate over whether, and how, channels should be made more secure for environmental whistleblowers.

10. Elletta Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L. L. 879, 908 (2004) (internal citation omitted).

11. See Robert G. Vaughn et al., *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 GEO. WASH. INT'L L. REV. 857, 862-63 (2003) (arguing that an "expansive view of protection . . . approaches whistleblower protection not only as a labor provision but also as an embodiment of the human right to freedom of expression").

terrorists will use information relating to the nation's security to their advantage.<sup>12</sup> Since then, whistleblower advocates who offer their legal services to whistleblowers report a significant increase in the number of cases involving government whistleblowers working for counter-terrorism departments.<sup>13</sup> At the same time, current judicial trends indicate that federal whistleblower law as applied to retaliation complaints will be construed narrowly.<sup>14</sup> Ultimately, any changes to federal whistleblower laws must balance national security concerns with the need for government accountability and transparency.

Part I of this Comment provides an overview of the potential of whistleblowers to effect policy change by drawing upon the historic example of the whistleblower "Deep Throat," who reported a White House cover-up of the infamous Watergate scandal during the Nixon Administration. Part I also sets the stage for redefining the importance of whistleblowing, given September 11th and the importance of restricting access to information to protect national security. Part II begins by providing a brief review of traditional labor law protections for environmental whistleblowers from employer retaliation and then analyzes a unique, information-based statutory tool available to some environmental whistleblowers in the federal government: the disclosure referral process of the Whistleblower Protection Act of 1989. Part III analyzes the new procedural requirements imposed on federal agencies under the No FEAR Act. Finally, Part IV proposes a new paradigm for policymakers who contemplate greater legal protections for whistleblowers. Specifically, this Comment argues that federal whistleblower laws should reject the traditional goal of adequately protecting the individual whistleblower from employer retaliation and should strive for legal protections that properly capitalize on a whistleblower's information to improve overall governmental accountability and transparency.

## I. SETTING THE STAGE

This Comment examines the less prevalent form of whistleblowing by public sector whistleblowers who face unique concerns distinct from private sector whistleblowers. Theoretically, federal agency whistleblowers work for agencies prone to waste due to lack of competition, in contrast to entities in the private sector.<sup>15</sup> Some commentators

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12. See, e.g., Joseph A. Siegel, *Terrorism and Environmental Law: Chemical Facility Site Security vs. Right-to-Know?* 9 WIDENER L. SYMP. J. 339 (2003).

13. Marci Alboher Nusbaum, *Devine Intervention: Marci Alboher Nusbaum on the Savior of Whistleblowers*, LEGAL AFF., Nov/Dec. 2002, at 48.

14. See, e.g., Callahan et al., *supra* note 10, at 888.

15. See Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 356-58 (1991).

suggest that public sector whistleblowers warrant separate treatment because they act as watchdogs on behalf the American taxpayers.<sup>16</sup> In other words, American taxpayers are to federal agencies what shareholders are to corporations. In that sense, public whistleblowers inform Congress and other decision makers of wasteful agency behavior.

The term "whistleblower" has been applied to a wide range of individual employees. The simple use of the term to describe individuals limits the potential effectiveness of whistleblowers by impliedly demanding an analysis of the whistleblower's credibility as opposed to that of the offending agency. The legal definition of whistleblower turns on the substance and form of statutes and the common law, which recognize causes of action and other official channels for action on behalf of whistleblowers.<sup>17</sup> Nevertheless, most of these laws share the presumption that protecting whistleblowers from retaliation will encourage whistleblowing.<sup>18</sup>

Generally, social science research and modern-day examples contradict this premise, and instead show that factors other than fear of retaliation, such as their potential effectiveness in helping their employers get back on track and job satisfaction, influence whistleblowers.<sup>19</sup> For instance, Cynthia Cooper, an employee of communications giant WorldCom, blew the whistle on the company's unlawful accounting practices because "the importance of exposing the company's wrongful activities outweighed her concern for her own . . . future employment at the company."<sup>20</sup> Therefore, a legal scheme that focuses narrowly on preventing retaliation against whistleblowers overlooks those whistleblowers who are more concerned about the impact of their message rather than retaliation.

The underpinnings of the legal safeguards for public-sector whistleblowers are integrally connected to a series of political and historical events that have come to shape the current legal landscape, namely the Watergate scandal, the collapse of the multinationals Enron and WorldCom, and heightened national security concerns. In recent years, whistleblowers within federal agencies have turned away from legal regimes that offer them civil remedies in cases of retaliation and

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16. *Id.*

17. STEPHEN M. KOHN & MICHAEL D. KOHN, *THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS* 96 (1988).

18. Callahan et al., *supra* note 10, at 908 n.202.

19. See generally JOHNSON, *supra* note 3.

20. Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH. L. REV. 1133, 1158 (2003) (citing Amanda Ripley, *The Night Detective*, TIME, Dec. 30, 2002, at 45).

prefer to blow the whistle anonymously to the media,<sup>21</sup> as did Deep Throat.

Deep Throat was one of the first federal employee whistleblowers to gain worldwide notoriety. For almost thirty years, Deep Throat's identity remained secret until the magazine *Vanity Fair* revealed the whistleblower as W. Mark Felt,<sup>22</sup> who was the second- and third-highest ranking official at the Federal Bureau of Investigation when news broke of the Watergate scandal.<sup>23</sup> Indeed, he set the stage for generations of future whistleblowers. According to some players within the Nixon administration at the time of Watergate, Deep Throat's role was crucial to the government investigation because he "was the figure who provided the crucial organizing idea. . . provid[ing] the background against which government officials [including Judge John J. Sirica] . . . formed their opinions and made their decisions."<sup>24</sup>

### A. *The Deep Throat Whistleblowing Profile*

The legend of Deep Throat has profoundly influenced the collective American psyche and continues to set the course of action for federal-agency whistleblowers. The Deep Throat whistleblower profile represents the modern-day whistleblower in several respects. The following brief account of the events leading to the discovery of the Watergate break-in highlights the role of Deep Throat in the affair.

During the two-year-plus *Washington Post* investigation of the break-in of Democratic headquarters at Watergate on June 17, 1972, reporter Bob Woodward often communicated with a deep background source within the Executive Branch who had access to President Nixon's Committee for Re-Election of the President.<sup>25</sup> Woodward relied on the source, called Deep Throat, to confirm information already unearthed and to add context to the complex factual matrix of the investigation.<sup>26</sup>

In speaking to Woodward in a parking garage or occasionally by

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21. PROJECT ON GOVERNMENT OVERSIGHT, et al., *THE ART OF ANONYMOUS ACTIVISM: SERVING THE PUBLIC WHILE SURVIVING PUBLIC SERVICE* 9-17 (2003). For example, in 2001, anonymous employees of the U.S. Fish and Wildlife Service released scientific assessment documents on the Artic National Wildlife Refuge that Interior Secretary Gale Norton had edited substantively in order to downplay the projected effects of drilling the land. *Id.* at 11. See also Deborah Schoch & Kenneth R. Weiss, *Norton Admits 'Mistake,' Refuge: Interior Secretary Says She Mischaracterized Effects of Alaska Oil Drilling on Caribou Reproduction*, L.A. TIMES, Oct. 20, 2001, at A18.

22. John D. O'Connor, *I'm the Guy They Called Deep Throat*, VANITY FAIR, July 2005, at 86.

23. David Von Drehle, *FBI's No. 2 Was 'Deep Throat'*, WASH. POST, June 1, 2005, available at 2005 WLNR 8639585.

24. Leonard Garment, *Frank Wills and Deep Throat*, WASH. POST, Oct. 3, 2000, at A25. Mr. Garment served as counsel to the White House in the Nixon Administration.

25. BERNSTEIN & WOODWARD, *supra* note 2, at 71.

26. *Id.*

phone, Deep Throat verified key pieces of information central to determining the parameters of the scandal. At times, he appeared scared and paranoid and for good reason. He confirmed that the White House directed a vast operation to gather intelligence on the opposition in the electoral process, including possible sabotage and espionage.<sup>27</sup> He provided information that led to the subpoena of the presidential tape recordings at issue in *United States v. Nixon*, such as the fact that some of Nixon's Oval Office recordings had contained "deliberate erasures."<sup>28</sup>

Aside from providing the opportunity for the Supreme Court to recognize executive privilege in *United States v. Nixon*,<sup>29</sup> the Watergate scandal triggered a five-year congressional debate, mainly over separation of powers issues. The debate concluded in 1978 with the enactment of the Ethics in Government Act.<sup>30</sup> Congress was motivated by the possibility that the Executive Branch may manipulate special prosecutors and sought to create an independent special prosecutor (later known as "independent counsel") position insulated from but nevertheless accountable to the Executive Branch.<sup>31</sup> Ultimately, Congress decided on a scheme whereby a panel of three federal circuit judges would appoint a special prosecutor, which the Attorney General was vested with the power to remove for good cause. After congressional reauthorization in 1982, 1987, and 1994, the law withstood a constitutional challenge in *Morrison v. Olson*,<sup>32</sup> and today its Watergate-inspired independent counsel provisions remain intact.

The Deep Throat whistleblower is a federal employee who works within the Executive Branch agencies or independent agencies. This individual has access to, and substantial knowledge of, information that may be sufficient to make a good-faith allegation that her employing

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27. *Id.* at 134-35. Deep Throat's contribution to the Post's reporting of the scandal is substantial in light of all of his alleged interactions with Woodward. Deep Throat informed Woodward that the scandal went beyond CRP high-level officials' funding of the Watergate burglary. *Id.* at 73. Later he confirmed that the CRP's deputy campaign director and CRP's scheduling director had received over fifty thousand dollars from a secret fund that was the source of funding for the break-in. *Id.* at 76-77. He knew that the former CRP treasurer Hugh Sloan had no part in the break-in, but that Sloan possibly had information on who did. *Id.* at 78. Deep Throat urged Woodward to consider that the FBI and grand jury investigations had been limited to only the Watergate break-in and had "ignored other espionage and sabotage." *Id.* at 134. According to Deep Throat, even Nixon's campaign director, John N. Mitchell, participated in the conspiracy. *Id.* at 244. Even an Assistant to the President, Bob Haldeman, possibly had some control over the secret fund that supported the operation. *Id.* at 173.

28. *Id.* at 333.

29. *United States v. Nixon*, 418 U.S. 683 (1974).

30. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C. & 28 U.S.C.).

31. Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 *MERCER L. REV.* 489 (1998).

32. *Morrison v. Olson*, 487 U.S. 654 (1988).



agency has engaged in fraud, waste, abuse, or otherwise illegal behavior. From this individual's perspective, the dissemination of this information to the public takes precedence over any other consideration, including financial rewards for whistleblowing. A Deep Throat-style whistleblower prefers anonymity. To go public would shift the focus of public inquiry from the subject matter of the wrongdoing to the whistleblower herself. This individual may eschew legal protections available to her in favor of releasing the information to the public by communicating confidentially with a trusted media outlet. However, in so doing, the whistleblower may not necessarily enjoy full protection from prosecution, should her identity be discovered. Overall, the Deep Throat whistleblowing profile yields several propositions that increasingly ring true today.

First, whistleblowers with access to sensitive information about the illegal conduct of their superiors can have a radical impact on our legal system when they share that information. Second, the Deep Throat whistleblower is more concerned with informing the public of possibly illegal conduct within the federal government rather than her job stability. Third, the media's role in utilizing information shared by a whistleblower is significant. Fourth, the anonymity preference of Deep Throat whistleblowers derives from the lack of legal tools available to use this information to reform the regulatory process, combined with a fear of harm. For example, individuals who blow the whistle on matters regarding human health and the environment often do so anonymously to the media.<sup>33</sup> However, this form of whistleblowing does not guarantee the validity of the whistleblowers' allegations. Moreover, whistleblowers working within a wide variety of federal agencies are turning away from the labor law model that whistleblowers have traditionally employed to fight reprisal after-the-fact. Finally, the secondary effects of publicly blowing the whistle may result in the creation of law and policy that ultimately achieves a greater balance in favor of governmental accountability.

B. *Whistleblowers Walking the Tightrope: Weighing Environmental Protection, Information Management at Federal Agencies, and National Security Interests*

Even before September 11, 2001, the political process has understandably supported the widespread restriction of the public release of

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33. See, e.g., Shankar Vedantam, *EPA Inspector Finds Mercury Proposal Biased*, WASH. POST, Feb. 4, 2005, at A4. Two staffers at the Environmental Protection Agency blew the whistle to the *Washington Post* about the agency's allegedly politically biased development of pollution limits on the toxic metal mercury. *Id.*

environmental data in order to protect national security.<sup>34</sup> Due to the increased scarcity of information on agency activity, whistleblowers with such information have an even greater potential to effect change. In no other highly regulated area is this more apparent than in matters regarding human health and the environment.

Environmental law and policy lends itself to whistleblower enforcement because of its technical complexity and emphasis on self-reporting.<sup>35</sup> Indeed, Congress has recognized the importance of information-based legal tools as a means to protect the environment by creating programs that mandate the disclosure of environmental information to allow citizens to scrutinize agency actions.<sup>36</sup> For example, the U.S. Environmental Protection Agency ("EPA") employs a "right to know" information disclosure philosophy as a regulatory tool.<sup>37</sup> As the growth of the Internet ushered in the new Information Age, data collection and management increasingly became central to the functioning of federal agencies whose missions include the protection of environmental quality, natural resources, and public health.<sup>38</sup> Moreover, the agencies charged with enforcement authority under federal environmental laws have considerable discretion in making enforcement decisions.<sup>39</sup> In this context, whistleblowers play a great role in the enforcement of environmental law and policy.

Information on compliance and implementation is a commodity to federal regulators, such as EPA, and the public alike, the latter of which "bears most of the cost of an environmental violation."<sup>40</sup> The value of information to federal agencies is evidenced in their decision-making processes. In many complex policy areas, federal agencies develop a

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34. See, e.g., Carl Hulse, *A Reversal on Public Access to Chemical Data*, N.Y. TIMES, Mar. 27, 2001, at A18.

35. Douglas R. Williams, *Loyalty, Independence and Social Responsibility in the Practice of Environmental Law*, 44 ST. LOUIS U. L.J. 1061, 1065 (2000). ("[E]specially because [lawyers] are situated between clients and their environmental consultant auditors, lawyers are likely to possess information about their clients that is difficult and costly for federal regulators to obtain independently. Thus, environmental law practice is particularly suited for gatekeeper and whistleblower enforcement strategies.").

36. John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-to-Know*, 12 KAN. J.L. & PUB. POL'Y 579, 589 (2003).

37. Mark Greenwood, *Governmental Accountability for Information Policy*, *Coalition for Effective Environmental Information White Paper*, in *Hazardous Wastes, Superfund, and Toxic Substances: The Information Revolution* 61, 81 (ALI-ABA Course of Study Oct. 28, 1999), WL SE48 ALI-ABA 61.

38. *Id.*

39. For example, the Supreme Court has held that an administrative agency's refusal to enforce a statutory scheme is committed to agency discretion, and is presumptively not subject to judicial review. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

40. Note, *Lawyers' Responsibilities to the Public: Regulating Lawyers in the Regulatory State*, 107 HARV. L. REV. 1605, 1627 (1994).

policy bias in support of over-represented regulated, and likely well-funded, interests, which is called "agency capture."<sup>41</sup>

In spite of the public's need for environmental information, since 9/11 national security concerns have underscored recent legislative restrictions on information. For example, under the Critical Infrastructure Act of 2002,<sup>42</sup> private entities may trigger an exemption from Freedom of Information Act requirements by voluntarily submitting "critical infrastructure information" ("CII") to certain federal agencies.<sup>43</sup> The statute defines CII broadly without clarifying the definition of critical infrastructure.<sup>44</sup> Consequently, public access to information about chemical manufacturing facilities, the identity of such facilities, and the sharing of that information with other government agencies is precluded. The Critical Infrastructure Act is but one example of the lawmaking trend to limit information in light of national security concerns. Similarly, municipal water systems' vulnerability assessments under the Safe Drinking Water Act, as amended by the Bioterrorism Act, are exempted from public disclosure.<sup>45</sup>

In recent years, the political process has attempted to strike a delicate balance between the two competing policy concerns of national security and environmental protection embodied in federal laws. Arguably, however, these objectives are not mutually exclusive. Rather, these twin concerns provide another reason for federal whistleblower law to move away from a labor law model of protecting whistleblowers from employer retaliation and towards information-based legal protections for whistleblowers. Such protections would allow Congress and the public to take advantage of the sensitive and controversial information that whistleblowers generally provide. Moreover, an information-based legal paradigm would thereby encourage greater governmental accountability on environmental issues, while at the same time provide a filter for information that agencies must keep from the public in the interests of national security. Unfortunately, current legal schemes offering protection to environmental whistleblowers erroneously sacrifice concerns of environmental protection and governmental accountability in the name of national security.

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41. Echeverria & Kaplan, *supra* note 36.

42. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 211-15, 116 Stat. 2135, 2150-55 (codified as 6 U.S.C. §§ 131-34 (2005)).

43. *Id.* § 214(a)(1)(A) (codified at 6 U.S.C. § 133 (2005)).

44. *Id.* § 212 (codified at 6 U.S.C. § 131 (2005)).

45. *Id.*

## II. FEDERAL STATUTES AVAILABLE TO FEDERAL ENVIRONMENTAL WHISTLEBLOWERS: FEDERAL ENVIRONMENTAL LAWS AND THE WHISTLEBLOWER PROTECTION ACT

In the post-New Deal era, public health and the environment emerged as legislative priorities. Since Deep Throat's time, Congress has created legal tools for environmental whistleblowers that rest upon the presumption that protecting whistleblowers from retaliation will encourage whistleblowing. The whistleblower provisions in eight major federal statutes discussed below are a testament to the weight Congress has given to these areas. Prospective whistleblowers who work within a federal agency charged with implementation and enforcement of federal environmental laws and regulations have several legal options.<sup>46</sup> To name a few, under the WPA, environmental whistleblowers may file a disclosure with a relatively unknown prosecutorial agency to compel their employer agencies to perform internal investigations or file a prohibited personnel practice complaint. In addition, they may file a reprisal complaint alleging a violation of the whistleblower provisions of certain federal environmental statutes discussed herein. With the exception of the disclosure option, these labor law protections against employer retaliation fail to truly capitalize on the information in order to increase governmental transparency.

Specifically, the labor law-based protections embodied in these environmental statutes fall short of doing justice to the overarching policy goal of increasing federal government compliance with laws designed to protect the environment. Increasingly, whistleblowers face employer retaliation in spite of the existence of these laws. A comparative analysis of these laws will better illustrate the potential effectiveness of the Whistleblower Protection Act and the No FEAR Act, which employ information-based legal protections to increase government transparency and accountability.

### A. *Whistleblower Protections in Federal Environmental Statutes*

The following eight federal environmental statutes contain similar provisions that provide whistleblowers the right to bring a complaint alleging retaliation for whistleblowing: the Clean Air Act ("CAA"),<sup>47</sup>

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46. Significantly, if the whistleblower is an attorney who represents a federal agency, however, her options are more limited, if not non-existent: she most likely may not blow the whistle without committing a violation of the duties associated with the attorney-client relationship. Jeffrey V. Havercroft, *Whither the Whistleblower: Organization Attorneys and Client Wrongdoing*, 22 J. LEGAL PROF. 279 (1998).

47. 42 U.S.C. § 7622 (2005).

Safe Drinking Water Act ("SDWA"),<sup>48</sup> the Solid Waste Disposal Act ("SWDA"),<sup>49</sup> Water Pollution Control Act or the Clean Water Act ("CWA"),<sup>50</sup> Toxic Substances Control Act ("TSCA"),<sup>51</sup> and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>52</sup> Notably, the WPA does not bar federal employees from bringing a whistleblower claim under the environmental statutes.<sup>53</sup> In addition to these public health-oriented acts, the Energy Reorganization Act ("ERA")<sup>54</sup> and the Occupational Safety and Health Act ("OSHA")<sup>55</sup> also contain whistleblower provisions that provide for more generous protection of whistleblowers than the other statutes. Overall, the legislative intent of the statutes is to protect the public interest by eliminating past retaliation, as well as future retaliation, against employees who engage in protected whistleblowing activity and is achieved by allowing whistleblowers the right to bring a complaint alleging retaliation.<sup>56</sup>

However, the current statutory framework excludes many important environmental issues from whistleblower enforcement.<sup>57</sup> Several major statutes lack whistleblower protection provisions, such as the Endangered Species Act ("ESA"),<sup>58</sup> the Federal Insecticide, Fungicide, Rodenticide Act ("FIFRA"),<sup>59</sup> the Federal Food, Drug, and Cosmetics Act ("FFDCA"),<sup>60</sup> the Food Quality Protection Act of 1996 ("FQPA"),<sup>61</sup> and the National Environmental Policy Act of 1969 ("NEPA").<sup>62</sup> Collectively, these statutes regulate the protection of endangered and threatened wildlife from extinction, the registration of pesticides and setting the allowable amounts of pesticides on foods, and the analysis of environmental impacts of every major federal action that may signifi-

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48. 42 U.S.C. § 300j-9(i) (2005).

49. 42 U.S.C. § 6971 (2005).

50. 33 U.S.C. § 1367 (2005).

51. 15 U.S.C. § 2622 (2005).

52. 42 U.S.C. § 9610 (2005).

53. *Pogue v. United States Dep't of Navy*, No. 87-ERA-21, at 8-9 (DOL Off. Adm. App. May 10, 1990).

54. 42 U.S.C. § 5851 (2005).

55. 29 U.S.C. § 651 (2005).

56. *See, e.g.*, S. REP. NO. 92-414, at 3748 (1977) (recognizing that "[a]ny worker who is called upon to testify or who gives information with respect to an alleged violation of a pollution control law by his employer or who files or institutes any proceeding to enforce a pollution control law against an employer may be subject to discrimination"). Notably, the legislative history specifically excludes frivolous complaints from protection. *Id.* at 3749.

57. Robert R. Kuehn, *Suppression of Environmental Science*, 30 AM. J.L. & MED. 333, 366-67 (2004).

58. 16 U.S.C. §§ 1531-1544 (2005).

59. 7 U.S.C. §§ 136-136y (2005).

60. 21 U.S.C. §§ 301-399 (2005).

61. 7 U.S.C. § 136 (2005).

62. 42 U.S.C. §§ 4321, 4331-4335, 4341-4346b, 4347 (2005).

cantly affect the environment. Often, employees at these agencies who want to enforce the aforementioned protections may not fall within the purview of the eight statutes.<sup>63</sup>

Given that other commentators have summarized them extensively, this Comment does not explore the details of the substantive and procedural issues that comprise the backbone of the complaint process.<sup>64</sup> Generally, the complaint process employs a standard administrative law model with several levels of review at the administrative level and opportunities to appeal. According to most of the statutes, whistleblowers may file complaints with the Department of Labor ("DOL") in which they may claim that their employer agency retaliated against them for engaging in a protected activity by alleging a violation of the environmental statute.<sup>65</sup> Notably, most of these statutes mandate a relatively short statutory filing deadline of thirty days from the date of the violation;<sup>66</sup> an extremely short timeframe and the greatest weakness of the laws.<sup>67</sup> Remedies include reinstatement to the same or equivalent position, compensatory damages, and under two statutes (SDWA and TSCA), punitive damages.<sup>68</sup> If the federal agency whistleblower seeks judicial review from a federal court without having exhausted her administrative remedies, the court may dismiss her claims.<sup>69</sup>

Whistleblowers who successfully proceed under these statutes to file a complaint alleging employer retaliation and whose claims may incite public or congressional outrage often reach a private settlement with the offending agencies or achieve reinstatement to a new position. In other words, these whistleblower statutes seek to return the whistleblower to the *status quo*, which often means that the agency returns to the *status quo* as well.

For example, when the EPA fired toxicologist Dr. William Marcus for publicly criticizing the scientific basis of a report that the agency planned to apply to its regulation of fluoride, Dr. Marcus achieved job reinstatement after bringing a complaint alleging retaliation under the

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63. Telephone Interview with Jeff Ruch, Executive Director, Public Employees for Environmental Responsibility (Oct. 24, 2003).

64. Laura Simoff, *Confusion and Deterrence: The Problems that Arise from a Deficiency in Uniform Laws and Procedures for Environmental "Whistleblowers,"* 8 DICK. J. ENVTL. L. & POL'Y 325 (1999); see also Rutzel, *supra* note 6.

65. Simoff, *supra* note 64, at 332 (citing 29 C.F.R. § 24.1 (1998)).

66. 42 U.S.C. § 7622(b)(2)(A) (CAA); 42 U.S.C. § 300j-9(i)(2)(A) (SDWA); 15 U.S.C. § 2622(b)(1) (TSCA); 42 U.S.C. § 9610(b) (CERCLA).

67. Simoff, *supra* note 64, at 340.

68. Rutzel, *supra* note 6, at 11; see 42 U.S.C. § 7622(b)(2)(B) (CAA); 42 U.S.C. § 300j-9(i)(2)(B)(ii) (SDWA); 33 U.S.C. § 1367(b) (CWA); 15 U.S.C. § 2622(b)(2)(B) (TSCA); 42 U.S.C. § 9610(b), (c) (CERCLA).

69. *Rockefeller v. Abraham*, No. 02-2117, 2003 WL 254879, at \*2 (10th Cir. Feb. 5, 2003).

federal environmental statutes.<sup>70</sup> However, his case had little deterrent effect as evidenced by the fact that he was forced to file another complaint of retaliation alleging that certain EPA managers created a hostile working environment following his reinstatement. Although Dr. Marcus succeeded in obtaining \$100,000 in compensatory damages in his second case,<sup>71</sup> his story illustrates the potential for the inherently adversarial nature of the complaint process and retaliation disputes to obscure the greater issues of concern, namely whether the agency's approach to regulation was so flawed as to constitute a violation of federal environmental law.

The environmental whistleblowing provisions providing a right to bring a retaliation complaint contrast with the WPA in several legally significant respects. As an initial matter, the provisions protect both government and private sector employees, whereas the WPA protects only federal civil servants.<sup>72</sup> Thus, based on their status as government or private sector employees, federal environmental whistleblowers may have a choice of administrative schemes under which to file complaints of retaliation. Second, unlike the WPA, the environmental whistleblowing statutes do not contain disclosure provisions by which a whistleblower could compel an agency investigation.<sup>73</sup>

In addition, although the text of the statutes does not explicitly address internal whistleblowing, federal courts have held that these provisions protect internal as well as external whistleblowing.<sup>74</sup> The internal/external distinction is useful to describe a federal employee's legal options under current law, especially if she is an environmental whistleblower. If the employee shares the information to her supervisors, for example, the employee may be characterized as an "internal whistleblower."<sup>75</sup> Otherwise, if the employee goes outside the offending agency to report the information to another agency, then that employee acts as an "external whistleblower."<sup>76</sup> Although the federal environmental statutes protect both internal and external whistleblowing, the comparable provisions of the WPA currently protect only external

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70. Kuehn, *supra* note 57, at 358-59.

71. *Id.*

72. *See infra* Part II.B.

73. *Cf.* 42 U.S.C. § 7622 (CAA); 42 U.S.C. § 300j-9(i) (SDWA); 42 U.S.C. § 6971 (SWDA); 33 U.S.C. § 1367 (CWA); 15 U.S.C. § 2622 (TSCA); 42 U.S.C. § 9610 (CERCLA).

74. *See* Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d 474, 478 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); Pogue v. U. S. Dep't of the Navy, 87-ERA-21 (Sec'y May 10, 1990) (filing internal complaints is protected activity under CERCLA), *rev'd on other grounds*, Pogue v. U. S. Dep't of Labor, 940 F.2d 1287 (9th Cir. 1991).

75. Rutzel, *supra* note 6, at 12.

76. *Id.*

whistleblowing.<sup>77</sup> Overall, by providing individuals the right to allege employer retaliation, the whistleblower complaint process under the environmental statutes only indirectly results in the enforcement of a limited number of federal laws protecting human health and the environment. Relief is thus sought and provided on a case-by-case, individualized basis. This characteristic of the complaint process does not lend itself to greater public oversight into the regulatory process because deterrent effects, if any, are achieved in a fragmented manner. In contrast to these limitations, the information-based disclosure provisions of the Whistleblower Protection Act and the relatively untapped No FEAR Act create a positive new regime in federal whistleblower law to achieve increased government transparency and accountability.

### B. *Introduction to the Whistleblower Protection Act*

An effective legal apparatus available to most federal environmental whistleblowers is contained within a civil service statute, the Whistleblower Protection Act of 1989 ("WPA").<sup>78</sup> The reader should recognize that this Comment does not serve as an exhaustive review of the entire statute but rather highlights some core provisions of this complex statute for purposes of comparison with the complaint process provided in federal environmental statutes.

By way of introduction, the WPA applies to the public sector and protects federal employees or former federal employees but excludes non-civil service employees of the federal government from its coverage.<sup>79</sup> The WPA's disclosure function does not allow for direct attacks on government misconduct, in contrast to the False Claims Act, which is a statute providing a specific remedy for contractual frauds against the federal government.<sup>80</sup> However, the WPA presents the only opportunity

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77. See *infra* Part II.B.

78. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.). For an exhaustive analysis of the 1994 amendments to the WPA, see Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999).

79. ALAN F. WESTIN ET AL., WHISTLEBLOWING!: LOYALTY AND DISSENT IN THE CORPORATION 52 (Thomas H. Quinn & Michael Hennelly, eds. 1981). Unless otherwise noted, references to "federal employee[s]" in this Comment should be considered to include all individuals over which the OSC's Disclosure Unit has jurisdiction: federal employees, former federal employees, and federal employment, and excluding non-civilian employees. 5 U.S.C. § 1213(a) (2004).

80. Known as an example of a statute aimed directly at governmental misconduct, the False Claims Act ("FCA") authorizes private individuals to bring actions on behalf of the federal government for funds falsely claimed by governmental contractors, with the purpose of preventing governmental fraud. 31 U.S.C. §§ 3729-3733 (2004). Successful private parties stand to recover significant financial awards under the FCA. See generally Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the*



for whistleblowers to force an investigation into potential misconduct. A relatively unknown independent federal agency, the Office of the Special Counsel ("OSC"), investigates and prosecutes whistleblower disclosures and complaints under the WPA. The President appoints the head of this agency, the Special Counsel, subject to Senate confirmation.<sup>81</sup> The President may remove the Special Counsel "for inefficiency, neglect of duty, or malfeasance in office."<sup>82</sup>

The following abbreviated history of the WPA reflects the ways in which the law has evolved to become more protective of whistleblowers. The WPA's predecessor, the Civil Service Reform Act ("CSRA") created mechanisms for federal employees to voice dissent internally to agency supervisors and externally to the OSC, including information concerning government actions that were illegal or at least carried the appearance of impropriety.<sup>83</sup> The CSRA also upheld the discretion of employer agencies to fire agency employees solely based on merit or lack thereof, with an exception for under-performing employees who attempted to avoid termination by engaging in whistle-blowing activity.<sup>84</sup> To a certain extent, the problems that Congress intended CSRA to solve went unabated because the OSC failed its statutory mandate. The OSC dismissed complaints without investigation<sup>85</sup> and only prosecuted one claim during the period of the law's inception until Congress amended the law in 1989.<sup>86</sup> Even if the OSC decided that the disclosure did not warrant an agency investigation, the agency often referred a whistleblower's disclosures to the relevant agency head.<sup>87</sup> These referrals afforded the offending agency a sneak peak at the whistleblower's complaint to "perfect its defenses or destroy evidence before the dissent reached third parties willing and able to seriously address it in good faith."<sup>88</sup> In response to these problems, Congress enacted the Whistleblower Protection Act Amendments of 1994.

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*False Claims Act*, 37 VILL. L. REV. 273 (1992). The FCA is limited, however, in that it applies only to contractual frauds against the government.

81. 5 U.S.C. § 1211 (2000).

82. *Id.* § 1211(b).

83. See DANIEL P. WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 49-50 (1991).

84. *Id.*

85. According to the account of Bertrand Berube, whose former employer, the General Services Administration, fired him after he expressed concerns about health and safety hazards at federal buildings, the OSC summarily dismissed his complaint after making some phone calls. JOHNSON, *supra* note 3, at 101.

86. "After its 1978 creation until passage of the Whistleblower Protection Act of 1989, the Special Counsel conducted only one hearing to restore a whistleblower's job - in 1979." Devine, *supra* note 78, at 534.

87. *Id.* at 531-63.

88. *Id.* at 563.

The WPA framework provides two legal avenues to federal agency whistleblowers, both via the OSC: filing a disclosure or filing a prohibited personnel practices ("PPP") complaint. The latter complaint process under the WPA adopts a labor law model and specifically recognizes twelve prohibited PPPs, including retaliation against whistleblowers. This portion of the statute makes it illegal for federal agencies to retaliate against whistleblowers who disclose information that they reasonably believe evidences any of the following: a violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, if such disclosure is not barred by law or not required to be kept secret in the interests of national defense or the conduct of foreign affairs.<sup>89</sup> Depending on the factual circumstances of each individual case, whistleblowers may have the option of filing both a disclosure and a PPP complaint.

The process of filing a PPP complaint is available to external whistleblowers who are victims of adverse employer actions and seek corrective remedies, such as job reinstatement and/or back pay,<sup>90</sup> and disciplinary actions, such as the removal, suspension, or fining of employers found to have committed PPPs.<sup>91</sup> Other commentators have addressed exhaustively the specific elements of a PPP complaint, the procedure by which complaints are adjudicated, case law interpreting the statute, and related statutory provisions within the WPA.<sup>92</sup> Unlike the environmental statutes, this portion of the WPA does not protect whistleblowing to co-workers in the normal course of job duties.<sup>93</sup> Similar to the federal environmental statutes the information provided by whistleblowers rarely goes beyond closed doors, and more often than not, whistleblowers in the public sector find themselves in a struggle to keep the focus on the agency's credibility instead of their own.

For example, the former Ombudsman of the EPA, Robert Martin, filed a PPP complaint with the OSC after the EPA "forced him to resign" after he drafted a report criticizing the agency's handling of the World Trade Center cleanup.<sup>94</sup> The draft report alleged that the agency misled the public about the health risks posed by the air pollution ema-

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89. 5 U.S.C. § 2302(b)(8) (2000). It should be noted that the OSC has no jurisdiction over any PPP matter with respect to the CIA and other intelligence agencies, the FBI, or the GAO, for example.

90. *Id.* § 1214 (2000).

91. *Id.* § 1215 (2000).

92. See generally Devine, *supra* note 78; Rebecca L. Dobias, *Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?* 13 FED. CIR. B.J. 117 (2003).

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

94. Press Release, Government Accountability Project, Whistleblower Group Calls for

nating from the World Trade Center debris.<sup>95</sup> Mr. Martin's credibility and potential for bias became the subject of media attention. The truth of his allegations remains unknown, however, because Mr. Martin eventually settled the complaint through mediation by the OSC.<sup>96</sup> Thus, although most whistleblower law is grounded in the complaint process, it remains an inefficient and indirect way to inform the public about possible problems within a federal agency's regulatory process and to increase governmental transparency and accountability.<sup>97</sup>

Because other commentators have exhaustively analyzed the WPA's anti-retaliation protections,<sup>98</sup> and because the disclosure referral process employs an information-based approach to whistleblowing, this Comment focuses on the information-based disclosure provisions of the WPA. A prospective whistleblower unconcerned with the possibility of retaliation should consider filing a disclosure with the OSC, which "facilitates disclosures . . . [by] operating an independent and secure channel for disclosure and investigation of wrongdoing in federal agencies."<sup>99</sup> As this process is one of the few avenues by which to trigger an independent review of a federal agency, the disclosure option is a potentially powerful vehicle for government reform (although it is not without its flaws).<sup>100</sup>

### C. *The WPA Disclosure Process: An Information-Based Tool for Whistleblowers in the Federal Public Sector*

A disclosure under the WPA, unlike a traditional retaliation complaint provided by other whistleblower statutes, may result in the unique remedy of compelling an agency-wide investigation into the veracity of the whistleblower's disclosure. In pertinent part, section 1213 of the WPA protects "any disclosure of information by an employee, former employee, or applicant for employment which . . . [the employee] reasonably believes evidences (A) a violation of any law, rule, or regula-

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Congressional Probe of EPA Leadership: GAO Report Exposes False Statements to Court (Nov. 14, 2002) [hereinafter GAP], <http://www.whistleblower.org>.

95. Justin Scheck, *Whitman's Toxic Power Play*, MOTHER JONES, Oct. 27, 2003, available at <http://www.besafenet.com/MotherJonesArticle.htm> (last visited June 20, 2005).

96. GAP, *supra* note 94.

97. Ruch, *supra* note 63.

98. See generally Devine, *supra* note 78; Dobias, *supra* note 92.

99. U.S. OFFICE OF SPECIAL COUNSEL, FINAL REPORT TO THE OFFICE OF MANAGEMENT AND BUDGET ON GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY THE OFFICE OF SPECIAL COUNSEL 1-2 (2002), [http://www.osc.gov/documents/osc\\_d18.pdf](http://www.osc.gov/documents/osc_d18.pdf). Within the OSC, the Disclosure Unit ("DU") "is responsible for reviewing information submitted by federal whistleblowers . . . advising the Special Counsel on the appropriate disposition of the matter . . . analyz[ing] agency reports of investigation to determine whether they . . . meet statutory requirements." *Id.* at 1-5.

100. Ruch, *supra* note 63.

tion, or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>101</sup>

Furthermore, as to the latter four categories of disclosures, the plain language of the statute limits coverage to disclosures “not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”<sup>102</sup> Thus, the statute allows for the safeguarding of sensitive information pertaining to national security. Moreover, section 1213 applies to disclosures made “to the Special Counsel or to the Inspector General of an agency,” but also allows individuals to blow the whistle to a separate agency apart from the offending employer agency.<sup>103</sup> Thus, the statute creates a powerful tool for whistleblowers in the federal public sector by allowing for the safeguarding of sensitive information pertaining to national security, and for individuals to blow the whistle to a separate agency apart from the offending employer agency.

Although the statute reads silent as to the form of the disclosure, the OSC requires disclosures to be made in writing.<sup>104</sup> Under no circumstances may the OSC reveal the identity of anyone who files a disclosure, except with the consent of a whistleblower or in cases where the Special Counsel finds that a particular whistleblower’s identity “is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.”<sup>105</sup> Likewise, disclosures and their supporting documents are not publicly available at any point in the process.<sup>106</sup> On the one hand, these confidentiality protections benefit a

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101. 5 U.S.C. § 1213(a)(1) (2005). According to the OSC, the agency lacks jurisdiction in the event the individual is a government contractor, an FBI agent, a state employee operating under federal grants, or a Post Office employee. This distinction may affect would-be environmental whistleblowers because of the many federal grants to the states to implement numerous environmental programs, such as Safe Drinking Water State Revolving Funds. Safe Drinking Water State Revolving Funds fund improvements to aging drinking water infrastructure, such as old pipes, which are critical to ensuring safe drinking water. Internet users may perform searches of the Grants Information and Control database, accessible via EPA’s website, to retrieve data on States’ receipt of EPA federal grant funds. See U.S. Environmental Protection Agency, Overview, Grant Control and Information System, at <http://www.epa.gov/enviro/html/gics/index.html> (last visited July 31, 2005). A search for all types of EPA federal grant funds allocated to States, for example, returned 4,007 entries. *Id.*

102. 5 U.S.C. § 1213(a)(1)(B) (2005).

103. *Id.* § 1213(a)(2). This section allows for disclosure to the Special Counsel, the Inspector General of an agency, or a designated employee. *Id.*

104. U.S. Office of Special Counsel, Whistleblower Disclosures, Filing a Disclosure, at <http://www.osc.gov/wbdisc.htm> (last updated May 4, 2005).

105. 5 U.S.C. § 1213(h) (2005).

106. E-mail from Mary Monahan, Attorney, U.S. Office of Special Counsel, to Sarah Wood, Law Student, University of Miami School of Law (Feb. 17, 2004) (on file with author).

whistleblower who often may not want to reveal her identity to the OSC, much less to the public at large. On the other hand, the whistleblower feels highly encouraged to disclose her identity to the OSC because as a matter of policy, the OSC “generally does not consider anonymous disclosures,”<sup>107</sup> and will refer the anonymous disclosures to the Inspector General of the corresponding agency. In fiscal year 2002, the OSC referred 125 disclosure allegations to agency Inspectors General,<sup>108</sup> which raises the speculation that a considerable amount of disclosures are filed anonymously. Moreover, a potential benefit to going public with a disclosure is the opportunity to marshal media attention around the agency’s conduct, such as in the Army Corps of Engineers case study discussed herein. Indeed, the media operates as a medium for the communication of the whistleblower’s message to the public, and may be one of the most effective tools to encourage agency reform.

Assuming the whistleblower makes known her identity to the OSC, the evaluation of the veracity of the disclosure occurs next. Specifically, within fifteen days of receiving the disclosure, the OSC must examine the whistleblower’s disclosure on its face to determine whether the disclosure shows a “substantial likelihood” of any of the five behaviors prohibited by statute: violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health and safety.<sup>109</sup> This standard of review is known as the substantial likelihood test. Notably, disclosures often allege multiple instances of agency wrongdoing ranging across the five types of wrongdoing.<sup>110</sup> In addition, under this standard of review, the OSC will evaluate the disclosure to determine whether it relates to the whistleblower’s job duties and responsibilities with the agency.<sup>111</sup> To this end, the OSC will consider whether the disclosure is based on first-hand knowledge, as opposed to mere speculation, and if it contains factual support sufficient to show a substantial likelihood of wrongdoing.<sup>112</sup>

If the disclosure conveyed information sufficient to meet the substantial likelihood test, it would seem that the OSC would make this determination within the stated fifteen-day timeline. In recent years, however, the OSC has been so backlogged that according to a 2003 report, “only one case had been reviewed within the statutory period of 15 working days during [former Special Counsel Elaine Kaplan’s] five

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107. U.S. Office of Special Counsel, Evaluating Disclosures, *supra* note 104.

108. 2002 OSC ANN. REP. 18, at <http://www.osc.gov/documents/reports/ar-2002.pdf>.

109. 5 U.S.C. § 1213(b) (2005).

110. 2002 OSC ANN. REP. 18, <http://www.osc.gov/documents/reports/ar-2002.pdf>.

111. 5 U.S.C. § 1213(c)(2)(B) (2005).

112. U.S. Office of Special Counsel, Whistleblower Disclosures, Evaluating Disclosures, at <http://www.osc.gov/wbdisc.htm> (last updated May 4, 2005).

years in office.”<sup>113</sup> This rate of progress appears to be slow-moving, given that whistleblowers filed 555 disclosures with the OSC during fiscal year 2002,<sup>114</sup> an increase from 380 and 422 from fiscal years 2001 and 2000, respectively,<sup>115</sup> and not including the 245 disclosure cases awaiting review from the previous fiscal year.<sup>116</sup> Moreover, 556 disclosures that the OSC had yet to resolve in fiscal year 2002 were carried into fiscal year 2003, and the agency received an additional 535 new disclosures that fiscal year.<sup>117</sup> To be sure, the causes of delay may stem from a lack of personnel and financial resources, which are common concerns among many federal agencies charged with implementing ambitious statutory schemes. Notably, the Disclosure Unit of the OSC only had eight full-time employees as of July 2003.<sup>118</sup> Nevertheless, at the time of this Comment’s publication, the OSC has yet to release its annual report for fiscal year 2004 – which concluded in October 2004.<sup>119</sup>

Despite the almost certain possibility that the OSC will delay its review of most disclosures beyond the fifteen-day timeline, federal agency whistleblowers nevertheless have great incentive to make disclosures to the OSC. After all, a disclosure that satisfies the substantial likelihood test triggers a unique remedy of a potential agency-wide investigation that begins with a referral process.<sup>120</sup> This standard is difficult to meet, given that out of 842 total disclosures in fiscal year 2002, the OSC referred only nineteen for agencies to investigate and complete a report,<sup>121</sup> and in fiscal year 2003 only eleven out of 1,901 disclosures were referred to agencies.<sup>122</sup>

The referral process begins once the OSC submits the disclosure to the relevant agency head. The agency is then required to investigate the matter and respond to the OSC within sixty days.<sup>123</sup> Often, the agency’s Office of Inspector General performs the investigation.<sup>124</sup> With the enactment of the Inspectors General Act of 1978 and its later amend-

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113. Tania Branigan, *Backlog of Whistleblower Cases Growing, Agency Report Says*, WASH. POST, July 21, 2003, at A4.

114. 2002 OSC ANN. REP. 18, <http://www.osc.gov/documents/reports/ar-2002.pdf>.

115. *Id.*

116. *Id.*

117. 2003 OSC ANN. REP. 13, <http://www.osc.gov/documents/reports/ar-2003.pdf>.

118. *Id.*

119. Cf. U.S. Office of Special Counsel, Whistleblower Disclosures, E-Library, at <http://www.osc.gov/wbdisc.htm> (last updated July 21, 2005).

120. 5 U.S.C. § 1213(c)(1) (2005).

121. 2002 OSC ANN. REP. 18, <http://www.osc.gov/documents/reports/ar-2002.pdf>.

122. 2003 OSC ANN. REP. 13, <http://www.osc.gov/documents/reports/ar-2003.pdf>.

123. 5 U.S.C. § 1213(c)(1) (2005).

124. U.S. Office of Special Counsel, Whistleblower Disclosures, The Referral Process under 5 U.S.C. § 1213(c), <http://www.osc.gov/wbdisc.htm> (last updated May 4, 2005).

ments, Congress created Offices of Inspector General (OIGs) located within, but theoretically independent of, many federal agencies.<sup>125</sup> The OIG offices exercise a wide range of investigative oversight duties and powers pertaining to executive agency operations.<sup>126</sup> Not only do OIGs report to their respective agencies, but they report to Congress as well.<sup>127</sup> As this Comment later explains, however, Inspectors General have no power to remedy the problems that form the subject of the disclosure.

Once the agency completes the investigation, its written report should address how the agency conducted the investigation, whether the agency found any violations, and what the agency plans to do about such violations.<sup>128</sup> OSC then forwards the agency response to the whistleblower for review and comment.<sup>129</sup> If OSC deems the agency response inadequate, the OSC charges the agency with another sixty-day period to respond. On the other hand, if the OSC deems the agency report adequate, then the disclosure process continues into the next phase. Notably, in reviewing reports in fiscal year 2002, the OSC found that in seven of the ten statutory referral cases that the OSC closed that year, the agency had substantiated the whistleblower's disclosure allegations in whole or in part.<sup>130</sup>

Upon accepting the agency's report as meeting the statutory requirements, the OSC then forwards the report to the whistleblower for review and comment.<sup>131</sup> Next, the OSC sends the whistleblower's comments and the agency report to the President and congressional committee with oversight responsibility over the agency<sup>132</sup> and places the whistleblower's comments in a public file located at OSC.<sup>133</sup> Only the agency report and the comments are available to the public and the whistleblower; as previously discussed, the whistleblower's disclosures are not releasable under any circumstances.<sup>134</sup>

In the event that the report contains evidence of criminal violations, however, the OSC forwards the agency report directly to the Attorney General and notifies the Office of Personnel Management and Office of

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125. Inspector General Act of 1978, Pub. L. No. 95-452, § 4(a), 92 Stat. 1101, *reprinted in* 5 U.S.C. app. 3 §§ 1-12 (1978).

126. *Id.* §§ 4-6.

127. *Id.* §§ 4(5), 5(6)(b).

128. 5 U.S.C. § 1213(d).

129. *Id.* § 1213(e)(1).

130. 2002 OSC ANN. REP. 19, <http://www.osc.gov/documents/reports/ar-2002.pdf>.

131. 5 U.S.C. § 1213(e)(1).

132. *Id.* § 1213(e)(3).

133. *Id.* § 1219(a) (2005).

134. E-mail from Mary Monahan, Attorney, U.S. Office of Special Counsel, to Sarah Wood, Law Student, University of Miami School of Law (Feb. 17, 2004) (on file with author).

Management and Budget of the referral.<sup>135</sup> In that case, the OSC may not place the agency report in the public file nor can the whistleblower access the report.<sup>136</sup> Instead, the public will remain entirely ignorant of alleged criminal violations at the agency. Moreover, once the report disappears into the chasm of the Attorney General's office, there is no way to track the status of the case nor compel the DOJ to do anything about it. Thus, the ability of the public to access agency reports and whistleblower's comments depends entirely on whether the report contains evidence of criminal as opposed to only civil violations.

The discussion above assumes that the disclosure conveyed information sufficient to meet the substantial likelihood test. If the OSC decides that disclosure is not meritorious, the statute does not require the OSC, or the agency for that matter, to act further on the disclosure. In fiscal year 2002, the OSC closed 286 disclosures "due to lack of sufficient basis for further action."<sup>137</sup> In the event that any given disclosure fails the substantial likelihood test, OSC has discretion to refer the disclosure to the relevant agency IG if the Special Counsel believes that the disclosure nevertheless warrants the agency's attention.<sup>138</sup> In fact, this is a common way that the OSC closes out its pending disclosures. In fiscal year 2003, the agency processed and closed 401 disclosures, which include those disclosures that the OSC forwarded to agency IGs "for various reasons."<sup>139</sup> Similarly, as discussed above, in most cases the agency's IG offices are charged with conducting investigations into a whistleblower's disclosure.

The above discussion outlined the procedural aspects of the disclosure provision of the WPA without criticism. Although the WPA offers the unique remedy of the possibility of compelling an agency-wide investigation into the veracity of a whistleblower's disclosures, it is not without its flaws. Indeed, a renowned legal expert on the Whistleblower Protection Act argues that the 1994 amendments to the disclosure provisions of the WPA fail to "address the basic conflict of interest inherent in agencies investigating themselves. Until that occurs, whistleblowers are well-advised to continue dissenting outside the civil service system if they want an objective review of their charges."<sup>140</sup> These comments refer to the location of IG offices located within, but theoretically independent of, the agencies themselves. On the one hand, the IG statutory scheme sets up mechanisms to ensure that an agency's IG offices may

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135. 5 U.S.C. § 1213(f).

136. *Id.*

137. 2002 OSC ANN. REP. 18, <http://www.osc.gov/documents/reports/ar-2002.pdf>.

138. 5 U.S.C. § 1213(g)(2).

139. 2003 OSC ANN. REP. 13 n. 27, <http://www.osc.gov/documents/reports/ar-2003.pdf>.

140. Devine, *supra* note 78, at 565.



function independently of agency influence.<sup>141</sup> For example, Congress appropriates funding to EPA's IG office separately from the rest of the agency's funding.<sup>142</sup> On the other hand, IG offices lack both decision-making and enforcement powers, which limits the overall effectiveness of the disclosure process. These limitations create a major shortcoming in that ultimately the IG offices can restrict information flow from within the agency.

Another concern with the disclosure provisions of the WPA arises under the doctrine of separation of powers. A key purpose of the separation of powers doctrine is to prevent the government from selectively enforcing its laws as it sees fit.<sup>143</sup> Under the separation of powers doctrine, whistleblower should be able to trigger a disclosure process by blowing the whistle to either the legislative, executive, or judicial branches.<sup>144</sup> As previously mentioned, the False Claims Act offers may offer some relief to federal employees to blow the whistle to the judicial branch. In addition, the pithy Lloyd-Lafollette Act recognizes the right of employees to freely communicate with Congress.<sup>145</sup> However, on its face the law offers no legal remedies in the event the right is abridged,<sup>146</sup> although Congress annually passes anti-gag appropriations riders that prohibit the use of appropriated funds to interfere with communications protected under the Act.<sup>147</sup>

Otherwise, under the WPA, a whistleblower within the Executive Branch has no choice but to go the OSC (also located within the Executive Branch) in order to invoke the disclosure process. The ultimate decision to proceed on a disclosure regarding a federal agency rests with an official of an independent agency, the Special Counsel, whose job security depends on the President's power to remove the Special Counsel for cause. Specifically, Congress modeled the removal provision in the WPA after that of the Ethics in Government Act to make the Special Counsel removable only for "inefficiency, neglect of duty, or malfeasance in office."<sup>148</sup>

In spite of the separation of powers concerns discussed above, at the time of its enactment, President Clinton seemed to question the Special Counsel removal provision as an unconstitutional interference with

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141. See generally 10 U.S.C. § 3014 (2005).

142. Website, U.S. Environmental Protection Agency, Office of the Inspector General, <http://www.epa.gov/oigearth/>.

143. *Id.* (citing THE FEDERALIST NO. 47 (Rossiter ed. 1961)).

144. WESTMAN, *supra* note 83, at 40.

145. Lloyd-Lafollette Act, 5 U.S.C. § 7211 (1978).

146. *Id.*

147. See, e.g., Transportation, Treasury, and Independent Agencies Appropriations Act, Pub. L. No. 108-199, §§ 618, 620, 118 Stat. 279, 354, 355 (2004).

148. 5 U.S.C. § 1211(b) (2005).

the constitutional vesting of ultimate authority over the Executive branch in the President.<sup>149</sup> Nonetheless, this provision has yet to be challenged in court<sup>150</sup> — another issue on the cusp of future evolutions in federal whistleblower law. Ultimately, due to these separation of powers problems discussed above, the WPA merits description as one of only two legislative attempts since *Morrison v. Olson* to “combine the advantages of unified administration and centralized control with the benefits of independence.”<sup>151</sup>

Another problem with the WPA derives from the practical effects of the disclosure process as they unfold in the real world. For instance, some whistleblower advocates question the OSC’s routine granting of extensions of the sixty-day deadline to respond over the phone, with the agency report following sometimes as late as a year or two after the OSC’s referral. Generally, OSC “provide[s] agencies with at least one extension of varying length. Subsequent extensions will require justification by the agency and will be addressed on a case-by-case basis.”<sup>152</sup> Presumably, if the agency fails to issue a punctual report and has not received an extension, the OSC must send the whistleblower’s allegations directly to the President and appropriate congressional oversight committees along with a statement explaining the agency’s failure to issue a report.<sup>153</sup>

# 1. EMPLOYING AN INFORMATION-BASED TOOL FOR WHISTLEBLOWING: THE UPPER MISSISSIPPI RIVER CASE STUDY

The story of Dr. Donald C. Sweeney II, a former economist with the St. Louis District of the Army Corps of Engineers turned whistleblower, illustrates the benefits and weaknesses of the WPA’s disclosure provisions to capitalize on a whistleblower’s information to increase government transparency and accountability. In February 2000, Dr. Sweeney filed a disclosure with the OSC to call attention to the failure of the Corps to justify economically a billion-dollar navigation project on the Mississippi and Illinois Rivers,<sup>154</sup> known as the Upper

149. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1208 (2000)

150. *Id.* at 1208.

151. Breger & Edles, *supra* note 149, at 1207-08 (internal citations omitted).

152. E-mail from Mary Monahan, Attorney, U.S. Office of Special Counsel, to Sarah Wood, Law Student, University of Miami School of Law (Jan. 14, 2004) (on file with author).

153. 5 U.S.C. § 1213(e)(2), (e)(3), (e)(4) (2005).

154. Letter to Elaine Kaplan, Office of the Special Counsel, from Donald Sweeney, Economist, regarding OSC File No. DI-00-0792 [hereinafter Sweeney Letter] (summarizing the contents of Dr. Sweeney’s Feb. 7, 2000, disclosure to the OSC under the Whistleblower Protection Act), [http://www.peer.org/corps/sweeney\\_comments.html](http://www.peer.org/corps/sweeney_comments.html). See also Ruch, *supra* note 63.

Mississippi River-Illinois Waterway System Navigation Feasibility Study. The Corps completed the final feasibility report in November 2004, and approved a Chief of Engineers Report for submission to Congress.<sup>155</sup> Although ultimately some substantive difficulties with the project remained, Dr. Sweeney's disclosure demonstrated the awesome potential of an information-based whistleblower protection scheme to increase federal agency transparency in a multi-billion dollar project.

Pursuant to the Flood Control Act of 1970,<sup>156</sup> Congress directed the Corps to conduct a study of measures that would expand the navigation capacity of the UMR-IWW system.<sup>157</sup> This system includes approximately 1,200 miles within five states, thirty-seven lock and dam sites, and floodplain habitat necessary for the survival of some of the 485 species dependent on the region.<sup>158</sup> Moreover, at least twenty-two major cities depend on the system for water and it is used as a crucial conduit for commodities such as grain, coal, fertilizers, and petroleum transportation.<sup>159</sup> The study has the unbridled potential to affect key natural resources, national and local economies, and millions of people.<sup>160</sup>

Starting in 1993 and scheduled for seven years with a budget of \$57 million, the study originally focused on reducing barge congestion on the commercial navigation system, most likely through lock expansion.<sup>161</sup> Ultimately, the Corps articulated the underlying goal of the project "to outline an integrated plan to ensure the economic and environmental sustainability of the UMR-IWW Navigation System to ensure it continues to be a nationally treasured ecological resource as well as an efficient national transportation system."<sup>162</sup> The final submission to Congress asked for around eight billion dollars for both the economic and environmental purposes of the project.<sup>163</sup> The project component most relevant to Dr. Sweeney's story is the congressionally mandated cost-benefit analysis.

In 1993, the Corps selected Dr. Sweeney to serve as the lead econo-

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155. Press Release, U.S. Army Corps of Engineers, Chief of Engineers Recommends Ecosystem Restoration and Navigation Improvements for Upper Mississippi River and Illinois Waterway, (Dec. 15, 2004), <http://www2.mvr.usace.army.mil/umr-iwwsns>.

156. Flood Control Act of 1970, Pub. L. No. 91-611, § 216, 84 Stat. 1818.

157. Michael Grunwald, *How Corps Turned Doubt Into a Lock: In Agency Where Answer is 'Grow,' A Questionable Project Finds Support*, WASH. POST, Feb. 13, 2000, at A1.

158. U.S. ARMY CORPS OF ENGINEERS, INTERIM REPORT FOR THE RESTRUCTURED UPPER MISSISSIPPI RIVER-ILLINOIS WATERWAY SYSTEM NAVIGATION FEASIBILITY STUDY 2, 4 (2002).

159. *Id.* at 2, 58.

160. *See generally id.*

161. *Id.* at 21.

162. U.S. ARMY CORPS OF ENGINEERS, FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT for the UMR-IWW SYSTEM NAVIGATION FEASIBILITY STUDY ii (2004).

163. *Id.* at xii-xv.

mist on the UMR-IWW project and assigned him the task of determining the economic feasibility of expanding seven major locks on the system.<sup>164</sup> Over the next five years, Sweeney developed an alternate economic model that did not include overly high estimates of barge traffic on the system.<sup>165</sup> Dr. Sweeney considered such data to be the major flaw of the Corps' original models.<sup>166</sup>

Previously, the Corps had relied on a study predicting an increase in corn, grain, and other commodity shipments – a study completed by Sparks Companies, Inc., a consultant company to the Corps whose other clients include agribusiness firms, farmers, farming organizations, and transportation companies.<sup>167</sup> The data contemplated no correlation between increased barge traffic and shippers' demand for barge use.<sup>168</sup> In other words, the data used in the old models assumed that the shippers' demand for barge use would increase, even if shippers' costs increased due to greater barge traffic.

In contrast, Dr. Sweeney's model accounted for this factor and realized the potential for the Corps to overestimate barge traffic due to reliance on the Sparks study. Dr. Sweeney's model, as applied to the cost-benefit analysis, yielded the conclusion that costly and environmentally destructive lock expansions were unnecessary.<sup>169</sup> Instead, the model supported the use of small-scale alternatives such as scheduling changes, congestion fees, and the use of towboat operators assisting each other in passing through locks ("self-help measures").<sup>170</sup>

Despite reviewers' widespread praise of Dr. Sweeney's work and the study's impending deadline, top Corps officials scrapped his model and created a new economics panel in 1998.<sup>171</sup> In addition, they demoted Dr. Sweeney to the position of advisor to the new panel – a significant demotion, considering his previous responsibility as the lead economist on the project.<sup>172</sup> Instead of pursuing a protection from retaliation under a labor law inspired whistleblower provision, Dr. Sweeney filed a disclosure under the WPA on February 7, 2000,<sup>173</sup> because he wanted to keep the focus on the Corps' conduct, not his own.<sup>174</sup>

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164. Grunwald, *supra* note 157.

165. *Id.*

166. *Id.*

167. Michael Grunwald, *River Blindness: The Army Corps of Engineers' Continuing Campaign to Pour Concrete into the Mississippi*, SLATE, Nov. 10, 2003, at <http://www.slate.com>.

168. *Id.*

169. Grunwald, *supra* note 157.

170. *Id.*

171. *Id.*

172. *Id.*

173. Sweeney Letter, *supra* note 154. See also Ruch, *supra* note 63.

174. Ruch, *supra* note 63.

In his disclosure, Dr. Sweeney alleged that the Corps “had exerted improper influence and manipulated a cost-benefit analysis for purposes of obtaining approval to undertake a navigation improvement project on the Upper Mississippi River and Illinois Waterway.”<sup>175</sup> Attached to the disclosure was an incriminating paper trail: a set of internal emails and memorandums indicating the desire of top brass at the Corps, such as the major general who served as then director of civil works programs, for the economics team to “develop the economic component of the case for a recommendation that includes near-term improvements.”<sup>176</sup>

At its core, the disclosure claimed that Corps leaders encouraged and even participated in direct manipulation of economic analyses in order to achieve a result favoring immediate lock expansion and that barge industry representatives had an improper influence with the senior leaders.<sup>177</sup> For example, the affidavit of Dr. Sweeney noted that the projections of traffic growth used in the original Corps model were grossly higher than real traffic growth on the Upper Mississippi River<sup>178</sup> and made four specific allegations.

First, the commander of the Rock Island District in Illinois ordered Sweeney’s successor on the economics panel to change the N value (an economic term representing demand elasticity) to 1.2 instead of 1.5.<sup>179</sup> The change in the N value had the effect of increasing the calculated benefits of improvements.<sup>180</sup> Second, the Corps changed the parameters of contingency cost analysis and rehabilitation cost savings three weeks after a meeting between industry and Corps officials, although an independent review process had already reviewed and approved the parameters.<sup>181</sup> According to Dr. Sweeney, his economics team found no rehabilitation cost savings or any need for rehabilitation, yet rehabilitation cost savings suddenly accounted for all of the net estimated benefit from expanding locks.<sup>182</sup> Third, after meeting with representatives of navigation interests, the Corps altered the self-help parameter without any analysis.<sup>183</sup> Finally, the disclosure alleged that the agency may have committed a violation of federal law when two generals in particular

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175. Press Release, Statement of Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, Press Conference December 6, 2000, [http://www.osc.gov/documents/press/2000/pr00\\_36.htm](http://www.osc.gov/documents/press/2000/pr00_36.htm).

176. Grunwald, *supra* note 157 (quoting Memorandum from Col. James Mudd, Rock Island District Commander, to the Economics Panel (Oct. 2, 1998)).

177. Sweeney Letter, *supra* note 154.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

authorized millions on Preliminary Engineering and Design projects, despite a requirement under the Water Resources Development Act of 1999 that preliminary engineering funds be spent only after the completion of a final report and upon a showing of justification.<sup>184</sup>

Dr. Sweeney's experience with the disclosure process was atypical in that the OSC moved quickly on his case. The OSC found that Dr. Sweeney had "established a substantial likelihood that Corps officials and employees had violated applicable laws, rules and regulations governing the conduct of such cost-benefit analyses, and that a gross waste of funds would occur as a result of these violations."<sup>185</sup>

The allegations, if true, presented breaches of Army policy and federal law. "The laws, regulations and policies that provide the basic guidance for feasibility studies creates an implicit obligation to conduct studies in an impartial, objective manner . . . Title 33, USC, Section 22-82, requires a feasibility plan to describe, with reasonable certainty, the economic benefits and detriments of the recommended and alternative plans."<sup>186</sup> Other legal standards applicable to the Corps' handling of the analyses included federal regulations that prohibit civil service employees from giving "preferential treatment to any private organization or individual, and endeavor to avoid any actions creating an appearance they violated the law or ethical standards."<sup>187</sup>

Because the OSC found Dr. Sweeney's disclosure to meet the substantial likelihood test and pursuant to her statutory obligation, the Special Counsel referred Dr. Sweeney's disclosure to Secretary Cohen of the Department of Defense ("DOD") on February 24, 2000.<sup>188</sup> The Army's Office of the Inspector General conducted the investigation into Dr. Sweeney's allegations. After receiving four extensions from the OSC,<sup>189</sup> the DOD finally released the Army Inspector General's report in response to the mandatory investigation.

In large part, the Defense Department's report vindicated Dr. Sweeney's whistleblower disclosure. The Army Inspector General's report included five principle findings. First, the Inspector General found that the Corps tweaked the project's economic analyses to reach the Corps' desired outcome of project approval.<sup>190</sup> Second, the Inspector General's

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184. *Id.*

185. *Id.*

186. U.S. ARMY INSPECTOR GENERAL, DEP'T OF ARMY, AGENCY REPORT OF INVESTIGATION: CASE NO. 00-019 9 (2000) (citing 33 U.S.C. § 22.82 (2000)).

187. *Id.* (citing 5 C.F.R. § 2635.101(2000)).

188. Sweeney Letter, *supra* note 154.

189. U.S. Army Corps of Engineers, Restructured Upper Mississippi River -Illinois Waterway Navigation Study, Background Information, at <http://www2.mvr.usace.army.mil/umr-iwwsns> (last visited Nov. 24, 2003).

190. U.S. ARMY INSPECTOR GENERAL, *supra* note 186, at 6.

report determined that two major generals had created a supportive atmosphere conducive to manipulation of the cost-benefit analysis.<sup>191</sup> Third, the Inspector General agreed with Dr. Sweeney that a colonel had purposely tinkered with the N-value (which represented demand elasticity) in order to produce mathematical support for large-scale construction even with the knowledge that Corps economists disagreed.<sup>192</sup> Fourth, the Inspector General concluded that a certain major general within the Corps gave the barge industry an improper influence by allowing them to directly access the economic analysis.<sup>193</sup> The most sweeping finding of all was the Inspector General's discovery that a "Project Growth Initiative" exists within the agency and that Corps divisions are pressured to lobby aggressively for major projects because such projects also fund the Corps staff members who work on the projects.<sup>194</sup>

In light of these findings, the Corps asked to delay the feasibility study for one year so the Corps could re-do its analyses. For example, the Corps sought to input traffic forecasts that better reflected actual traffic patterns on the river in response to the results of an internal review (separate from the Sweeney disclosure and NAS reviews) ordered by a certain major general.<sup>195</sup> Next, the Corps vetted the internal review, including re-examined traffic forecasts, through an independent peer review.<sup>196</sup> The independent peer review found that both the original and revised methodologies in forecasting traffic were inherently flawed and recommended that the project should discard them.<sup>197</sup> Meanwhile, as required by the WPA, Dr. Sweeney received the responsive report of the Army IG for an opportunity to provide comments. In his comments, he concurred in the basic findings of the report and commended the Corps.<sup>198</sup>

Specifically, he found the strongest findings of the report to be the Corps' admissions that its employment of the customer service model involved conflict-of-interest problems.<sup>199</sup> Moreover, Dr. Sweeney offered several suggestions for improvement, such as overhauling completely the project and to put in place procedural mechanisms, like truly independent peer review, so that unauthorized expenditures of appropri-

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191. *Id.* at 5.

192. *Id.* at 11.

193. *Id.* at 10-11.

194. *Id.* at 12-13.

195. Michael Grunwald, *Army Corps Delays Study Over Flawed Forecasts; Review Faults Data for Mississippi River Plans*, WASH. POST, Oct. 5, 2000, at A33.

196. *Id.*

197. *Id.*

198. Sweeney Letter, *supra* note 154.

199. *Id.*

ated funds do not occur.<sup>200</sup> In December 2000, Special Counsel Elaine Kaplan submitted to the President and relevant Congressional committees the comments of Dr. Sweeney, as well as the final report of the Department of Defense concerning the IG's investigation of the allegations.<sup>201</sup> However, the challenge facing the Corps had only just begun.

Almost a year later, the study underwent a major transformation in substance and form, in no small part due to Dr. Sweeney's whistleblowing. In August 2001, the Corps released a new guidance document in which the agency announced a re-structuring of the single-purpose study, with the sole goal of reducing commercial traffic, into a dual-purpose integrated study that emphasizes collaboration and sustainability.<sup>202</sup> In so doing, the Corps adopted an NAS recommendation to take equal consideration of ecological resources of the system, such as the impact of the project on fish and wildlife.<sup>203</sup>

In addition to this re-evaluation by the Corps, other branches of government took notice of the controversy. According to the Corps, the House Appropriations Committee completed its own investigation of the Corps' mismanagement of the project, but the results of that investigation are not available to the public.<sup>204</sup> Despite this investigation, Congress never asked Dr. Sweeney to testify regarding the Corps' mishandling of the project;<sup>205</sup> perhaps legislators saw no need to become involved on the assumption that the disclosure process functioned as Congress intended.

Since the restructuring, the Corps brought together numerous and diverse stakeholders historically at odds with one another in a series of public meetings. The agency has been under enormous pressure from all sides to complete the study by the congressionally mandated deadline while adhering to its duty to comprehensively address all stakeholder interests – no small task given what is at stake. Nevertheless, the Corps continued to carry the restructured feasibility study toward completion, and accompanying that effort was an alleged retooling of the economics component of the project.

The Corps' revised approach to the economics component of the project was based on a range of scenarios without any probabilities

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200. *Id.*

201. *Id.*

202. Memorandum from Robert H. Griffin, Brigadier General, USA, Director of Civil Works, to Commander, Mississippi Valley Division (Aug. 2, 2001), available at [http://www2.mvr.usace.army.mil/UMR-IWWSNS/documents/Guidance%20Memo%20\(Aug%202001\)%20Restructuring.pdf](http://www2.mvr.usace.army.mil/UMR-IWWSNS/documents/Guidance%20Memo%20(Aug%202001)%20Restructuring.pdf)

203. *Id.*

204. U.S. Army Corps of Engineers, Restructured Upper Mississippi River –Illinois Waterway Navigation Study, at <http://www2.mvr.usace.army.mil/umr-iwwsns> (n.d.).

205. Ruch, *supra* note 63.



attached. As before, the consulting company Sparks<sup>206</sup> played a role in devising the framework for analysis.<sup>207</sup> Sparks developed five possible scenarios, called the Central, Most Favorable, Least Favorable, Favorable, and Hypoxia Scenarios; these scenarios applied to demand forecasts for farm products as measured by export movements of corn, soybeans, wheat, and prepared animal feeds.<sup>208</sup> Under the Most Favorable Scenario, barge movements are expected to increase by sixty-two percent on the UMR and by eighty-three percent on the IWW by 2050, the highest percentages of all the proposed scenarios.<sup>209</sup> In fact, only one scenario, the Least Favorable, has a percentage increase that will not reach the historic high of total number of barge movements on the UMR (set in 1990).<sup>210</sup>

According to whistleblower advocates, the scenarios approach removes a difficult decision from the economics team at the Corps and instead leaves the choice of scenario to policymakers who prefer to "Pick a Pork."<sup>211</sup> Dr. Sweeney remains concerned that the Corps put a new spin on its original approach – one that favors navigation improvements regardless of their economic justification to the exclusion of numerous viable and less invasive non-structural alternatives.<sup>212</sup> Moreover, in its latest reviews of the study before and after the final report was completed, the NAS observed that with respect to the scenarios-based approach, four of the five scenarios were "inconsistent with the past 20 years of relatively steady export levels."<sup>213</sup>

In the end, the Corps released its final feasibility report on September 27, 2004, in which the Corps proposed immediate implementation of 1.66 billion dollars' worth of new 1200-foot locks as well as the implementation of small scale/nonstructural measures at a total cost of \$218 million.<sup>214</sup> Moreover, as to ecosystem restoration, the Corps proposed a

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206. Sparks Companies, Inc., at <http://www.sparkscsco.com> (last visited June 20, 2005).

207. Grunwald, *supra* note 167.

208. SPARKS COMPANIES, INC., UPPER MISSISSIPPI RIVER AND ILLINOIS WATERWAY NAVIGATION STUDY: ECONOMIC SCENARIOS AND RESULTING DEMAND FOR BARGE TRANSPORTATION – FINAL REPORT 6, 71, (2002), available at <http://www2.mvr.usace.army.mil/umr-iwwsns/documents/EconScenarioFinal05012002.pdf>.

209. *Id.* at 48.

210. *Id.* at 52.

211. Ruch, *supra* note 63.

212. See Vernon Loeb, *Whistle Blows Again at the Corps: Economist Says Locks Project Still Based on Flawed Model*, WASH. POST, Nov. 15, 2002, at A31.

213. NATIONAL RESEARCH COUNCIL, REVIEW OF THE U.S. ARMY CORPS OF ENGINEERS RESTRUCTURED UPPER MISSISSIPPI RIVER-ILLINOIS WATERWAY FEASIBILITY STUDY 3 (2004), available at <http://www.nap.edu/books/0309091330/html>.

214. U.S. ARMY CORPS OF ENGINEERS, FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT for the UMR-IWW SYSTEM NAVIGATION FEASIBILITY STUDY (2004), available at <http://www2.mvr.usace.army.mil/umr-iwwsns/>.

framework that includes \$1.462 billion in fish passage measures, adaptive management measures such as water level management, island building, and shoreline protection, among other measures.<sup>215</sup> Notably, the final report incorporated the controversial scenarios approach and the two previously used economic models against whose use the NAS strongly cautioned.<sup>216</sup> Nevertheless, according to many stakeholder groups, the Corps failed to remedy the essential problems that Dr. Sweeney identified.<sup>217</sup>

Regardless of the substance of the Corps decision, Dr. Sweeney's disclosure caused increased government transparency and accountability. In this way, Dr. Sweeney's story closely mirrors the Deep Throat whistleblower profile in that both individuals successfully focused the public's attention on the issue at stake rather than on the whistleblower. Here, Dr. Sweeney brought attention to the issue of protecting the Upper Mississippi from needless and environmentally harmful lock expansion. Likewise, Dr. Sweeney's disclosure under WPA had a profound impact on the project in several ways. First, he demonstrated that whistleblowers have the potential to increase federal agency accountability by informing the public of suspect agency activity, with the agency acting as the source of that information. Ultimately, Dr. Sweeney's whistleblowing compelled one of the largest, most complex federal agencies to conduct an internal investigation lauded by all parties for its honesty and which uncovered issues of bias towards navigation interests. As a result, the Corps publicly acknowledged the need to address the agency's potential bias towards navigation interests – a bias that pervades Corps culture. Moreover, the Corps re-directed one of the largest civil works projects in recent history, largely because of Dr. Sweeney's whistleblowing. Overall, his use of the WPA disclosure process to blow the whistle has set a new precedent for future whistleblowers.<sup>218</sup>

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215. *Id.*

216. *Id.*

217. *See, e.g.,* Press Release, American Rivers, Mississippi River Lock Expansion Not Justified, Says National Research Council (Oct. 6, 2004), <http://www.americanrivers.org>.

218. James Browning, a maintenance worker at Liberty Glen Water Treatment plant, a drinking water treatment facility in California operated by the U.S. Army Corps of Engineers, successfully compelled a Corps investigation under the WPA. *See* Press Release, U.S. Office of Special Counsel, U.S. Office of Special Counsel Transmits Report Substantiating Whistleblower's Allegations of Public Health and Safety Danger in Drinking Water at California Campground (July 25, 2002), <http://www.osc.gov/press02.htm>.

In his disclosure to OSC, Mr. Browning alleged that in April 2000, the water treatment plant operator at Liberty Glen allowed the plant to serve water exceeding turbidity limits set forth in state regulations and attempted to cover up the violation on a surface water treatment form by stating that the plant was not operational during the high-turbidity month. *Id.*

When Mr. Browning blew the whistle on the operator's misconduct to the park manager of

### III. THE NO FEAR ACT

A relatively new federal statute is poised to alter the landscape of federal whistleblower law, assuming agencies will fully implement the law. On May 15, 2002, President Bush signed into law the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 ("No FEAR Act").<sup>219</sup> First introduced by Representative James Sensenbrenner (R.-Wis.), the legislation passed unanimously in the Senate and House before reaching the Oval Office for President Bush's signature.<sup>220</sup> Although proponents salute the law as the "first civil rights law of the 21st century,"<sup>221</sup> some civil rights groups call its potential effectiveness into question.<sup>222</sup> The overarching aims of the No FEAR Act are to ensure that "[f]ederal agencies will pay more attention to their EEO and whistleblower complaint activity and act more expeditiously to resolve complaints at the administrative level when it is appropriate to do so."<sup>223</sup> At its core, the law is a hybrid of the systematic approach, as seen in the WPA's opportunity for an agency-wide investigation, with the individualized approach to accountability that comprises the retaliation complaint process.<sup>224</sup> To fully understand the potential scope and impact of No FEAR, however, a review of the previous legal and historical background is in order.

Notably, the No FEAR Act has its origins in the whistleblowing complaint of EPA senior scientist Marsha Coleman-Adebayo.<sup>225</sup> In her capacity as EPA liaison to a Clinton Administration program in South Africa known as the Gore-Mbeki Commission, Coleman-Adebayo reported that toxic waste emissions from a U.S.-based company were affecting South African residents.<sup>226</sup> Upon blowing the whistle, the EPA removed her from her liaison position, stifled her attempts to con-

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the park that received the turbid water, the manager did not take any corrective action. *Id.* OSC found that the manager's actions created a substantial and specific danger to public health and safety, and verified Mr. Browning's other allegations by checking the plant's daily log. *Id.* In its report, the Corps agreed with the OSC's findings and permanently closed the treatment plant, and the operator is no longer treating water. *Id.* The San Francisco District Commander reprimanded the park manager and required him to undergo further training. *Id.*

219. Notification and Federal Employee Antidiscrimination and retaliation Act of 2002, Pub. L. No. 107-174, § 104, 116 Stat. 566 [hereinafter No Fear Act].

220. H.R. REP. NO. 107-807, at 52-53 (2003).

221. Marsha Coleman-Adebayo, *Toward a Fair Federal Workplace*, N.Y. TIMES, May 27, 2002, at A13.

222. See, e.g., Darryl Fears, *Report is Bleak for Whistleblowers*, WASH. POST, Mar. 11, 2004, at A25.

223. S. REP. NO. 107-143, at 2 (2002).

224. Ruch, *supra* note 63.

225. Coleman-Adebayo, *supra* note 221.

226. *Id.*

duct an investigation, and denied her a promotion.<sup>227</sup> Moreover, certain employees at the EPA allegedly victimized her with verbal abuse and harassment.<sup>228</sup> As a result, Coleman-Adebayo sued her employer agency. The case went to trial, and in August 2000, a jury awarded her \$600,000 in damages.<sup>229</sup>

Yet, as per existing law, apparently not a dime of the jury award came out of the EPA's budget. Rather, EPA could expect a general account managed by the Treasury Department, called the Judgment Fund, to pay plaintiffs their monetary awards.<sup>230</sup> Pursuant to its constitutional powers,<sup>231</sup> in 1956 Congress created the Judgment Fund as a mechanism for the federal government to pay legal judgments for which there were no means to pay them.<sup>232</sup>

Before the enactment of No FEAR, offending agencies were encouraged to pursue discrimination and whistleblower complaints into court because should such complaints be resolved by judgment or settled once they reach court, the agencies could rely entirely on the Judgment Fund<sup>233</sup> to cover the expenses of any monetary relief.<sup>234</sup> Whereas for the complaints resolved at the administrative level, offending agencies have been and continue to be fiscally responsible for any monetary relief that emerges. As to those complaints that reached court, however, in fiscal year 2000 the Judgment Fund paid for approximately forty-three million dollars worth of costs resulting from the resolution of whistleblower cases.<sup>235</sup> As a result, agencies such as the EPA, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Agriculture<sup>236</sup> avoided any of the intended effects of monetary judgments in lawsuits, namely punishment for and deterrence from discrimination against agency employees. Conversely, some federal employees who prevailed on their discrimination and whistleblower cases could not collect outstanding judgments accorded to them by the

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227. *Id.*

228. *Id.*

229. *Id.*

230. H.R. REP. NO. 107-807, at 52 (2003) (noting that the EPA testified that the general treasury pays for judgments and settlements in both discrimination and retaliation cases).

231. U.S. CONST. art. I, § 9, cl. 7.

232. Jeffrey Axelrad, *What is the Judgment Fund?* 1 ASS'N TRIAL LAW. AM. ANN. CONVENTION OF REFERENCE MATERIALS 435 (2004), WL 1 Ann.2004 ATLA-CLE 435. For a comprehensive understanding of the administration of payments from the Judgment Fund, see generally 28 U.S.C. §§ 2414, 2517, 2672, 2677 (2000).

233. 31 U.S.C. § 1304 (2000).

234. S. REP. NO. 107-143, at 2 (2002).

235. *Id.* at 3.

236. No FEAR Act § 101(5).

judicial process.<sup>237</sup> In order to pass No Fear, Congress seized upon these failures of this system, as well as on the efforts of a grass-roots coalition effort that drafted and lobbied for the law.

To deal with these issues, the No FEAR Act purports to usher in a new legal regime in order to increase agency accountability at the management level. The statute does not create any new substantive rights. Rather, Title II of No FEAR imposes several new procedural requirements upon federal agencies: the reimbursement requirement, the notification requirement, and the reporting requirement.<sup>238</sup> The Office of Personnel Management ("OPM") is charged with implementing Title II.<sup>239</sup> In addition, Title III of No FEAR creates a new scheme for the Equal Employment Opportunity Commission ("EEOC") and federal agencies to publicly disseminate data on EEOC complaints.<sup>240</sup>

The statute became effective on October 1, 2003.<sup>241</sup> A year and a half after the statute's enactment, OPM breathed life into No FEAR by finally issuing the first implementing regulation under the statute. On January 22, 2004, OPM promulgated the interim final rule for the reimbursement requirement, the first of three regulations that OPM must issue under No FEAR.<sup>242</sup> The January 2004 OPM regulation establishes the procedures through which federal agencies must reimburse the Treasury Department for judgments and settlements against the agencies for discrimination.<sup>243</sup> Shortly thereafter, EEOC followed suit by issuing an interim final rule pursuant to Title III.<sup>244</sup> In light of the implementing regulations, each of No FEAR's major provisions, as they currently stand, shall be examined in turn.

First and most important, No FEAR requires federal agencies to use

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237. See, e.g., *The Travis Smiley Show: Interview with Rep. Sheila Jackson-Lee and Matthew Fogg* (NPR radio broadcast, Mar. 11, 2004), available at 2004 WL 56756809.

238. No FEAR Act §§ 201-03.

239. Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 69 Fed. Reg. 2,997, 2,997 (Jan. 22, 2004) (codified at 5 C.F.R. pt. 724) (setting for the Office of Personnel Management interim final rule with request for comments).

240. No FEAR Act §§ 301-03.

241. No FEAR Act § 104.

242. See generally Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 69 Fed. Reg. at 2,997; Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 C.F.R. § 724 (2005).

243. The reader is cautioned that OPM may modify the interim final rule after it finishes reviewing comments received during the comment period, which was extended to April 26, 2004. Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 69 Fed. Reg. 16,769 (Mar. 31, 2004) (to be codified at 5 C.F.R. pt. 724) (extending the comment period on the final interim rule).

244. Posting Requirements in Federal Sector Equal Employment Opportunity, 69 Fed. Reg. 3,483 (Jan. 26, 2004) (to be codified at 29 C.F.R. pt. 1614).

their own budgets to reimburse the Judgment Fund in the event that whistleblowers win or successfully settle their discrimination and retaliation cases against the agencies.<sup>245</sup> Conversely, the statute leaves intact a significant remnant of the pre-No FEAR regime, namely that the Judgment Fund makes direct payments to employee whistleblowers.<sup>246</sup> Known as the "central accountability provision" of the statute,<sup>247</sup> the primary objective of the reimbursement requirement is to increase federal agencies' compliance with anti-discrimination and whistleblower laws.<sup>248</sup> Specifically, federal agencies must reimburse the Judgment Fund for settlements and judgments in cases covered under the act pursuant to the procedures proscribed by the Financial Management Service ("FMS") of the Department of Treasury, which is the administrator of the Fund.<sup>249</sup>

Generally, the scope of the reimbursement requirement calls for federal agencies to reimburse the Judgment Fund for payments made after October 1, 2003, in connection with federal discrimination and whistleblower protection laws. For example, No FEAR covers payments from the Judgment Fund in connection with the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Rehabilitation Act of 1973, or any law, rule, or regulation that prohibits discrimination on the basis of marital status or political affiliation.<sup>250</sup> Whistleblower retaliation cases subject to federal agency reimbursement are those delineated by the WPA, such as the exercise of any appeal, complaint, or grievance, the assistance of someone else in the exercise of those rights, disclosing the information to the agency's Inspector General or the OSC, or the plaintiff's refusal to violate a law at the agency manager's request.<sup>251</sup>

However, the statute remains silent as to the timeframe in which agencies must reimburse the Judgment Fund.<sup>252</sup> Nevertheless, the legislative history of No FEAR implies a congressional intent to strike a balance between a recalcitrant agency that retaliates against whistleblowers on one hand and the stark realities of the appropriations process on the other hand. Agencies are expected to reimburse the general treasury within a *reasonable time*, but a smaller agency may need to spread out

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245. No FEAR Act § 201(a)-(c); 5 C.F.R. § 724.103.

246. 69 Fed. Reg. 2,997.

247. S. REP. NO. 107-143, at 3 (2002).

248. No FEAR Act § 101(8).

249. 5 C.F.R. § 724.104(a).

250. No FEAR Act § 201(c)(1) (incorporating by reference the discriminatory conduct prohibited by the Whistleblower Protection Act, as described at 5 U.S.C. § 2302(b)(1)).

251. *Id.* § 201(c)(2) (incorporating by reference retaliatory conduct prohibited by the Whistleblower Protection Act, as described at 5 U.S.C. § 2302(b)(9)(A)-(D)).

252. No FEAR Act § 201(b).

the reimbursement *over a number of years* if the amount is large compared to an agency's annual appropriation.<sup>253</sup> Thus, Congress recognized that an agency might be hard-pressed to pay for a sizable judgment out of its own budget without its mission or workforce experiencing adverse impacts. Sizable judgments may particularly affect smaller agencies with naturally smaller budgets.<sup>254</sup> Smaller or less politically popular agency programs may lose funding or will be eliminated altogether as agencies lose major discrimination suits. With these concerns in the background, ultimately No FEAR leaves the interpretation of "reasonable time" to the agencies charged with implementation of the law.

Accordingly, OPM has interpreted the statute to permit agencies to reimburse the Judgment Fund within forty-five business days of receiving notice from FMS, the administrator of the Fund.<sup>255</sup> This timeframe does not operate as a strict deadline, however. If the federal agencies cannot or do not want to reimburse the fund within forty-five business days, the Interim Final Rule gives agencies the option of "contact[ing] FMS to make arrangements in writing for reimbursement."<sup>256</sup> Such vague terms leave open the almost-certain possibility that the scheme will incur substantial delays by agencies in making reimbursement requirements. In fact, the reimbursement process may extend over several years, in light of legislative history to that effect.<sup>257</sup> Recalcitrant agencies face just one sanction for non-compliance, which is that on its official website, the Treasury Department will post the agencies' failure to pay.<sup>258</sup>

Although agencies might delay reimbursement beyond the forty-five day deadline, No FEAR specifically prohibits agencies from dipping into funds earmarked for the enforcement "of *any* Federal law."<sup>259</sup> In addition, legislative history strongly cautions agencies from reducing its workforce or taking away benefits to which employees are entitled by contract.<sup>260</sup> For lack of language to the contrary, the statute permits

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253. S. REP. NO. 107-143, at 7 (2002) (emphasis added).

254. Stephen Barr, *Law Now Requires Agencies to Pay Up for Bias, Whistle-Blower Cases*, WASH. POST, Oct. 1, 2003, at B2.

255. Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 C.F.R. § 724.104(b) (2005).

256. *Id.*

257. S. REP. NO. 107-143, at 4 (2002).

258. GEN. ACCT. OFF., *Judgment Fund: Treasury's Estimates of Claim Payment Processing Costs under the No FEAR Act Contract Disputes Act*, GEN. ACCT. OFF. REPS. & TESTIMONY, May 1, 2004 [hereinafter *Treasury's Estimates*], available at 2004 WLNR 6600785; see also 5 C.F.R. § 724.105.

259. No FEAR Act § 201(b) (emphasis added).

260. S. REP. NO. 107-143, at 4 (2002).

agencies to pay for reimbursement with funds allocated for payroll and expenses. The costs of the Department of Justice's defense of the agencies in court are excluded from reimbursement payments.<sup>261</sup> In the end, however, "[a]ll reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency," as OPM regulations make clear.<sup>262</sup>

No later than eighteen months after the law's enactment, the statute required the General Accounting Office ("GAO") to conduct and complete a study of the effect of the reimbursement requirement on federal agency operations.<sup>263</sup> If agency compliance with similar requirements mandated by other laws serves to predict No FEAR's success, then Congress should anticipate low reimbursement rates across the board. As with No FEAR, the Contract Disputes Act of 1978 requires federal agencies to reimburse the Judgment Fund for payments made in connection with contract disputes.<sup>264</sup> Additionally, the statute does not oblige agencies to make reimbursement payments within any specific timeframe.<sup>265</sup> According to GAO, "[d]uring fiscal years 2001, 2002, and 2003, federal agencies reimbursed Treasury for fewer than one of every five dollars owed under CDA, with at least 18 agencies having unpaid amounts at the end of each fiscal year."<sup>266</sup> Similarly, the Treasury Department's clear lack of authority to enforce the reimbursement requirement will limit the potential effectiveness of No FEAR.

Pursuant to the second major provision of No FEAR that intends to increase agency accountability, agencies must educate their employees of their rights under anti-discrimination and whistleblower laws, such as the Whistleblower Protection Act.<sup>267</sup> Otherwise, "employees [might] shy away from reporting problems because they have insufficient understanding of their rights."<sup>268</sup> To address this concern, No FEAR specifically requires federal agencies to inform their employees, in writing and on the Internet, of whistleblower protection and anti-discrimination laws that may be available to them.<sup>269</sup> Congress clarified that notification to former employees is satisfied by Internet postings.<sup>270</sup> Pursuant to the

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261. GEN. ACCT. OFF., *No Fear Act: Methods the Justice Department Says It Could Use to Account for Its Per-Case Costs Under the Act* GEN. ACCT. OFF. REPS. & TESTIMONY Aug. 1, 2004, available at 2004 WLNR 6630816.

262. 5 C.F.R. § 724.104(a).

263. No FEAR Act § 206(c).

264. *Treasury's Estimates*, *supra* note 258.

265. *Id.*

266. *Id.*

267. No FEAR Act § 101(6).

268. S. REP. NO. 107-143, at 8.

269. No FEAR Act § 202(a)-(b).

270. S. REP. NO. 107-143, at 8.



same provision, federal agencies must also offer rights training to their employees.<sup>271</sup> On-line trainings are preferred because they would provide agencies “with the ability to monitor who is and is not participating in the training” and because on-line trainings are more affordable.<sup>272</sup> Moreover, management serves equally as a focus of the notification requirement, as “workforce relations should improve if managers are more aware of their responsibilities and employees of their rights.”<sup>273</sup>

To expand legislative oversight of federal agencies, the third major provision of No FEAR demands that agencies to report annually to Congress, the EEOC, and the Attorney General on the quantity and substance of their whistleblower retaliation and discrimination cases.<sup>274</sup> Specifically, “not later than 180 days after the end of each fiscal year,” each agency must submit an annual report that includes the following information: the number, status, and disposition of cases arising under the discrimination and whistleblower laws; the amount of money that the agency must reimburse the Judgment Fund, if any; the number of employees disciplined for retaliation, discrimination, and/or harassment, final year-end compliance data; a detailed description of the agency’s policy relating to the discipline of federal employees who illegally discriminate against others and the number of employees disciplined under that policy; detailed causal and trend analyses of the aforementioned information; and any adjustments the agency had to make in its budget because of No FEAR Act reimbursements.<sup>275</sup> The first report from each agency must include data for each factor for each of the five preceding fiscal years, to the extent that such data is available.<sup>276</sup>

In addition, No FEAR requires employing federal agencies to post on their websites over eleven pieces of summary EEOC complaint data, including but not limited to: the number of EEO discrimination complaints filed annually, the number of individuals filing those complaints, the average length of time for an agency to process complaints, the number and percentage of complaints for which the final agency action involved a finding of discrimination for both bases and issues of alleged discrimination, and the number and percentage of administrative decisions rendered with and without an EEOC hearing.<sup>277</sup> Many agencies

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271. No FEAR Act § 202(c).

272. S. REP. NO. 107-143, at 15.

273. *Id.* at 8.

274. No FEAR Act § 203(a).

275. *Id.* § 203(a)(1)-(8).

276. *Id.* § 203(b).

277. *Id.* § 301(a)-(b). Under EEOC regulations, an agency must post its statistical data on the agency’s website in both PDF and text formats. Federal Sector Equal Employment Opportunity Procedures Under the Notification and Federal Employee Antidiscrimination and Retaliation Act (No Fear Act) of 2002, 29 C.F.R. § 1614.703(a) (2005).

have disclosed their EEOC complaint data on their websites;<sup>278</sup> other agencies have yet to do so.<sup>279</sup> The final major provision of No FEAR directs the EEOC to provide corresponding data on administrative hearings and appeals from final agency actions,<sup>280</sup> in addition to that which it must provide as an employing federal agency.<sup>281</sup>

At least initially, No FEAR probably will not improve federal agencies' treatment of whistleblower retaliation and discrimination complaints. Instead of being the main strength of the statute, the reimbursement requirement is rather its greatest weakness for lack of any deadline for reimbursement and because there are no penalties for agencies' failure to reimburse. Although far-reaching in its scope, No FEAR remains another example of why whistleblowers should not rely solely on the labor law model of whistleblower protection. Ultimately, the most likely consequence of the law will be that federal agencies will settle greater numbers of discrimination and whistleblower complaints at or before the administrative level, outcomes for which offending agencies were already fiscally responsible even before the enactment of No FEAR. Nevertheless, on its face, the law is innovative in that it provides an overarching accounting tool on retaliation complaints against many agencies.

#### IV. A NEW PARADIGM FOR FEDERAL WHISTLEBLOWER LAW

Traditional whistleblower protection laws respond to the concerns that bona fide whistleblowers must be protected from retaliation by their employer agencies. Along these lines, many commentators argue for additional legal protections by expanding what activities are protected under the federal environmental statutes or the prohibited personnel practices complaint process under the WPA.<sup>282</sup> Commentators note the need for a broad change in negative public opinion toward whistleblowers.<sup>283</sup> Within this analysis, however, the whistleblower

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278. See, e.g., Department of Agriculture, <http://www.usda.gov/nofear/> (last visited June 20, 2005) (including twenty-one postings for USDA agencies); Department of Veterans Affairs, <http://www.va.gov/orm/NOFEAR-Select.asp> (last visited June 20, 2005); EEOC, <http://www.eeoc.gov/stats/nofear/index.html> (last modified Oct. 29, 2004); General Services Administration, <http://www.gsa.gov> (last reviewed June 20, 2005); Environmental Protection Agency, <http://www.epa.gov/civilrights/nofearact.htm> (last updated June 21, 2005); Marine Mammal Commission, <http://www.mmc.gov/reports/administrative/welcome.html> (last revised May 18, 2005); U.S. Postal Service, [http://www.usps.com/nofearact/\\_htm/nofear.htm](http://www.usps.com/nofearact/_htm/nofear.htm) (last updated Apr. 29, 2005).

279. Selective Service System, <http://www.sss.gov/nofear.html> (last updated Aug. 11, 2004).

280. No FEAR Act § 302(a)-(b).

281. *Id.* § 302(c).

282. See, e.g., Jones, *supra* note 20.

283. *Id.* at 1155 (arguing that "a change in society's opinion about whistleblowers is needed to help erase the stigma attached to whistle-blowing").

remains the foremost policy concern, as opposed to governmental transparency and accountability.

Experience shows that negative attitudes toward whistleblowers have and will remain intact notwithstanding some policymakers' commendable efforts to increase public support for whistleblowers through the creation of broader legal protections against retaliation. Nevertheless, agency employees continue to blow the whistle on agencies such as USACE at the great risk of becoming the victim of retaliation or discrimination. Consequently, shielding whistleblowers from retaliation is a necessary but insufficient component of any legal model of whistleblower protection. Policymakers' reliance on the retaliation model does not maximize a whistleblower's potential to increase governmental accountability because it relies in part on a hoped-for widespread change in public opinion, which is an amorphous and frankly unrealistic expectation.

In contrast, this Comment suggests that policymakers should develop legal tools, by following the example of the WPA's disclosure provisions, to take advantage of the information that whistleblowers offer to promote government transparency and accountability. This should be a policy goal equal to the protection of the whistleblower's job. A legal paradigm centered on information disclosure will maximize benefits to the public because the law's reference point will gauge the quality of the whistleblower's information and not their credibility.<sup>284</sup>

For example, where the law's reference point is information sharing, as in the disclosure process under the WPA, whistleblowers such as Don Sweeney have achieved more success through information-based disclosure provisions than those relying on the reprisal complaint process. The WPA disclosure mechanism, through the OSC, acts as an information filter and permits only substantiated allegations to cause the offending agency to come under public scrutiny and the watchful eye of Congress. The disclosure mechanism attempts to strike a balance between information dissemination and the withholding information sensitive to national security interests. However, even the WPA disclosure process is not without its flaws. Most significantly, the OSC has fallen behind on managing its heavy workload.

Given the success of Dr. Sweeney to use the information-based disclosure provisions of the WPA to achieve greater government transparency and accountability, a new legal approach to the evaluation of federal whistleblower law would fully support the notion of freedom of information as a means of promoting governmental accountability. At its core, the new paradigm incorporates the key aspects of the Deep

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284. Vaughn et al., *supra* note 11, at 864.

Throat whistleblowing profile: promoting the objective of long-term change via greater governmental accountability, using the media as a tool for information disclosure, and keeping the focus on the quality of the whistleblower's information rather than the quality of the whistleblower as a person. As exemplified by Deep Throat, the option of anonymous whistleblowing offers greater oversight into the regulatory process by keeping the focus on the information rather than the individual's identity.<sup>285</sup> Just as with a WPA disclosure, the new paradigm recognizes information as a necessary commodity to regulatory agencies, especially given that wrongdoing such as waste and fraud is becoming harder to detect in the age of the information evolution.<sup>286</sup>

In the future, several criteria may be used to measure proposed reforms to whistleblower laws in order that whistleblowers' legal tools promote information sharing. For example, in an argument for incorporating a private justice model into public regulation, one commentator articulates four components that should be included in a whistleblower's compensation package, namely open lines of communication between the whistleblower and the regulatory system, public access to the whistleblower's information, supportive cultural values, and a significant financial reward.<sup>287</sup>

The new whistleblowing paradigm offered here adopts the first three criteria of the private justice model. As to financial rewards, however, not all commentators agree that financial incentives are effective as a remedy for blowing the whistle. On the one hand, monetary rewards designed to stimulate whistleblowing may be criticized for increasing the possibility of frivolous retaliation claims, as employees who would not otherwise complain of retaliation may decide to do so in order to reap financial gains. This criticism does not apply to the disclosure option. On the other hand, the reimbursement requirement of the No FEAR Act seems to reinforce the notion of financially rewarding whistleblowers.

Finally, whistleblower empowerment should include legislative oversight in order to speak to separation of powers concerns that bubble under the surface of these issues. A lack of transparency in the regulatory process controverts the will of the people as represented in the Legislative Branch. For example, when certain individuals within the USACE manipulated its economic data to ensure greater spending on navigation projects, Congress' spending power was arguably affected.

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285. Rutzel, *supra* note 6, at 37.

286. See, e.g., Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 977 (2002).

287. *Id.* at 978-79.

Although the Special Counsel is removable by the Executive Branch, the Special Counsel heads the very agency charged by Congress to represent the interests of Executive Branch employees against their employer agencies. To some degree, No FEAR speaks to these issues. The No FEAR Act calls for increased legislative oversight in that federal agencies must submit annual reports to Congress on the number of cases in which they are alleged to have violated whistleblower statutes, including the WPA and the federal environmental statutes. In addition, Congress should amend the Lafollette Act to codify the annual restriction on using appropriations to interfere with whistleblowers' rights, and to include explicit remedies for breach of a whistleblower's right to communicate with Congress.

## V. CONCLUSION

Drawing upon the example of Deep Throat, a new paradigm in the application of federal whistleblower law is emerging, with environmental whistleblowers in the public sector leading the way. The disclosure process of the WPA and the No FEAR Act present golden opportunities for whistleblowers to bring greater transparency to the regulatory process while recognizing information as a valued commodity in today's political and legal discourse. As the case study of whistleblower Don Sweeney demonstrates, the WPA's disclosure option has stood out as an information-based, albeit flawed, legal mechanism available to would-be whistleblowers who are poised to violations of the law that occur in federal regulation of the environment or in any other highly regulated policy area for that matter. Moreover, but for its lack of implementation, the No FEAR Act may increase legislative oversight of the regulatory process, as well as hold federal agencies financially accountable for meritorious whistleblower claims. Both the disclosure provisions of the WPA and No FEAR exemplify certain elements of the new paradigm; both sets of laws are plagued either by agencies that lack the necessary resources to enforce the laws, in the case of WPA disclosures, or vague statutory language that makes enforcement difficult, as with No FEAR. From within this new paradigm, the legacy of Deep Throat will come full circle as the dissemination of knowledge increasingly becomes a paramount goal of federal whistleblower protection law.

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