Courage Without Martyrdom

The Whistleblower's Survival Guide

Government Accountability Project

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Introduction

Every year, thousands of Americans witness wrongdoing on the job. What they witness may jeopardize the health, safety or lives of others. They may see managers at a nuclear facility violate a safety code, a chemical company dump hazardous waste unlawfully, or a food processing plant attempt to sell contaminated and dangerous meat to consumers.

Most employees remain silent. They conclude that it is not their concern. Or that nothing they can do would stop the problem. Or that they can't afford to cause problems on the job.

Others choose to bear witness and speak out. They seek to make a difference by "blowing the whistle" on unethical conduct in the workplace. Under the Whistleblower Protection Act, whistleblowing is defined as disclosing information that an employee reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of power, or substantial and specific danger to public health or safety.

Whistleblowers' actions may save lives or billions of dollars. But rather than receive praise for their integrity, they are often targeted for retaliatory investigations, harassment, intimidation, demotion, or dismissal and blacklisting. Pentagon whistleblower

Ernie Fitzgerald describes whistleblowing as "committing the truth," because employers often react as if speaking the truth about wrongdoing were committing a crime.

The Government Accountability Project (GAP) was created to help these employees, who, through their individual acts of conscience, serve the public interest. Since 1977, we have provided legal and advocacy assistance to thousands of employees who have blown the whistle on lawlessness and threats to public health, safety and the environment. This experience has given GAP attorneys and organizers valuable insights into the process and hazards of whistleblowing.

This handbook is designed to share these insights with others. We hope that a broad audience will find its contents useful—that it will help concerned citizens, policymakers, and public interest groups understand the difficulties and social importance of whistleblowing. There are lessons for all of us in the experiences of whistleblowers, about the powerful disincentives that have been built into our institutions of government and business against coming forward to speak the truth about wrongdoing. But above all, this handbook was written with one set of readers in mind—employees of conscience in government or the private sector who want to make a difference.

This handbook offers ideas on how best to blow the whistle and maximize the chances of success and survival, despite inadequate and often unjust laws and procedures. Ultimately, the system must be changed if whistleblowers are to be protected and honored for their indispensable role in preserving openness and accountability in government and industry. Until then, employees must understand the realities of the current system, so that they can make clear-eyed decisions about whether and how to turn information into power by blowing the whistle on misconduct in government or industry.

CHAPTER ONE

Deciding to Blow the Whistle

The decision to blow the whistle may be among the most significant choices you will make in defining your professional identity and career future. We want to help you make this decision—and to act on it—in the most informed way possible.

We will expose you to the many pitfalls of whistleblowing. We will explain your rights under the law, outlining both the protections provided for federal government workers under the Whistleblower Protection Act and other statutes, and the patchwork of legal protections that exist for private-sector employees. We will explore the challenges you will face in trying to secure these rights. We will also describe what we have learned about the patterns of bureaucratic response to employees who step forward to speak the truth about institutional misconduct.

If you decide to blow the whistle, even after learning about the risks, we want you to do it in a smart and strategic manner, one that will serve your own as well as the public's interests. You may want to remain anonymous or you may choose to go public. You may decide to take your story to the media, or prefer to talk to public officials with the power to correct the problem. Your decisions will affect your future, your family and your career. A

well-planned strategy offers you a chance of succeeding, but unplanned or self-indulgent dissent could be the path to professional suicide.

Through our work with whistleblowers over the years, GAP staff have learned much about what kinds of strategies and cases are most likely to be successful and which are a recipe for frustration or failure. GAP has three primary criteria for evaluating potential whistleblower cases; you may want to ask yourself these questions as you consider whether to blow the whistle.

- Is the wrongdoing at issue substantial enough to warrant the risks of reprisal and the investment of human and financial resources to expose it?

- Are your allegations reasonable and can they be proven?

- Can you make a difference in resolving the wrongdoing by taking these personal risks, or will you merely be beating your head against a bureaucratic wall?

Beyond these general criteria, your decision about whether to blow the whistle is an intensely personal one. It means making a choice between conflicting social values. Our society honors "team players" and doesn't like cynical troublemakers and naysayers. But we also admire rugged individualists and have contempt for bureaucratic "sheep." We look down on busybodies, squealers and tattletales. But we condemn just as strongly those who "don't want to get involved," claim to "see nothing" or look the other way. And while we believe in the right to privacy, we simultaneously fight for the public's right to know.

The decision also raises conflicting and deeply personal issues of loyalty and livelihood. Loyalty to family is as much an instinct as a duty: we don't bite the hand that feeds our family by turning on our employers. We may feel a similar loyalty to our colleagues at work. At the same time, few would disagree that we have a duty of loyalty to the public trust, the law and our communities as well—one that would lead us to speak out against wrongdoing. For government workers, these loyalties are embodied in the Code of Ethics (see Appendix H) and other laws

that include a "duty to disclose" violations. Too often, however, supervisors expect workers to honor this obligation only when it does not conflict with their primary loyalty to their agency. This leaves employees in a "lose-lose" situation—guilty by silence, or doomed to risking the reprisals that come with whistleblowing.

Any decision about how to act on these conflicting values is not easy, and it is one that only you can make. But your decision should also be fully informed by an understanding of the likely consequences of your actions.

One thing is certain. With the truth on their side, individuals *can* make a difference. Whistleblowers are the Achilles heel of organizational misconduct, if they bear witness when it counts. Used strategically, truth is still the most powerful political weapon in our society, capable of defeating money and entrenched political machines. Armed with the truth, whistleblowing Davids repeatedly have exposed and defeated Goliaths who put goals of economic or political power above the public interest.

At their best, whistleblowers embody the professional integrity of true public servants: through their actions, they add the concept of citizenship to their identity as workers. Within large organizations, they are the human factor that counterbalances the tendency of bureaucracies to put organizational self-interest above all else, even when it means institutionalizing patterns of wrongdoing. And their actions change policies and institutions. Consider a handful of representative examples from GAP's experience. Whistleblowers have:

- forced the cancellation of a nuclear power plant that was 97 percent completed and was approved by the government for operation—despite the fact that its construction was compromised by shoddy materials, massive falsification of x-rays on safety welds and uninspected work on safety systems.

- provided the evidence that led to injunctions against two incinerators and cancellation of three others for dumping toxic substances such as dioxin, arsenic, chromium, mercury and other heavy metals into the environment in five states. Whistleblowers also helped persuade the Environmental

Protection Agency to declare a moratorium against new incinerators and to institute a new combustion policy establishing dioxin limits for all hazardous waste incinerators.

■ exposed systematic illegality and forced a new clean-up after the Three Mile Island nuclear incident, by revealing utility company plans to remove the reactor vessel head using a crane whose brakes and electrical system were destroyed in the accident and had not been tested with weight. The vessel head consisted of 170 tons of radioactive rubble that, if dropped, could have triggered another accident. Whistleblowers went public with the evidence two days before the head lift was to take place and stopped it until the crane was repaired and tested.

■ forced cancellation of proposals in the 1980s to replace federal meat inspection with industry "honor systems" for the USDA seal of approval—plans that could have led to even more food poisoning outbreaks from government-approved meat, similar to the 1993 Jack-in-the-Box tragedy.

■ forced the shutdown of a nuclear weapons production plant that had released over two million pounds of radioactive dust into the environment around Cincinnati, Ohio.

■ revealed that a Veterans Administration hospital police chief periodically beat patients, minorities and homeless people seeking shelter. The chief's tactics included smashing a victim's face into the wall and refusing to allow the blood to be cleaned up, and beating a patient who was on a kidney dialysis machine. The whistleblower lost his job, but he stopped the brutality and today is a respected member of the Cincinnati police force; the former VA police chief is now a convicted felon.

■ exposed fraud and abuse in the Brilliant Pebbles project—planned as the next generation of the "Star Wars" missile defense system—and helped spark cuts of $2.1 billion from the Star Wars budget before it was formally canceled in 1993.

■ revealed that the Hanford nuclear weapons reservation in Washington state has emitted more radioactive waste than the government and its contractors have acknowledged, totalling at least 440 billion gallons spilled into the air, ground, Columbia River and water supply. A whistleblower proved that more than a million gallons have leaked from a tank that official records claim has lost only 5,000 gallons. Whistleblowers' dissent halted plans to dump 7.5 million gallons of liquid radioactive waste into the water supply; stopped the restart of a plutonium reprocessing plant scheduled to pump out some 50 million tons of carcinogenic carbon tetrachloride; and forced a commitment from that facility to cut radioactive emissions by 60 percent, literally saving citizens in the Pacific Northwest from having millions more gallons of liquid radioactive wastes dumped into the groundwater and river.

■ challenged Standard Form 189, a blanket "gag order" that would have required nearly three million employees with security clearances to obtain advance permission from their superiors before discussing virtually any concerns with government officials, members of Congress or the public. After 1.7 million employees signed the form, one man, Ernie Fitzgerald, refused. Thanks to his courage and support from the chair of a congressional subcommittee, Congress outlawed provisions in that or any other federally-funded gag order that conflict with the First Amendment and the Whistleblower Protection Act.

Without question, the rewards and public benefits of whistleblowing can be substantial. But so too are the risks and costs. Time and again, GAP has seen whistleblowers pay an enormous professional and personal price for their actions—often a price they did not anticipate. We want you to be prepared. As a result, we do not mince words in describing the possible costs of your decision to blow the whistle.

You almost surely will suffer some level of retribution or harassment for living the values of a public servant. You may not

believe your employer is your adversary, but the record shows that employers often do not want to be told what is wrong with their operations. Frequently they greet the bad news by trying to silence the messenger—to avoid any bad publicity, cost overruns, liability, or simply to prolong the benefits of the misconduct. It is not uncommon for whistleblowers to be harassed, socially ostracized, or even fired from their jobs; some are professionally destroyed. Those who aren't fired may find themselves deprived of meaningful work.

You must also take a realistic and pragmatic view of the law, and the degree to which you will be legally protected from retaliation for speaking the truth. In theory, whistleblowers—at least those in the federal government—have the benefit of a government agency (the Office of Special Counsel) that exists to protect their constitutional rights of freedom of speech and freedom to petition Congress. All too often, however, employees who choose to exercise these rights on the job find that their rights exist on paper only.

"When you work your way up like I did, you have a pride in your work. You have to stand up, not just for yourself, but for a principle. At the time, I made a decision of conscience."

—Equal Employment Opportunity Commission whistleblower

Federal employees often are confined to defending their rights before administrative judges who lack the bureaucratic independence to rule against powerful interests without risking reprisal themselves. By effectively blocking access to our federal courts and to a jury trial before one's peers, these whistleblower laws provide only second-class rights, hardly the foundation for first-class public service. Perhaps most frustrating, the law provides little to deter those who retaliate. Federal officials are effectively shielded from personal liability, even for violating a government whistleblower's constitutional rights. Too often, managers who carry out reprisals subsequently receive promotions or bonuses rather than reprimands.

Besides the obvious risks of potential job loss and inadequate protection by existing laws and agencies, there is also an emotional and mental price to pay for whistleblowing. People who have been lifetime friends may turn against you, and the people with whom you work may treat you as an outcast. Forest Service law enforcement agents who challenged timber theft and defended endangered species learned this the hard way, as local television news shows and newspapers denigrated them for their disloyalty. In a community that depends on an industry or government money for its livelihood, do not be surprised when people ostracize you and perhaps your family if they perceive your action as threatening their way of life—even if you believe your actions are in their interest.

As important as recognizing the *extent* of the likely consequences of blowing the whistle is understanding *how long* you may be paying the price for your actions. You should not become a whistleblower unless you are prepared to make the commitment of following through on your charges. You will learn that it is very difficult to stop mid-stream and have any hopes of surviving the ordeal mentally or professionally. Long after the public has forgotten your courageous actions, your superiors will remember what you did to them.

Even more important, the government agency or corporation that employs you has an institutional memory. Bureaucrats come and go, but the bureaucracy rarely forgets or forgives. On occasion, third or even fourth generations of managers continue the harassment campaign against a whistleblower—long after the original target of the dissent has left, and even after the whistleblower was vindicated.

There is another reason to weigh your decision to blow the whistle carefully: you owe it to the values or issues you are seeking to defend. If you quit while you are still needed, your point of view almost certainly will lose. In the aftermath your legacy will be to have undermined your goals. Wrongdoers will be stronger and corrupt institutions reinforced, because you stuck your neck out tentatively and quit.

As a general rule, it would be better to have looked the other

way than to have blown the whistle unsuccessfully. That is why GAP examines timing, the difference between knowledge and proof, and other factors affecting prospects for legal success when we select whistleblower clients. Frequently we turn down whistleblowers seeking our representation because we believe in them but recognize that they do not have a good chance of success—and we do not want to be responsible for helping dig them and their causes into a deeper hole.

DECIDING HOW LOUDLY TO BLOW THE WHISTLE

Part of deciding whether to blow the whistle is thinking through how you would do it. One of the first issues to consider is whether you want to "go public" with your concerns or remain an anonymous source. This decision depends on the quantity and quality of your evidence, your ability to camouflage your knowledge of key facts, the risks you are willing to take, and your willingness to endure intense public scrutiny.

Going public unquestionably boosts both the risks and rewards of whistleblowing. Before deciding to go public, it is worthwhile to examine your motivations carefully. Some potential whistleblowers expect recognition and glory to follow after they become public crusaders for truth, but most who have done it will advise that the pain overwhelms any ego boost. If your main motivation is revenge or public recognition, you are blowing the whistle for the wrong reason. No matter how truthful or significant your dissent, you assume a real risk of being discredited rather than vindicated. And any public recognition from vindication is likely to be fleeting at best.

It also is foolhardy to blow the whistle as a money-making venture. Publicity about multi-million dollar awards in damage suits and "bounty" statutes such as the False Claims Act may lead some employees to conclude that blowing the whistle may bring a cash award. Realistically, the odds of cashing in from a whistleblower suit are akin to winning the lottery. The odds of painful and protracted reprisal, on the other hand, are a good

bet. It would be wiser to invest in the lottery: you will not get fired for losing, or risk being blacklisted in your profession even if you win.

A public whistleblower should not expect justice. The only thing that you can count on is personal satisfaction that you did the right thing, and that you lived your values instead of stopping at lip service. If you approach your whistleblowing with the idea that this is all you will receive, any other benefits will be a bonus.

The alternative to going public—blowing the whistle anonymously—has its own strengths and limitations. The positive side of being an anonymous whistleblower is that you may protect your career. However, you often are limited in what you can expose, because you must ensure that the documentation you leak is self-explanatory and can stand on its own merits without your public explanation. Many, if not most, investigative bodies do not consider anonymous allegations to be credible. You may choose to provide another source—a reporter or your representatives at a non-profit organization—with a fuller explanation of your documentation, and trust your source to convey it without revealing your identity.

You must also be careful that your allegations cannot be traced back to you. Sometimes the substance of the charges can be your "signature," because your job position makes you the only person who could be aware of the problem you have exposed, or the only one with access to the relevant records. While there are ways to avoid having documents traced back, it is virtually impossible to *guarantee* that the information will not lead back to you.

Anonymity offers another potential advantage: it can allow you to maintain your insider's position, and to witness how the bureaucracy attempts a cover-up once the problem has been exposed. GAP has seen whistleblowers on the inside who leaked information and then were actually on the "damage control" team assigned to cover up the fraud. Once public whistleblowers are exposed, they usually are isolated from the bureaucracy and the evidence. After the flow of information dries up, it is hard to rebut the system's evasions, denials or disingenuous "reforms."

To be a successful anonymous whistleblower, you must have an effective outlet and strategy for leaking the documentation. Chapter three of this handbook covers potential whistleblower outlets and the best way to approach them.

Keep in mind that it takes a certain personality to leak information anonymously while remaining cool enough not to draw suspicion. If you don't have a good "poker face," and you cannot think of a safe strategy for leaking information without having it traced to you, consider going public or not blowing the whistle at all.

Whichever path you choose, be decisive. The worst approach you can take is to remain semi-anonymous. If you are suspected of the leak but are not publicly known, you will experience the worst of both worlds: the agency or company will begin to retaliate while denying any knowledge that you are a whistleblower, which can deprive you of your legal rights against reprisal. Perhaps worst, you will not have the benefit of outside resources to blunt the attack.

The following checklist may help you determine if you are ready to blow the whistle either anonymously or publicly:

If you plan to remain anonymous, ask yourself:

- Am I in a position to know that what I see as misconduct really is improper in the bigger picture, or could "tunnel vision" be leading me to a wrong conclusion?
- Will it work—or will anonymous disclosures simply give the wrongdoers an opportunity to cover up the problem?
- Can I prove my allegations with self-explanatory documents that do not need my public explanation?
- Can these documents be traced to me because a small group of people received them or my copies are uniquely marked? (Beware of tracebacks through fax identifications.)
- Can I act nonchalant when these documents are disclosed so as not to attract suspicion?
- If discovered, do my spouse and I have the ability to support my family without my job or even outside my current profession?
- Is my family prepared for and does it accept the possibility of stress from uncertainty, and the possibility of a negative public profile if I am discovered?
- If discovered, what liability will I incur, if any?

If you plan to go public, ask yourself:

- Does my job allow enough perspective to ensure that my conclusions are not the mistaken product of "tunnel vision," even if my information is accurate?
- Are my family and I financially and mentally ready for a protracted fight with my employers to prove my allegations and to try to retain my job?
- Am I mentally ready to have my fellow workers and perhaps my friends turn against me because of my disclosures?
- Am I ready for personal attacks against my character and to have any past indiscretions made public?
- Do I have enough evidence to prove my charges without having to go back to my workplace? Even if I can prove my initial allegations, would I be more valuable through sustaining my access to information by not going public?
- Am I sure that my motivations are to expose the wrongdoing on behalf of the public interest, and not just sour grapes, revenge, or a quest for financial gain or public attention?
- Am I financially and mentally ready to risk my career?

BLOWING THE WHISTLE WISELY

If challenging the powers that be is as old as organized society, so is retaliation for doing so. The first reaction of large organizations to perceived internal threats is often an almost instinctive counterattack. Because your employer might well strike back after you blow the whistle, a carefully planned and executed strategy is crucial. To maximize your own protection after blowing the whistle, we recommend twelve basic survival strategies:

*1. **Before taking any irreversible steps, talk to your family or close friends about your decision to blow the whistle.*** One of the most serious risks of whistleblowing is family break-up, because the entire family will suffer the resulting hardships. If you choose to challenge the system without your family's knowledge or approval, you may lose them in the aftermath—a sacrifice greater than the professional consequences.

*2. **Develop a plan so that your employer is reacting to you, instead of vice-versa.*** To ensure your best chance of survival, you will need to go on the offensive, rather than simply reacting to the bureaucracy's or company's actions. As in other situations, the best defense is a good offense: your employers should be responding defensively to your strategically-timed releases of information, meetings with the press and public officials, and other elements of your whistleblowing plan. Once you have stopped setting the agenda, and are reduced to responding to their attacks on you and the credibility of your disclosures, your chances of losing escalate.

*3. **Be alert and discretely attempt to learn of any other people who are upset about the wrongdoing.*** Through strategic but casual questioning and discussions with co-workers, you can learn whether your objections to the wrongdoing are credible among colleagues and whether you see enough of the whole picture to be certain that your suspicions are well founded. Your colleagues may be important witnesses in the future, and may have additional information about the problem, or confirm that it

is more widespread than you know. It is possible that some co-workers may be as concerned as you are about the problem, and may be willing to join you in making a disclosure. Solidarity can make all the difference in preventing retaliation. Remember, you should be careful not to expose yourself in the process as a trouble-maker or a threat to the organization's policies.

*4. **Before formally breaking ranks, consider whether there is any reasonable way to work within the system by going to the first level of authority.*** Challenges to institutional operations are often not taken seriously unless you can prove that you gave the proper authorities a chance to "do the right thing," and that their response to your warning was indifference or an attempt to cover up the problem. It is crucial, however, that your attempt to work within the system does not sound the alarm, triggering a cover-up or reprisal. It is very hard to do this successfully and safely, especially if you are challenging significant wrongdoing. Perhaps most important, working within the system can expose you to retaliation without the benefit of support from a public constituency—the most isolated, and therefore vulnerable, position for a whistleblower.

The best initial approach to challenging potential misconduct may be to raise an issue casually, in an informal setting or meeting: you want to appear to be thinking aloud in a nonconfrontational way, or asking for help in answering difficult questions. If that doesn't work and you're not at peace with letting the matter drop, you may have to make your point more directly, in as low-key and nonadversarial a manner as possible. This may be best done in writing. You must state clearly what is wrong and what your position is on the matter, without being pushy or demanding. You will be risking exposure—but it may be important for your credibility later. If there is no record of your prior objection to the wrongdoing, your superiors may respond by making you the scapegoat for the very misconduct that you have attempted to expose. This would divert your energies to proving that *you* were not responsible for the wrongdoing.

In many situations, however, it is unwise or impossible for

you to complain internally, especially when you seek to expose serious misconduct. It is hard to decide how far to protest within the system—even if you plan to remain anonymous. The decision whether to inform anyone internally must be made carefully, on a case-by-case basis. If you make a record of protest in the system and then the problem is exposed publicly, you may draw suspicion to yourself. However, if you do decide to go public or are informally discovered, qualifying for coverage under the free speech laws depends on being able to prove that your boss *knew* you were a whistleblower. Your legal defense may depend on some institutional record of your dissent.

Another strategy is to maintain the identity not of a public whistleblower, but of a cooperative witness who simply tells the truth under oath when the authorities demand answers. It is more difficult for an employer to retaliate against a subpoenaed witness who reluctantly agrees to speak truthfully about a problem when questioned by authorities. Of course, you may have to take steps to convince authorities to seek disclosures from you—and this could prove difficult. Because this is a "Catch-22" situation, you may want to seek professional advice from the Government Accountability Project, the Project on Government Oversight, Public Employees for Environmental Responsibility or other experts.

5. ***Maintain good relations with administrative and support staff.*** Managers who respond to dissent with harassment and repression may use the same approach routinely with secretaries, clerks and other assistants. These people can be a great help to you in the future. They may provide you with discrete warnings or, later on, offer testimony as to management motives.

6. ***Before and after you blow the whistle, it is very important to protect yourself by keeping a careful record of events as they unfold.*** Not keeping close, contemporaneous records of harassment and other activities is one of the biggest mistakes that whistleblowers make. There are several good ways to do this and the time you take now could be very valuable in any future investigation or court proceeding.

Keep a diary—a factual log of your work activities and events at your workplace. Try to keep this diary as straightforward as possible, leaving out any speculations, personal opinions, or animosity you may have toward your fellow workers or your situation. The diary does not have to be kept on a daily basis, but it is important to write down events that relate to the wrongdoing you are planning to report or any harassment you are receiving, in part to record your objection to it. Record events that happen, and the full names and titles of all people involved. Make sure that you date and initial each entry.

This may seem like a burden, but it is an invaluable investment in your professional survival. As legal evidence, the extra credibility from your written impressions at the time of disputed events may make the difference between winning and losing a future lawsuit. It is also an insurance policy against memory losses, and helps to piece together significant facts and patterns. Be aware, of course, that your employer will have access to the diary if there is a lawsuit.

Write memoranda for the record of important events or conversations about which you want to make a permanent record. Place the date and title, "Memorandum for the Record" or "Memo to File" at the top, and then write down everything you can remember from the conversation or event. Then sign the memorandum, date it, and if possible have someone witness it. If you need to write a memorandum for the record about a conversation or event in which it will be your word against someone else's, the safest way to proceed is to write the memorandum, make a copy, seal it well in an envelope and mail it to yourself. Once it is sent through the mail it will be postmarked, and you should store it in your records without opening it. Then when you need to prove your claim, the sealed envelope will show that you wrote the memorandum on the postmarked date.

Electronic-mail systems in large organizations can be used to memorialize or confirm important conversations and, in some cases, force managers to put their thoughts on the electronic record. Most systems allow all messages, even "eyes only" messages, to be printed. *A note of caution:* do not put anything on

this system that you want to keep private, and do not allow your only copy of a document to remain on the system. Be sure that confidential material is kept elsewhere and that you have hard copies of important documents in a secure location.

*7. **Identify and copy all necessary supporting records before drawing any suspicion to your concerns.*** Access to information could be cut off once the exposure of bureaucratic misconduct is identified as a threat to the organization. Even if you plan to remain anonymous, it is important to have a copy of all relevant documents because once the problem is exposed, documents may be destroyed or hidden. Either way, it is very hard to blow the whistle successfully without credible documentation to back up your claims.

Documentation generated by the organization itself is the best evidence. Many managers, when forced to do something that could later blow up in their faces, will keep a "Pearl Harbor file" to demonstrate that they were only following orders. Those files can be very valuable in trying to prove fraud or abuse of authority. If you cannot copy all the documents, make copies of the best supporting ones and then make a list of the rest, so that you can tell an investigator or a court exactly which records to pursue.

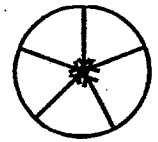
Be warned, however, that some employers will accuse you of "stealing" their "property" when you make copies of the evidence incriminating them. Inspectors General have opened criminal investigations on such grounds. For example, the U.S. Department of Agriculture (USDA) has investigated federal whistleblowers for alleged theft after they exposed contamination of USDA-approved beef and poultry on national television.

This issue highlights the unavoidable choices you face when deciding whether to blow the whistle. If you do not have enough documentation or witness testimony, you may be risking retaliation for nothing. Under those circumstances, you probably do not have a realistic chance of making a difference. On the other hand, there are severe, inherent risks in seeking to obtain the evidence necessary to be taken seriously. In other words, if you're going to do it, do it right—but be aware of what you're risking.

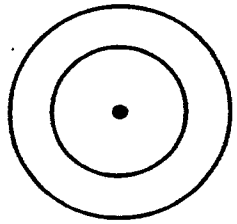
*8. **Research and identify potential allies such as elected officials, journalists or activists who have proven their sincerity and can help expose the wrongdoing.*** It is important not to contact the media, Congress or any other outlet until *after* you have definitely decided whether to blow the whistle and whether you plan to be anonymous or go public. Then, particularly if you decide to go public, it is essential to develop a support constituency whose interests in your act of public service coincide with your career survival. This is a cornerstone of your strategic plan. Whistleblowers are most often successful when they communicate their message to those citizens who will benefit from their disclosures; when whistleblowers remain isolated, they are more likely to lose. Developing a support constituency not only breaks the isolation you may face, but also exerts critical pressure on your employer. When the wrongdoing is exposed, your employer should be reacting to the media, Congress, the

Breaking the isolation: an illustration

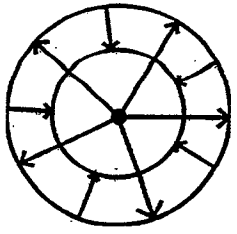
Typically, a whistleblower is encircled and isolated by traditional bureaucratic institutional employers—corporations, legislatures, executive agencies—and the disclosed information is filtered or suppressed.



Beyond the bureaucracy are the sources of potential power outside of the institutionalized powerholders. These include the media, public interest groups, and consumers—the commonweal.



The challenge is to inform and educate the outer circle constituencies so that they exert power on the defined traditional powerholders—to build information spokes so that the commonweal surrounds and holds accountable the bureaucracy.



courts, and the public. Ensuring that your support constituency is informed and working with you will help you remain on the offensive. Do not underestimate your allies' advice and support. The illustration provided here depicts this strategic component of successful whistleblowing.

9. Either invest the funds for a legal opinion from a competent lawyer, or talk to a non-profit watchdog organization about the risks and obstacles facing you. There are a range of considerations you may want to weigh with a legal expert. These include the potential retaliation you could suffer, the odds for a successful defense, how much it could cost to defend your rights, whether there are legal restrictions on any of the evidence you may be considering for disclosure, and the prospects for making a difference given the risks. Organizations such as the Government Accountability Project, the Project on Government Oversight and Public Employees for Environmental Responsibility can directly—or via a referral—offer you advice, help you plan legal, media and political strategies, and advise you about legal counsel. If you consult with a private attorney, keep in mind that the ultimate decision about whether and how to blow the whistle is yours to make, not the lawyer's: you are the one who must live with the moral, ethical and professional consequences of your decisions.

10. Always be on guard not to embellish your charges. This is essential to maintaining your credibility. It is far better to understate than to overstate your case, because your employers can leap at every slight exaggeration and use it to discredit you. GAP usually advises whistleblowers to stick to direct personal knowledge in telling their stories, and then give congressional or media investigators ways to uncover the rest of the facts—and any broader implications of wrongdoing—for themselves. The less you skate on thin ice with your information, the more credible you will be to people who have to trust you before they will help you.

11. Engage in whistleblowing initiatives on your own time and with your own resources, not your employer's. Government employees have been fired for conducting "personal business" (in one case, blowing the whistle on fraud) on government time, using "public property" (the office copier machine, fax or telephone). It is a good general rule not to engage in whistleblowing activities during office hours or using office equipment. There are exceptions, of course, such as in the case of a government auditor or investigator on assignment who inadvertently blows the whistle on government time, simply by conducting his or her audit or investigation. On other occasions, employees have obtained specific permission to use government time when cooperating as a witness in an investigation sparked by their or others' whistleblowing disclosures. Additionally, some collective bargaining agreements allow employees to use office supplies during normal hours to work on legal disputes with an employer.

12. Don't wear your cynicism on your sleeve when working with the authorities. With good reason, you may have a knee-jerk reaction that any authorities assigned to investigate your charges must be incompetent, corrupt, or attempting to cover up the wrongdoing.

Even if you feel this way, it may be a fatal mistake to display your suspicions. If the investigator or auditor were not defensive to start with, your attitude may poison the well and intensify the abuse against you. For better or worse, once you become a whistleblower you are in a partnership with whomever is on the front lines of enforcing the rules. You will get along better, enjoy the process more, and maintain the chance for an effective working relationship if you treat your partner civilly.

Further, the investigator deserves the presumption of innocence until proven guilty or complicit. It would of course be foolhardy to extend blind trust and "spill your guts" to someone who may be an agent for wrongdoers. But at least give your temporary partner a chance to prove him or herself: see if and how s/he acts on your evidence.

Keep in mind that many of our most courageous whistleblowers have been civilian or military law enforcement agents who sincerely were trying to do their jobs, acting on the concerns of pioneer dissenters who raised the issues. If you are wrong in assuming bad faith, you may lose one of your potentially most important allies.

The foundation for all these survival strategies is a healthy attitude. To transcend the stress, it helps to be fully aware of and accept what you are getting into. This is a time to draw on and learn the extent of your inner strength. You will need it. The constant, negative pressure whistleblowers face can color your judgement and make you paranoid about every event. Paranoia works in the bureaucracy's favor if it wants to paint you as an unreasonable, even unstable person whose charges should not be taken seriously. To succeed, you must be able to rise above this trap. The following suggestions may help.

Appreciate your sense of values and keep your sense of humor. It is better to stay calm—and even to laugh—than it is to seethe with anger when bureaucrats make a mockery of fairness or inflate their self-importance. It can be liberating to know that you have assumed responsibility for making your own decisions based on your values, rather than accepting the agency's or company's line unquestioningly. Along with the pain and fear, there is real satisfaction inherent in taking control of your life. Take time to reflect on and enjoy the self-respect that comes from knowing that you are living your values.

Watch your expectations of others. You can reduce your own isolation by not being judgmental, or expecting everyone else who is moral to blow the whistle. Even if you are doing the right thing and your concerns are accurate, it is enough to risk your own neck. Don't expect others to do the same. Your colleagues sincerely may hold differing opinions or may not be positioned to risk their source of economic support for their families. They will resent you if you morally condemn them for failing to make the same difficult choice as you have—and this resentment will add to your isolation.

Keep perspective. Do not surrender to the temptation to become an obsessive "true believer" in the importance of your whistleblowing cause. A measure of detachment is essential, for your well-being as well as your effectiveness. It helps to have another job or a hobby that takes a good portion of your time, so that your whistleblowing activity does not completely dominate your life. Doing this will help you remember that there is more to life than whistleblowing. Letting it consume you most likely will destroy you, and your credibility, over time. Similarly, while career reprisals may reduce your ability to support your family financially, only you can determine whether your whistleblowing will reduce—or enhance—your ability to provide your family with emotional support and guidance. You may have a lot more time and energy to give them. Through all these approaches, you can help turn the crisis of retaliation into a unique opportunity for other kinds of personal growth.

> *"I have values that just won't let me participate in illegal things. There is nothing extraordinary about me at all. I'm no hero. But you've got to live with yourself. If I didn't do it, how could I live with that face in the mirror every morning?"*
> *—General Services Administration whistleblower*

Anticipate retaliation and surveillance. No matter how healthy your attitude, constructive your approach or complete your ultimate vindication, facing some form of harassment is the rule rather than the exception for whistleblowers. Academic research confirms the pattern: in a 1987 study by Doctors Karen and Donald Soeken, 232 out of 233 whistleblowers reported suffering retaliation; similarly, 95 percent of whistleblowers in a 1989 study by Professors Philip Jos, Mark Tompkins and Steven Hays said they faced reprisals. Nor are these results unique to the United States: a study of whistleblowers in Australia by Dr. William De Maria found that 94 percent reported direct or indirect reprisals. So expect and be prepared for the worst.

In addition to confronting retaliation on the job, some whistleblowers find themselves the objects of surveillance by government, industry or private investigators. This experience can be very frightening and can exacerbate your understandable anxieties. While it is important to document any suspected surveillance through a diary or memorandum for the record, it is just as important not to let suspicious activity get to you. We often advise that if someone is watching you, s/he wants you to become affected by the surveillance and to act irrationally. It can be another way of bullying you into a mistake. It is to the benefit of your detractors for you to sound crazy to the general public by saying that your phone is tapped without having proof.

It is very hard to prove that you are being watched or that your phone is being tapped, so the best way to deal with this concern is to be careful about information you provide over the phone—without allowing yourself to be functionally gagged from communicating. Indeed, telephone communications can even be a way of conveying disinformation to listeners, or to issue subtle warnings that you wish to communicate. Similarly, be sure that nothing you do not want to reach your employer is exposed through office recycling or garbage, stored in an unsecured manner on your computer or sent to you at the office. Employers have been known to go through whistleblowers' desks, confiscate computer files, and even intercept and open mail they receive at the office. If you operate from the premise that you may be watched and are appropriately careful, the surveillance efforts will be in vain. And as explained above, if you are cool enough to be strategic, the surveillance may backfire.

Be prepared for public scrutiny. You should expect your employer to work very hard to find some flaw in your past or in your character and to attempt to exploit it. Even if this strategy fails as a diversionary tactic with others, it can create extraordinary stress for you. Everybody has skeletons in their closets. Like candidates in an election campaign or nominees for political appointments, whistleblowers have to develop thick skins. To paraphrase the famous reporter Clark Mollenhoff, you must be prepared to live with the whole record.

Although this list of survival strategies may seem overwhelming, it is only an introduction to the most important course you may take in your professional life. And careful, strategic planning may be the most important investment you make in your professional survival. You may appreciate the value of these burdensome suggestions more after learning the techniques used in organizational reprisals against whistleblowers. Taking on the system can be the wisest or worst decision of your life. If you intend to win, you may as well prepare and be smart about how you do it.

CHAPTER TWO

What to Expect: Classic Responses to Whistleblowing

If you are going to challenge the agency or corporation that employs you, you need to understand how large organizations operate. In particular, you should know how bureaucracies function to target troublemakers and to neutralize dissent.

TARGETING DISSENTERS: THE TACTICS OF RETALIATION

Intimidation and fear are the ultimate objectives of classic organizational reprisal techniques. The goal is to convince employees that the power of the organization is stronger than the power of individuals—even individuals who have truth on their side. The following is a list of tactics your employer may use in the effort to silence you, fire you or harass you into resigning. They are illustrative examples of how bureaucracies attempt to keep the majority silent by making examples out of troublemakers such as whistleblowers. Keep in mind that the list is not exhaustive: the forms of organizational harassment are limited only by the imagination, and may be "custom-fit" to strike at a whistleblower's unique vulnerabilities.

Spotlight the Whistleblowers, Not the Wrongdoing

The first commandment of retaliation is to make the whistleblower, instead of his or her message, the issue: obfuscate the dissent by attacking the source's motives, credibility, professional competence, or virtually anything else that will work to cloud the issue. The point of this tactic is to direct the spotlight at the whistleblower, instead of the alleged misconduct.

A common initial management response to a whistleblower's disclosures is to launch a witchhunt by placing the employee under investigation, and to keep digging for "dirt" to devise a smear campaign against him or her. When Three Mile Island engineer Richard Parks challenged sloppy clean-up practices that could have triggered another nuclear accident, for example, his employer's first reaction was to brush aside the safety issues and place Parks under investigation for an alleged financial conflict of interest. The search for incriminating evidence against a whistleblower can include extreme measures: Parks returned home one day to find that his house had been broken into and ransacked. Parks was not vindicated until he went public and sought help from the Department of Labor, Congress, and the Nuclear Regulatory Commission (NRC). All three supported him, and the NRC ordered clean-up procedures to be rewritten and extensive tests to be conducted.

Often, a government agency's Office of Inspector General or a private security firm will do the dirty work of investigating a whistleblower. Sometimes investigations and surveillance are conducted by "babysitters," spies assigned by management to "assist" the whistleblower. A top law enforcement manager at the U.S. Forest Service made enemies by briefing Congress on a practice the agency did not want exposed: its contractors were hiring and mistreating illegal aliens, and engaging in related mismanagement and questionable environmental practices. The Forest Service responded by opening a retaliatory investigation of the whistleblower. The investigators were assisted by the manager's subordinates, at the behest of agency superiors. The ensuing probe disregarded due process and did not attempt to resolve the factual disputes that were the point of the manager's original allegations.

A related technique is to open an investigation—and then deliberately keep it pending for an indefinite period. The idea is to leave the whistleblower "twisting in the wind," with the cloud of an unresolved investigation hanging over his or her head. The effect is not only to create uncertainty and stress for the whistleblower, but also to undermine his or her credibility: potential media, government and other officials may be discouraged from listening to and taking seriously a whistleblower's allegations when they learn that s/he is "under investigation." For five years, the Forest Service threatened to pursue disciplinary action for activities normally considered technicalities against two agents challenging age and sex discrimination in the agency. When the agents agreed to testify in Congress or appear on national television, the agency stepped in to "warn" the congressional and media contacts that the whistleblowers were under investigation and could be fired for serious misconduct.

Investigations have continued over decades, covering hundreds of witnesses. U.S. Department of Agriculture (USDA) meat grader John Coplin was under investigation almost continuously from 1957, when he first blew the whistle on bribery, until his 1981 retirement. William Lehman, a USDA import border inspector who stopped millions of pounds of contaminated meat from entering the United States and endangering consumers, was under investigation repeatedly for a decade.

Employers can be creative in devising grounds for an investigation or a smear campaign against a whistleblower. Any allegation will do, no matter how petty. Retaliatory travel, reimbursement and time audits are so common they could be classified as bureaucratic kneejerk reactions against whistleblowers. Even charges previously investigated and discredited will suffice. For example, in 1992 a blue-ribbon panel of independent experts discredited the Army's attempt to fire Star Wars scientist Aldric Saucier as incompetent for exposing mismanagement and abuse in America's anti-ballistic missile defense system. Instead the

agency reintroduced as new charges the same allegations about 1969 misconduct that had been investigated and not acted upon a decade earlier, in 1982.

Some employers will display real chutzpah in selecting charges, attempting to select and make stick the most outrageous or far-fetched charges possible—as a "lesson" to other employees about management's power to control events. For example, a whistleblower who is renowned for being a gentleman may face sexual harassment charges; a soft-spoken, self-effacing individual may be branded a loud-mouth egomaniac. In one case, a law enforcement officer renowned for his respect for civil liberties was suspended without being allowed to confront the source of anonymous charges that he made an illegal search during a drug raid. In another absurd instance, a doctor challenging misconduct in a $5 million federally-financed study was accused of anti-Semitism—despite the fact that her step-daughter was attending rabbinical school at the time. In some cases, employers select petty or ridiculous charges in an effort to hang the whistleblower on the very issue on which s/he dissented: a whistleblower exposing gross waste and fiscal mismanagement, for example, will be charged with theft of supplies or misuse of time cards.

Smear campaigns are often more vicious for whistleblowers higher up in the chain of command, because they are perceived as greater threats. They are more likely to "know too much," and their organizational stature gives them more credibility. Randy Taylor, Chief of Military Police at the Bermuda Naval Air Station, exposed the cover-up of post-Tailhook sexual attacks and misuse of the base as a taxpayer-financed resort (known as "Club Fed") for powerful politicians and military officials. The Navy responded by ordering him to undergo a psychiatric examination, which he passed.

Taylor's experience was not unusual. Psychiatric fitness-for-duty examinations are one of the ugliest forms of retaliation, and have long been used as a way to spotlight the whistleblower. When Department of Energy scientist Marlene Flor challenged improper transportation of toxic materials and sexual discrimination, she

was ordered to take a psychiatric examination in which she was grilled about her dissent. When she passed, she was ordered to take a second exam. Nonetheless, her security clearance was revoked and only restored after years of bureaucratic and legal battles. Others face more severe psychiatric retaliation. Within days of protesting payments to reserve troops for *not* reporting to weekend training assignments, Air Force Sergeant Joseph Taliaferro found himself confined to a mental ward, wearing slippers with Happy Faces on them.

Build a Damaging Record Against Them

This tactic goes hand-in-glove with spotlighting the whistleblower. Not infrequently, government agencies or private companies spend years manufacturing a record to brand a whistleblower as a chronic problem employee who has refused to improve. The idea is to convey that nothing the employee does is right. Ironically, many whistleblowers have a history of sterling performance evaluations—until this tactic is used against them.

An employer may begin by compiling memoranda about any incident, real or contrived, that conveys inadequate or problematic performance on the job. This is often followed by a series of confrontational "counseling" sessions, in which the employee is baited to lash back. Reprimands and comparatively mild disciplinary actions are taken first, in part because the employee has few if any due process rights in defense. By the time termination is proposed, the deck may be well-stacked through a contrived history that the agency has written about the whistleblower.

Threaten Them

This tactic is commonly reflected in statements such as, "You'll never work again in this town/industry/agency..." Warning-shot reprisals for whistleblowing, such as reprimands, often contain an explicit threat of termination or other severe punishment if the offense is repeated. In some cases, employees may have signed nondisclosure agreements as a condition of employment: the penalties in such nondisclosure agreements—which typically fail to

outline law enforcement/good government free speech exceptions—sometimes contain the threat of criminal sanctions for disclosures.

The art of making threats has been perfected in the world of federally-funded medical research. Dr. Suzanne Hadley, chief investigator for the Department of Health and Human Services Office of Scientific Integrity, began working with congressional investigators on cases of alleged high-level misconduct that undermined the integrity of studies funded by the National Institutes of Health (NIH). She promptly found herself facing an FBI agent who combined threats with interrogation.

NIH was a little more subtle with scientists Walter Stewart and Ned Feder. With NIH's approval they testified in their official capacity before a Health and Human Services advisory committee, the Commission on Research Integrity. Later, in response to a request by the Commission, Stewart and Feder used government time and stationery to send a draft congressional report on misconduct in AIDS research to the Commission. NIH reprimanded them for their communication and warned of worse punishment if they did it again. The reprimand was withdrawn after reports ridiculing NIH's action appeared in the press and after the Commission protested.

Isolate Them

Another retaliation technique is to transfer the whistleblower to a "bureaucratic Siberia." Two purposes are served: the isolation makes an example of the whistleblower, while also blocking the employee's access to information. After Food and Drug Administration scientist Dr. Joseph Settepani protested introduction of well-known carcinogens and mutagens into the food supply, he was reassigned to long-term research in a trailer on an experimental farm.

Federal Aviation Administration (FAA) engineer James Pope served as the agency's ombudsman for the general aviation constituency, until he exposed FAA suppression of an industry-developed back-up device to warn pilots of impending mid-air collisions. After Pope blew the whistle, his superiors reassigned him

to Seattle, Washington, where his duties vanished, except for tasks such as speaking to local Boy Scout troops. Joseph Whitson was in charge of drug testing for an Air Force base, where his sworn testimony exposing political manipulation of test results led to court martial acquittals. As he left the hearing, Whitson was reassigned to a desk in the basement of the base. He kept himself busy by occasionally sweeping the floor.

Employers may also isolate whistleblowers by assigning them to work at home, often without any duties, to facilitate later termination. NIH used an extreme version of this technique—assigning neither duties not any work station at all—for over a year with Dr. Hadley, until she filed a legal complaint to force the agency to approve work for her. A more blatant approach is to assign whistleblowers to administrative leave with pay. Gordon Hamel, a whistleblower at the President's Commission on Executive Exchange, and Susan Swift, a Justice Department whistleblower, each endured this fate for extended periods before being restored to gainful positions.

Publicly Humiliate Them

This tactic is the bureaucratic equivalent of placing whistleblowers in the public stocks. When Resolution Trust Corporation enforcement attorneys Bruce Pederson and Jackie Taylor protested political sabotage of savings and loan prosecutions, they were publicly denigrated and assigned to work in buildings not staffed by any other RTC employees.

The strategy of combining public humiliation with isolation is not unusual. Mary Eastwood, Acting Special Counsel under the Carter Administration, protested in 1981 when her successor Alex Kozinski began colluding with agency managers to purge whistleblowers and Democrats from the agency. He moved her to a desk in the corner of a public room, and ordered other employees not to talk with her.

Set Them Up for Failure

Perhaps as common as the retaliatory tactic of isolating or humiliating whistleblowers by stripping them of their duties is

its converse—placing them on a "pedestal of cards" by overloading them with unmanageable work. This tactic often involves assigning a whistleblower responsibilities and then making it impossible for him or her to fulfill those tasks.

One approach is to withdraw the research privileges, data access, or subordinate staff necessary for a whistleblower to perform his or her job. When Dr. Anthony Morris challenged the swine flu vaccine and other dangerous drugs, his Federal Drug Administration superiors transferred his animal handler, who was an essential partner for Dr. Morris to conduct his work in the laboratory. Employers may also set whistleblowers up for failure—and dismissal—by overwhelming them with new assignments. After vindication for challenging patient neglect, a Department of Veterans Affairs whistleblower was ordered to work double shifts without sleep and to perform medical procedures for which he protested he was unqualified. Subsequently he was fired for not properly treating patients.

"They will sacrifice the individual before saying that the agency made a mistake. The image of the organization is so important that they'll destroy your life and career first."
—Veterans Administration whistleblower

Another variation of this tactic is to appoint the whistleblower to solve the problem s/he has exposed, and then make the job impossible through a wide range of obstacles that undercut any possibility of real reform. The employee may then be fired for incompetence when the problem is not solved. Engineer Bert Berube was a victim of this tactic at the General Services Administration, where Administrator Gerald Carmen assigned Berube to correct serious building code violations, including numerous fire and occupational safety hazards Berube had identified at several federal facilities. Unfortunately, Berube was first denied the staff, authority and even access to information necessary for his mission. Then he was fired for his failure. It took nearly five years for his dismissal to be reversed in court.

Prosecute Them

The longstanding threat to attack whistleblowers for "stealing" the evidence used to expose wrongdoing is becoming more serious, particularly for private property that is evidence of illegality. In August 1989, moreover, the Justice Department announced that it had abandoned a decade-long policy of not prosecuting whistleblowers for unauthorized disclosures. Until this is reversed, an Attorney General may seek to send whistleblowers to jail if s/he sees fit. This policy of prosecution also extends to civil statutes: employers may allege, for example, that a whistleblower has violated the Privacy Act rights of culprits identified in an "unauthorized" whistleblowing disclosure.

The Justice Department has played the prosecution card against whistleblowers from its own ranks. Attorney Susan Swift worked in the Attorney General's Office of Legal Counsel. During the Bush-Clinton presidential transition, she challenged the destruction of documents involving Supreme Court nominations, last-ditch attempts to cancel affirmative action programs before the new administration took office, and numerous civil service merit system violations. She was placed on administrative leave with pay and left twisting in the wind. After a year, she left a telephone message for a supervisor, saying that he was not going to get away with the harassment. In response, he had her arrested by the FBI for "assault on a federal official." Thousands of dollars in attorney fees later, the charges were withdrawn.

Steve Cockerham, a meat inspector for the U.S. Department of Agriculture, was subjected to a retaliatory criminal investigation for allegedly "stealing" contaminated meat that was used on national television to illustrate the inadequacies of the government's Streamlined Inspection System—a deregulatory meat inspection plan that was eventually defeated. Were it not for the diligent defense efforts of consumer and labor groups, the agency may have succeeded in prosecuting Cockerham.

Perhaps the crudest form of prosecution is to equate whistleblowing with treason. In separate cases, Dr. Howard Wilshire from the U.S. Geological Survey and Jeff van Ee from

the Environmental Protection Agency were each threatened with criminal prosecution under a McCarthy-era statute as government employees "disloyal" to the United States. Their crimes? Making disclosures to or participating in meetings with environmental groups that successfully challenged illegal government activity through lawsuits.

Some state legislatures are trying to take whistleblowers' liability to disturbing new limits. A new trend is to propose "privilege laws" that would make whistleblowers liable for the financial bills companies incur after being forced to act on whistleblowers' disclosures. One proposal even would make state government employees criminally liable for warning citizens with information from environmental audits.

Physically Attack Them

Whistleblower Karen Silkwood from Oklahoma's Kerr McGee nuclear facility was killed after her car was forced off the road on the way to meet a reporter—leading investigators to suspect murder. Her fate demonstrated the risk of physical retaliation for whistleblowing.

Physical attacks on whistleblowers are not common, but are worrisome. Sometimes organizations encourage, or wink at, "the boys" who do their dirty work. Hanford Nuclear Reservation employee Ed Bricker suffered a physical attack after he protested leaks of radioactive waste. The offender was not punished. The treatment of USDA meat inspector Vernie Gee was even more disturbing. After confrontations with plant management about contaminated beef in southern California, he was jumped from behind by an employee who fled and became a fugitive. While Gee was still recovering in the hospital, USDA issued a reprimand to him for fighting.

In other cases, physical retaliation against whistleblowers is more subtle. Whistleblowers at nuclear weapons facilities and laboratories may find themselves assigned to work in the hottest radioactive spots in the plant. After challenging the Interior Department's refusal to collect strip mining fines under Secretary Watt, attorney Vince Laubach was ordered to move heavy office furniture despite serious back problems. He was forced to leave federal service and remains in constant pain a decade later.

Eliminate Their Jobs

A common tactic is to lay off whistleblowers even as the company or agency is hiring new staff. Employers may "reorganize" whistleblowers out of jobs or into marginal positions. A related tactic is to eliminate—through reorganization—the structural independence of particular oversight units. A nuclear engineering firm, for example, may deemphasize the quality control department by making it a component of the production staff.

The Forest Service used this approach twice with its Timber Theft Investigations Branch (TTIB). In 1994 the agency proposed to make the TTIB irrelevant by herding the investigative agents out of the forests and into a downtown office building. When they protested, the agency abolished the unit entirely through a new reorganization in 1995.

One of the most desperate examples of this tactic occurred in 1991, when a Bush administration Executive Order abolished the President's Commission on Executive Exchange (PCEE), a government-corporate exchange program. The PCEE's chief was a former Republican National Committee Co-Chair, and was attempting to turn it into a patronage outpost for the 1992 elections. President Bush issued the Executive Order just before two showdowns—a scheduled congressional follow-up hearing after sustained investigation; and a Whistleblower Protection Act hearing for Gordon Hamel, who faced termination after exposing the scam. By killing the PCEE, the government preempted the congressional hearing and successfully argued that Hamel's whistleblower claim was moot, since he could not be fired from a nonexistent agency.

Paralyze Their Careers

An effective retaliation technique—and one that also sends a signal to other would-be dissenters—is to deep-freeze the careers

of whistleblowers who manage to thwart termination and hold onto their jobs. These employees become living legends of retaliation when employers deny all requests for promotion or transfer. A related tactic is to deny whistleblowers the training needed for professional development. The message is clear: "s/he is going nowhere."

In 1957 meat grader John Coplin was the youngest main station chief in USDA history. After blowing the whistle on improper grading of meat products, he was never again promoted during his remaining 24 years with the agency. Larry King's career was similarly paralyzed when he blew the whistle on long-festering nuclear safety violations that the Nuclear Regulatory Commission was ignoring. King suffered harassment but retained his position. In his efforts to secure another position within government, he applied and was turned down for literally dozens of jobs—despite the fact that he was easily overqualified for several of the positions.

Bad references for future job prospects are common, and any whistleblower settling a legal case should be careful to take this into account. Sometimes the tactic is used subtly. For example, King consistently received excellent or outstanding performance evaluations at the NRC. As he later learned at a Whistleblower Protection Act hearing, however, hidden buzz words were used to signal that he should not be hired. Common examples are statements that an employee "is not always a team player," or "needs to work on maintaining a cooperative relationship with the industry."

Blacklist Them

Sometimes it is not enough merely to fire or make whistleblowers rot in their jobs: the goal is to make sure they "will never work again" in their fields, if possible. After several oil-industry whistleblowers exposed illegal pipeline practices, for example, the company placed them on a list of workers "not to touch" in future hiring.

Resolution Trust Corporation (RTC) whistleblower Richard Dunn, a quiet financial management expert, thought he had made a fresh start with a big-name accounting firm when he was fired after blowing the whistle on overbilling by contractors who were seeking to exploit failed savings and loans. But a week into his "fresh start," Dunn was summarily dismissed. He later learned that the RTC had told his new boss that he was fired for threatening a co-worker with a gun and therefore was ineligible for privately-contracted RTC work, a key part of his expertise for the new job. The firearms allegation lacked any substantiation in the RTC's personnel records or elsewhere.

Employers in the scientific professions have exercised perhaps the ugliest form of blacklisting—extradition. Whistleblowing foreign nationals, including students, have been warned that their visas will not be renewed and that the Immigration and Naturalization Service is available to ensure their departure. This tactic has been used in subtle ways by the National Institutes of Health with foreign nationals employed by the agency as consultants.

None of these techniques for retaliating against whistleblowers is unique or new. Over two decades ago, the classic institutional response to whistleblowers was captured in the instructions of President Richard Nixon to top aides H.R. Haldeman and John Ehrlichman. After learning that Pentagon cost-control expert Ernest Fitzgerald had blown the whistle on a $2 billion cost overrun on a construction contract for a military cargo plane, Nixon said simply, "Fire that son of a bitch."

In 1973 President Nixon took reprisal techniques to a new level. Fred Malek, his Director of the White House Personnel Office, issued the "Malek Manual," a secret report on how to purge the career civil service system of "unresponsive" employees—whistleblowers or Democrats—without running afoul of the law. The reprisal tactics above are largely drawn from the Malek Manual and illustrated with more recent examples. Ironically, whistleblowers exposed the Malek Manual and it was published in the Watergate Committee's report.

NEUTRALIZING DISSENT: THE TACTICS OF COVER UP

The point of the tactics described above is to overwhelm the whistleblower in a struggle for self-preservation—of credibility, career, family, finances and even sanity—until s/he is discredited or silenced, and the issues that triggered the whistleblowing are forgotten. These tactics, however, are only one part of the bureaucratic assault on whistleblowing. In addition to "shooting the messenger," employers also strive to bury the message by covering up the alleged wrongdoing.

Employers often rely on longstanding tactics of secrecy to cover up institutional misconduct. Large organizations will devise systems and written or unwritten policies for keeping dissent—including information about possible wrongdoing—from surfacing or creating problems for the organization. Some are standing policies. Others are adopted when organizations become aware of their own wrongdoing and seek to avoid getting caught. Still others are put into place after a whistleblower has publicly exposed an instance of misconduct, as a means of damage control. A few illustrative examples of the "smokescreen syndrome" follow.

Gag the Employees

The most direct way to silence potential whistleblowers is to gag employees, through repressive nondisclosure agreements or by excessively designating information "classified." More subtly, agencies routinely order staff not to respond directly to Congress or the media, but rather to refer all inquiries to a central office in-house. As of early 1997, the Justice Department had a policy that barred environmental staff from speaking with their personal lawyers about information they may want to disclose under the Whistleblower Protection Act. Because they institutionalize prior restraint of speech, these systemic "gag orders" generally have not been upheld when formally challenged in court on First Amendment grounds.

Private employers have their own variation of this tactic—gag orders built into company manuals or employment contracts, followed by civil suits for breaching the contracts or stealing proprietary information. At the Knolls Atomic Plant near Schenectady, New York, workers were threatened with a $100,000 fine, termination, and life imprisonment if they so much as commented on operations at the facility. The gag order was issued site-wide following a visit by GAP attorneys who spoke to workers about radiation leaks.

Case law is mixed on whether private-sector workers who want to blow the whistle are liable for violating gag orders in employment contracts or company manuals. You will need to do your homework to determine whether any disclosure restrictions apply to you and in what context. If the restrictions are relevant, be sure to consult a lawyer before blowing the whistle.

Institutionalize Conflict-of-Interest

Institutions accused of wrongdoing routinely handle investigations into their own misconduct. In many whistleblower cases, this is the equivalent of appointing the fox to investigate theft in the henhouse.

In one sense, it is only fair (and more efficient) to allow organizations a chance to resolve allegations and straighten out internal problems. That is the point of internal checks and balances; organizations should be willing and able to "clean their own houses." But when confirmation of misconduct could create liability or threaten government funding, or when individual organizational leaders are the direct cause of misconduct, this approach inevitably places in-house investigations in a conflict of interest.

During construction of commercial nuclear power plants, the Nuclear Regulatory Commission regularly referred charges from corporate whistleblowers back to the licensee accused of violating safety laws, sometimes identifying the whistleblower in the process. The agency explained that it could not investigate the charges independently due to scarce resources. As a rule, the

Commission then accepted at face value the plant's denials as the final word of the U.S. government on the allegations.

The Forest Service has honed this technique into a fine art. The agency's "whistleblower desk" regularly refers allegations requiring investigation to the same agency officials who would be held responsible for any misconduct. Not surprisingly, these officials rarely find misconduct in their investigations.

The frustrations of a Forest Service criminal investigator illustrate how conflict of interest can kill a significant investigation. A member of the agency's former timber theft strike force, the investigator learned of unprecedented levels of timber theft in the Alaska wilderness. He also discovered that a top manager from his own agency appeared to have played a leading role in covering up the crimes. As the investigator was about to schedule the showdown interview, the Forest Service assigned the suspect as his supervisor. The interview never occurred. The suspect/supervisor not only publicly attacked the investigator's competence and repeatedly canceled investigative trips, but also shattered the case's confidentiality by demanding that he give prior briefings to local Forest Service officials on everything he did. The case has gone nowhere.

Separate Expertise from Authority

The goal of this tactic is to ensure that organizational loyalists make all important decisions, even technical judgment calls, with only a limited advisory role for the experts. As a result of this gambit, Morton Thiokol's engineers were overruled by managers determined to make the disastrous Challenger launch—even though all of the company's practicing engineers opposed the launch. Some managers admonished the engineers to take off their "engineering caps" and put on their "management caps."

One variation on this tactic is to use a rigged version of "the democratic process" to control information and outcomes. Other experts—selected because they are loyalists—are called in to "outvote" the whistleblower, effectively overruling the scientific method. A more subtle version of this technique is to misuse the peer review process, either as a discrediting tactic by packing the

panel with a particular bias, or as a stalling tactic by instituting duplicative or unnecessary reviews.

One example involved the dissent of Nuclear Regulatory Commission engineer Isa Yin, who investigated and confirmed a whistleblower's charges that the seismic design review at the Diablo Canyon plant had been manipulated. When Yin's investigation threatened to block approval of the plant's license, the NRC appointed a team of 50 engineers to take over and complete the work and to engage in peer review of his findings. At the final licensing vote they disagreed as a bloc with Yin, who found himself arguing the facts in isolation and protesting that he had been denied access to the necessary data. The appeals court stayed the license for five months, in part due to lingering concerns about the handling of Yin's dissent.

Keep Them Ignorant

This tactic is an extreme use of the national security-type "need to know" rule—sometimes legitimate but more often used to hide the truth. The idea is to keep employees too ignorant to threaten the organization. There is often an overlap between this tactic and various reprisal tactics, such as isolation: employers may seek not only to punish whistleblowers, but also to make it impossible for them to gain access to information and evidence.

One technique is to stop employees from gathering evidence of wrongdoing by strangling them in red tape. Managers may pull out technicalities and obscure subsections of procedures to paralyze efforts to gather and disclose information. When a corrupt manager took over the Forest Service's timber theft investigative unit, he ordered particular investigators to stop using several standard investigative techniques, such as driving unmarked cars, appearing out of uniform, or talking with sensitive confidential witnesses. His excuse was that they did not rank high enough in the chain of command. That bureaucratic technicality had not stopped the U.S. Attorney's Office from relying on these investigators for years.

Strategies for removing whistleblowers from information and evidence can also be linked with reprisal tactics such as isolation

and internal reorganization. USDA meat inspector William Lehman faced repeated attempts to transfer him from his lonely border inspection station in Sweetgrass, Montana, where he exposed and sent back millions of pounds of contaminated meat yearly that foreign producers have attempted to export to U.S. consumers. In 1997 Lehman retired rather than choose between transfer and termination. Managers at the Diablo Canyon nuclear plant also used transfers to enforce ignorance. Charles Stokes was the engineer who blew the whistle on falsification of results in the plant's seismic design review. When he and other dissenters were transferred away, the company brought in replacements who were both unfamiliar with the job history—and savvy enough to realize that they should not ask questions about unrealistic assumptions behind key calculations.

"Suffering through whistleblower retaliation teaches you a lot about your own strengths and weaknesses, about what really matters in life, about who your friends are, and about what human beings are capable of doing to each other in even the most civilized of settings. It is a life-altering experience."
—Justice Department whistleblower

On occasion, employers isolate whistleblowers from the evidence through a longstanding labor-management technique: lock them out. The National Institutes of Health took this approach with Walter Stewart and Ned Feder, popularly known as the "fraudbusters" because of their persistence in acting on concerns raised by those challenging fraud in scientific research. In their official capacity at NIH, they became a magnet for scientific whistleblowers and eventually compiled evidence on some 100 cases involving alleged fraud in taxpayer-supported medical research on issues such as AIDS, cancer, and Alzheimer's Disease. After shutting down their laboratory on a pretext, NIH imposed a gag on the two scientists, literally locked them out of their lab, and stationed a guard at the door. In 1995 NIH moved the records for these cases of alleged fraud to a warehouse, also under lock and key, where they continue to gather dust. In their new positions, Stewart and Feder were banned from continuing the watchdog duties that previously had official approval.

Depriving scientists of access to their own research is a common tactic for enforcing ignorance in that profession. When Dr. Mary Ann Marrazzi developed a bulimia and anorexia nervosa treatment that was more effective in 18 of 19 patients than standard treatment, a senior scientist who lacked subject matter expertise took over a branch of her research, damaging Dr. Marrazzi's credibility. When Dr. Marrazzi challenged the move, she was denied access to her laboratory and records by her university employer. The study, meanwhile, stalled.

Similarly, revoking an employee's security clearance is both a tactic of retaliation and a technique for imposing ignorance on some three million workers whose jobs depend on clearances for access to information. In addition to being forced to undergo a psychiatric examination, Department of Energy scientist Marlene Flor had her security clearance suspended to neutralize her whistleblowing. Without her clearance she no longer had access to evidence needed to prove her charges.

Prevent the development of a written record

When a policy is indefensible, the goal is to restrict debate to an oral dialogue. This can be enforced through peer pressure, overscheduling to ensure that there is not time to construct a written record, or even a gag order if necessary. Managers recognize that it is difficult to be accused of revising an oral history, and verbal agreements diffuse accountability in the event of a serious problem.

Along with other tactics, this technique was used in the Diablo Canyon case. In 1985 the NRC's internal affairs unit, the Office of Inspector and Auditor (OIA), reexamined the peer review process that had overruled NRC engineer Isa Yin and Diablo Canyon whistleblowers about key design questions on which the plant's license was legally conditioned. Thorough documentation

and an adequate record had not been compiled, however. In its report OIA concluded that due to a lack of available supporting information, it was "unable to assess the validity of [peer review] conclusions" on key issues. More generally, OIA reported that it "did not find sufficient documentation to demonstrate that [the NRC staff] had verified the quality of the design control program, either in a direct inspection or in licensing review." In other words, the safety of the plant was (and remains) unknown.

Rewrite the issues

One of the more subtle bureaucratic gambits is to trivialize, grossly exaggerate or otherwise distort the whistleblower's allegations—and then discredit the employee by rejecting the validity of the resulting "red herring." The government's Office of the Special Counsel and Offices of Inspector General have fine-tuned this technique. In some cases, those investigative bodies will exaggerate charges until they are no longer credible. A whistleblower charging that his or her superiors overlooked problems on the job, for example, will find his or her claims exaggerated into allegations of willful misconduct. The government then finds that, although mistakes were made, the employer committed no intentional violations. The charges are dismissed, the whistleblower is discredited and the targets of the investigation promptly issue public statements that they are pleased to be exonerated.

Rewriting the record can degenerate into outright censorship. This may involve deleting evidence and/or issues that are too hot to handle—and therefore simply vanish from the ensuing report of investigation. In other cases, the findings are "massaged" through edits that ensure that they will not be interpreted as significant.

An investigative report—even one diluted by rewritten allegations, censorship and neutered recommendations—can still be damaging to wrongdoers. As a result, a related bureaucratic technique is to issue a press release declaring that the investigation had concluded that there was no wrongdoing—but then refuse to release the report containing the record of the investigation. The

Office of Research Integrity at the Department of Health and Human Services, for example, has a formal policy of not releasing reports on its investigative targets when it finds no wrongdoing, unless the subject of the investigation consents.

Study it to death

A related tactic is to launch an investigation that never ends, leaving the allegations of wrongdoing unresolved. Since 1988, now-retired Nuclear Regulatory Commission whistleblower Larry King has been attempting to ensure corrective action on nuclear safety violations that he argues could literally blow the containment lid off a nuclear plant in the event of an accident. Although his agency agreed the rules were broken, it first ordered multi-year engineering reviews to see if the engineering standards could be safely changed after the fact. After concluding that the rules were valid, the Commission asked for the utility-owner's side of the story. The utility's lawyers have been arguing the point for years, a profitable debate they would like to continue indefinitely—and one that is also less expensive for the plant owner than actually fixing the problems.

Scapegoat the small fry

Just as bureaucracies may trivialize allegations of wrongdoing by rewriting them, they may lower the scandal volume by shielding agency leadership from accountability. The reports of the Office of Research Integrity (ORI) at Health and Human Services, for example, rarely claim credit for successful scientific fraud prosecutions against department heads or laboratory chiefs at universities and biomedical research facilities. The ORI more frequently targets graduate students, laboratory technicians and an occasional assistant professor—those who do not have a support constituency or who were only following orders from higher-ups.

In 1983 the Office of Special Counsel (OSC) learned of multi-million dollar procurement misspending. Evidence raised questions about whether the Secretary of Defense participated in or

knew of alleged retaliation against the whistleblower, an auditor who had uncovered the scam. The OSC chose to prosecute a mid-level official and keep the cabinet official out of the case. In the end, the mid-level official escaped accountability after a court ruled that he had been following orders, not making reprisal decisions.

CHAPTER THREE

Where and How to Blow the Whistle

Once you have weighed the risks and rewards and decided to blow the whistle, you are faced with another dilemma: Where should you take your story? To government officials? The media? What avenue is most likely to expose and correct the wrongdoing you have revealed? Which is best able to protect your interests and concerns?

Whistleblowing outlets range from agency hotlines to independent oversight offices to Congress to non-profit organizations. These outlets are not equal. Some provide greater confidentiality than others. Some are well-positioned to expose wrongdoing; others tend to discourage dissent. Still others are known for taking action against whistleblowers. You should be aware of the advantages and disadvantages of each alternative before you choose. We will explain how each whistleblowing outlet is supposed to work and then describe, through past examples, how it actually functions.

Because every whistleblowing situation is unique, it is important to study each outlet to determine your best option. On balance, GAP's experience suggests that non-profit groups, the media, and false claims suits are the most effective channels for

exposing and addressing wrongdoing, given the current state of the federal bureaucracy and today's political climate. Bear in mind that even if you launch your challenge through nongovernmental avenues, it is generally necessary to find some sponsor from within a formal government institution. For example, a False Claims Act lawsuit can become too expensive for a whistleblower to pursue if the Justice Department does not adopt the case. Similarly, a congressional ally can be an invaluable partner for a whistleblower seeking to expose misconduct through the media or a non-profit group.

Perhaps most significant is knowing where *not* to blow the whistle. Trusting the wrong audience can seal your professional fate, trigger a cover-up of the wrongdoing you seek to expose—or both. The list of whistleblowing outlets below starts with institutions that often have proven to be a threat rather than a resource for whistleblowers.

OFFICIAL CHANNELS

Federal Hotlines

In 1979, the Secretary of Defense established the Department of Defense hotline as an avenue for the Inspector General's office to learn of potential wrongdoing or mismanagement. Today nearly all federal agencies and departments have hotlines, and the Army, Navy and Air Force each have an individual hotline. In an effort to institutionalize the process of reporting misconduct, the President's Council on Integrity and Efficiency (PCIE) recommended standards for receiving, controlling and screening allegations for each federal agency. These standards direct that:

- a simple, well-publicized system be developed for agency employees and other interested persons to submit allegations of fraud, waste, abuse and mismanagement while preserving anonymity when possible and if desired;

- a retrievable record be maintained of each allegation received;

- each allegation be screened as soon as possible, based upon the nature, content, and credibility of the complaint, and an appropriate decision be made—based in part on existing resources and priorities—on whether to refer the complaint for further inquiry on each allegation; and

- the rationale for the decision on each allegation be documented in the record.

With these standards as guidelines, hotlines are supposed to operate according to a common procedure. An employee can call the toll-free hotline and report an allegation of fraud, waste or mismanagement. The allegation is reviewed to determine if follow-up is necessary. If it deserves further review, it is sent to an investigator who researches the allegation in the field. If the investigation verifies the charge, corrective action is taken and the case is closed.

In theory, the process sounds straightforward and simple. In practice, it is anything but clear-cut; there are far too many gray areas and breakdowns in federal hotline investigations. The essential measure of the effectiveness of hotlines as a whistleblowing mechanism is their track record in producing results. It is abysmal. Even the best hotlines, such as those run by the General Accounting Office or the Department of Defense, investigate less than 20 percent or fewer cases within a year of the complaint, and substantiate or purport to take any corrective action on less than 10 percent. Hotlines provide an opportunity to make sure the system has received a warning about wrongdoing. But for those whistleblowers who seek to make a difference while avoiding retaliation, hotlines are in most cases worthless at best.

One important reason for the shortcomings and breakdowns in hotline systems is structural: investigations into alleged misconduct are compromised, intentionally or unintentionally, by conflicts of interest when an institution investigates itself. The problems are numerous.

Standardization of hotline procedures has not been achieved. In a report by the President's Council on Integrity and Efficiency

(PCIE), DOD received top billing as the best-run hotline, but the PCIE found faults even with DOD's system, and admitted that many of the others do not meet operational standards. In an effort to improve and encourage the uniform handling of hotline calls, the PCIE set up training courses available to federal, military and private industry hotline operators.

Two areas of concern addressed in the PCIE training courses are confidentiality and case follow-up. Confidentiality issues are inherent in the hotline system. Anonymity is a presumed goal of any employee choosing to blow the whistle through a hotline. But how does a whistleblower provide sufficient information to support his or her allegations without giving away details that identify him or her within the agency? The balance is hard to strike, often leading to one of two problems: the information received is either too vague to produce an investigation, or is traced back to the only person who could possess that information.

At some hotlines, the principle of confidentiality is treated with outright disdain. In one case, a whistleblowing scientist at a U.S. nuclear facility was terminated after he contacted the Inspector General hotline with evidence of wrongdoing. The Inspector General there had sent his "confidential" information straight to the whistleblower's supervisor.

A spokesperson for the DOD Inspector General hotline (who asked not to be identified) believes many military hotline operators are more interested in discovering who the caller is than in determining whether the allegation is true. In an atmosphere in which discipline, conformity, and unquestioning obedience to orders are prized above all else, it should come as no surprise that a whistleblower could be regarded as a traitor.

Randy Taylor, the Chief of Military Police at the Naval Air Station Bermuda, made his first mistake in challenging sexual coercion and massive spending abuses at the base by contacting the Navy Waste, Fraud and Abuse Hotline with another officer, Tom Coggins. Although the hotline is supposedly confidential, word quickly got back to his superiors, and he began to receive veiled threats of retaliation.

Or take the case of John Kartak. After 19 years in the Army, he was assigned to a recruiting station in Minneapolis. There he found that unqualified applicants were recruited to meet quotas. High school diplomas were forged and criminal records were concealed to permit the enlistment of marginal recruits. Kartak refused to cooperate in this misconduct, and called the Army hotline to blow the whistle. Kartak's "reward" was repeated harassment. His supervisors ordered him to submit to two psychological evaluations and eventually to involuntary commitment. One of his superiors told the Department of Veterans Affairs hospital, "He has lodged numerous complaints recently. . . . I find his behavior highly unstable. I am concerned that he may do something to harm himself or others." Kartak was also ostracized, threatened, and intimidated by his co-workers.

"Hotlines that supposedly guarantee anonymity can turn out to be direct channels to the reprisors themselves. If you're going to blow the whistle, figure out how to get an investigation of the wrongdoers without becoming the one investigated."
—Justice Department whistleblower

Kartak was vindicated when at least 58 people in the Minnesota recruiting office were found guilty of illegal acts ranging from forgery to drug-dealing. But the price of Kartak's vindication was high—and the abuse of the hotline system's confidentiality was evident.

Case follow-up is another area the President's Council on Integrity and Efficiency emphasizes in its training courses. The PCIE would like all agencies to adopt the procedure used by the DOD and General Accounting Office (GAO) hotlines. Those hotlines assign all callers case numbers so that they can call back later to find out what action was taken on their allegations. This system maintains the anonymity of the whistleblower while permitting him or her to follow up. The details of the case are not disclosed to the caller, but s/he is told whether the case was closed and whether the allegation was substantiated.

For a full report of a closed case the whistleblower must file a request under the Freedom of Information Act (FOIA). The problem is that this process can jeopardize his or her anonymity: in order to file a FOIA request, the whistleblower must identify him or herself. The requestor's name will be sent to the Inspector General investigating the report and can make its way back to the very people responsible for the wrongdoing. This kind of "Catch-22" can lead to serious reprisals.

Nancy Kusen discovered how the FOIA "Catch-22" works. Kusen was a contract administrator for the Defense Contract Administration Service (DCAS) who raised concerns about overcharging and alleged shoddy work by a Navy contractor. She complained first to her superiors, and when no action followed, she called the DOD hotline. The call led to an investigation by the Defense Criminal Investigative Service, which substantiated many of the complaints but found no criminality. At the same time, Kusen became the target of reprisals ranging from lowered performance evaluations to denials of promotion and repeated harassment.

Kusen filed a FOIA request to learn the status of her case. Records show that her request was referred to the Defense Contract Audit Agency (DCAA), which, in turn, asked the contractor's parent company if it objected to the release of the audits. The DCAA included a copy of Kusen's FOIA request containing her name, address and home phone number. According to the DCAA it is "routine practice" to include the FOIA request.

The FOIA request that disclosed Kusen's name to the contractor's parent company provided positive identification that she was the whistleblower, enabling them to single her out for harassment. In Kusen's case, the harassment had begun shortly after her initial call to the DOD hotline, convincing her that the hotline revealed her identity to DCAA and triggered the chain of disclosure. Her experience with the FOIA request serves as a warning to other whistleblowers.

Kusen's case contributed to the caveat now offered by the Inspector General's office to FOIA requestors: "Your confidential

status as a hotline caller does not apply to requests under the Freedom of Information Act." Without filing a FOIA request, however, you cannot determine whether the government investigated your charges in a thorough manner. Whistleblowers can try to avoid this structural "Catch 22" by having a trustworthy third party, such as a non-profit group or reporter, make the FOIA request.

Other problems with hotlines were noted in a General Accounting Office report on the DOD hotline. The DOD has taken some steps to address these concerns. It is likely, however, that these problems plague many hotlines. According to the GAO, four problems pose recurring concerns: 1) investigator objectivity, 2) insufficient documentation on case files, 3) incomplete investigative reports that do not comply with DOD reporting requirements, and 4) limited action on planned follow-up to solve identified problems.

In an effort to correct the problems identified in the GAO report, the DOD has started a Quality Assurance Review. The review checks the files of DOD field investigations to ensure that the summary report matches the investigative report. DOD also claims that it is more carefully reviewing cases it refers to its own agencies, the military services. This is important, because whether it is done advertently or inadvertently, the hotline system can pass information back to the relevant agency—which can send it right back to the program manager who may be involved in the fraudulent or wasteful activity. This can lead not only to reprisals against the whistleblower, but to a cover-up of the wrongdoing. In other words, the system structurally is vulnerable to serving as an early warning device for those with a motive to conceal the alleged misconduct.

The record on government hotlines speaks for itself. The odds of reporting fraud, waste, or mismanagement to a hotline and ensuring that it is investigated and corrected are small. Hotlines may be a vehicle for those who seek a clear conscience for putting the system on notice of significant wrongdoing. They are not a safe, reliable channel for whistleblowers who want to make a difference.

Corporate Voluntary Disclosure Programs

Corporate voluntary disclosure programs are the private-sector equivalent of government hotlines. These programs operate as part of corporations' internal systems of oversight and enforcement, often through in-house "ethics" offices for disclosures by company employees.

Corporate voluntary disclosure programs became popular during the 1970s as a way for the Securities and Exchange Commission to address illegal, shareholder-financed political contributions or bribes at home and abroad. In the 1980s they became common as an alternative to direct government investigations of whistleblower charges in the nuclear power and defense industries. They are a major element of corporate compliance programs, which are reviewed as part of the sentencing guidelines for legal violations by corporations. These voluntary disclosure mechanisms permit companies to act on their duty to identify, disclose and correct violations of institutional responsibilities. But they have proven no more reliable than the good faith a corporation brings to the process.

Structurally, corporate voluntary disclosure programs are vulnerable to the now-familiar conflict of interest inherent when an institution is responsible for disclosing its own misconduct. To illustrate, the investigations often are conducted by attorneys whose professional duty is to the client corporation—rather than to the public. The same attorney who interviews whistleblowers and serves as a liaison between the corporation and the government during a voluntary disclosure may later act as counsel for the defense in the event of enforcement action.

As a result, voluntary disclosure programs have failed to serve as an effective substitute for external oversight, and too often serve as a shield for liability. Summarized below are lessons learned from a review of "whistleblower" cases from corporate hotlines and voluntary disclosure programs since 1979. Programs have been:

- incomplete in scope because institutions set the boundaries for investigations, which at times have been limited to exploring the "tip" of the misconduct and screening out the "iceberg."

- incomplete in findings of fact after the investigation, because companies have elected not to disclose the most significant instances of fraud or abuse.

- inadequate substitutes for government fact-finding, because regulatory agencies have abdicated all but a monitoring role, and are further limited to the boundaries for relevance defined by the firms.

- inadequate even for government oversight, because firms can and do rely on program procedures and the attorney-client privilege to withhold key records in corporate investigative files from government auditors.

- vehicles to delay formal proceedings while a company's self-investigation proceeds—taking 2.8 years on average and over ten years in many of the cases surveyed, according to a 1996 General Accounting Office study. This delay also creates a window of vulnerability for evidence uncovered by potential defendants in the interim that might later be threatening if included in a public record for law enforcement proceedings.

- vehicles for advance discovery for any future litigation, which at worst creates opportunities to intimidate or influence witness testimony, and at best provides early knowledge of—and a corresponding opportunity to rebut—significant, threatening testimony.

- vehicles to lock in secrecy of corporate wrongdoing: unlike the 1970s Securities and Exchange Commission program, investigative files are not available for public scrutiny after the fact under the Freedom of Information Act—or even, as in the case of mismanagement on the Alyeska oil pipeline, disclosable in the legal discovery process. The trend in some state legislatures of passing "environmental audit privilege" laws

is a way of institutionalizing corporate barriers against the public's right to know.

- vehicles to divert the government from more direct investigation of cases in which it has not waived its normal enforcement authority and access to evidence, because oversight of voluntary disclosures has been institutionalized as the highest priority at Offices of Inspectors General.

- openly advocated in industry speeches as a way to avoid harsher government enforcement action (attractive only if a firm fears it will be caught anyway)—despite official disclaimers that the program's purpose is good corporate citizenship.

In short, these programs can be useful structures for a company that wants to do the right thing. But for those that don't, they offer an easy way to cover up misconduct. They are no substitute for independent accountability.

Incentive-Suggestion and Other Cash Awards Programs

After embarrassing disclosures of spare-parts costs several years ago, the DOD and its armed services claimed to be serious about establishing suggestion programs to save money. They began to reward individuals for suggesting ways to reduce spare-parts overpricing. The Navy reports that such calls to its pricing hotline have saved millions of dollars. These claims of success, however, should be placed in perspective: the Navy annually spends *billions* on spare parts.

The Service Suggestion Programs generally follow a simple structure. Personnel may submit a suggestion in writing to the Price Monitor/Installation Resource Management Office at the base. After preliminary review, the suggestion is sent out for investigation. If the suggestion is adopted, the caller receives a percentage of the savings ranging from $5-25,000. Any award of $25,000 must be approved by the President.

The design of the programs eliminates anonymity, which means the caller may be subjected to harassment from superiors who prefer the status quo. Again, the problem is systemic. Official policies and regulations guiding the procurement of such parts often are designed to maximize spending. The reason is political: agency higher-ups must make sure that the budget is spent every year in order to justify more money the following year for the bureaucracy.

Airman Thom Jonsson found out the hard way that the Air Force preferred the status quo to his suggestions for saving money. Jonsson was working for the maintenance and supply section of the C-5A cargo planes at Travis Air Force Base in California. In the course of his duties he discovered that many spare parts were purchased at extraordinary prices, including the now infamous $7622 coffee brewer. Another example was a $670 armrest pad, which Jonsson determined could be manufactured on base for $25 with no rearrangement of machinery or personnel.

In January 1984, Jonsson submitted his money-saving proposal to his base's Zero Overpricing Program representative. In April, Jonsson received notice that his proposal was "not in the best interest of the Air Force." He resubmitted his suggestion and waited for a response. By August 1985 he had heard nothing and decided to contact the Project on Military Procurement (now the Project on Government Oversight, or POGO), a non-profit watchdog agency. After POGO staff evaluated his claims and discussed Jonsson's goals with him, his allegations were brought to Senator Charles Grassley (R-IA), chair of the Senate Judiciary Subcommittee on Administrative Practices and Procedures. The subcommittee asked Jonsson to come to Washington and testify at hearings. Jonsson went to the Capitol on his own time and testified in civilian attire about the excesses he had witnessed on the C-5A spare parts. The hearings generated substantial publicity, which helped discourage retaliation from the Air Force. Eventually, Jonsson was granted a cash award for his suggestion.

A year later Senator Grassley asked Jonsson if the prices of the spare parts, including the armrest, had gone down. Jonsson reported that they had barely changed. When a press conference was scheduled to expose this information, the Air Force began to

harass Jonsson. He was denied routine leave, assigned a "babysitter" to make sure that he "didn't get into trouble" and subjected to an attempted arrest on the ironic charge of illegal destruction and disposal of spare parts. Several members of Congress protested loudly, with Senator Grassley, Representative John Dingell (D-MI) and then-Representative Barbara Boxer (D-CA) stepping in to protect Jonsson from harassment. His case serves as an important warning of the risks posed by incentive-suggestion programs to would-be whistleblowers, most of whom cannot expect a squadron of legislators to defend them.

The DOD Inspector General Cash Award program is different from the incentive-suggestion programs in several ways. Rather than systematically providing cash awards to anyone who suggests a viable way to reduce costs, the Inspector General Cash Award program is designed to give rewards to selected individuals who draw recognition because their disclosures save money. The weaknesses of the program are similar to others described here, however, and the program is by no means risk-free.

One would like to think that after you had been publicly recognized and honored for saving the government money, your superiors would not have the motivation or the nerve to harass you. But after your moment of glory has faded and you revert back to your regular employee status, you may be left facing the very officials you accused of wrongdoing. Indeed, your vindication may make it harder for them to forgive and forget.

More striking than the program's potential abuse, however, is its record of irrelevance. In the program's first six years, 38 people received $46,000 in cash awards for saving over $36 million. To put these results in perspective, keep in mind that during the same time period (fiscal 1984-1990), overall Pentagon spending levels approached two trillion dollars.

Inspectors General

The primary conventional channel for investigation of employee concerns is the Office of Inspector General (IG). Each agency has one, either by that name or another. These offices are

responsible for investigating and reporting on alleged misconduct by the agency or its employees. The IGs at most major agencies—a total of 62 as of mid-1995—are covered by the Inspector General Act of 1978 and subsequent amendments.

Employees who are considering disclosures to an IG should first determine whether their agency's Inspector General is statutory or non-statutory. Structurally, the distinction is quite significant. Statutory IGs can be nominated and dismissed only by the President. Non-statutory IGs are hired and fired by the agency chief—whose programs they are investigating. Agency heads can comment on but not change the text of reports submitted by statutory IGs. By contrast, agency chiefs have editorial censorship rights over reports by non-statutory IGs. Statutory IGs have the authority to investigate agency reprisals against their witnesses. Non-statutory IGs can investigate only what the agency chief permits.

For potential whistleblowers, the implications are clear: the risk of retaliation is far greater if your agency has a nonstatutory IG. Consider the work of the Department of Justice's Office of Professional Responsibility, which for years served as the non-statutory equivalent of an IG (a vacuum which has since been filled). Up to ten percent of the office's referrals each year were to investigate and identify for possible criminal prosecution the source of "leaks"—usually anonymous whistleblowing disclosures.

Whistleblowers should also keep in mind that Offices of Inspector General are in many cases mini-bureaucracies, and can be vehicles for the full range of bureaucratic waste, fraud and abuse. The Department of Labor Office of Inspector General, for example, has over 500 employees and a budget of more than $70 million. The office has been mired in controversy over cover-ups, whistleblower reprisals, and questionable travel expenditures. Similarly, Congress and the press have found evidence of repeated wasteful spending by the Inspector General for the Environmental Protection Agency.

Most importantly, IGs at best have a mixed track record of responding to whistleblowers. Even offices with statutory inde-

pendence may be led predominantly by employees grounded in the "old school" traditions, from a time in which the Inspector General served as management's eyes and ears. That meant that when the agency chief wanted to get the facts and act against wrongdoing, the IG performed as a law enforcement agency. But when the agency leader wanted to cover up a problem, the IG performed a damage-control operation, issuing a report that assembled the case for the defense.

That tradition continues, and structural incentives sustain it. Even statutory IGs receive their performance appraisals and merit bonuses from the department chiefs whose operations they are charged with keeping honest. Whistleblowers from the EPA's IG repeatedly have exposed their office as a damage-control operation that shredded evidence of misconduct involving government contracts. NASA's Inspector General retired under fire; he was under investigation for allegedly leaking evidence to targets of an open investigation, including NASA personnel. NASA's Administrator arranged for the Inspector General to keep his $120,000 annual salary during the next year, while he served as a management consultant to a local community college. The GAO later found that the Inspector General's actions "constitute a failure to exercise due professional care and could be viewed as an impairment of his office's execution of investigations."

"If you go to the Inspector General, expect your boss to know about it by the time you get back to work."
—Environmental Protection Agency whistleblower

An IG's genuine independence from the agency it oversees is necessary but not sufficient to ensure accountability. No satisfactory answer yet exists to the question, who watches the watchdog? The potential for conflicts of interest is great. And the conflicts can get personal: a 1992 Senate Government Affairs Committee report found that the National Archives and Records Administration (NARA) IG failed to recuse himself from investigations involving his own alleged misconduct in his prior job as a

NARA procurement official. After reviewing the IG's overall record, the committee found that "[h]is conduct raises questions about his own compliance with agency standards of conduct and code of ethics which an Inspector General is required to oversee as the 'agency watchdog.'"

A 1993 GAO report pointed out repeated instances of statutory IGs routinely returning cases for investigation to the agency charged with alleged misconduct. A July 1990 review by the staff of the Senate Governmental Affairs Subcommittee on General Services, Federalism and the District of Columbia found a pattern of IG wrongdoing that included: 1) IGs personally implicated in corrupt acts; 2) wrongful disclosure of confidential identities and sharing of confidential information with agency personnel; 3) improper destruction of evidence; 4) initiation of phony investigations of whistleblowers and intimidation of witnesses; 5) whitewashing of final reports by distorting or ignoring both fact and law; 6) improperly-conducted investigations through failure to follow up on relevant evidence and witnesses, or to question witnesses in confidence; and 7) refusal to investigate strong cases.

The most serious misconduct occurs when an IG wittingly or unwittingly serves as a hatchetman against whistleblowers. In GAP's experience, it has not been uncommon for an IG's office to implement one of the prime tactics of retaliation—directing the spotlight at the whistleblower rather than at his or her allegations of wrongdoing. In a disturbing number of government agencies, IGs have a history of failing to pursue the evidence of misconduct gathered by whistleblowers and instead searching for information to discredit and retaliate against them. In fact, GAP has represented whistleblowers from Offices of Inspectors General who suffered retaliation for refusing to participate in hatchet-jobs or cover-ups.

Gordon Hamel, who blew the whistle on misconduct at the President's Commission on Executive Exchange, learned the retaliatory power of IGs the hard way. After an Office of Personnel Management (OPM) probe confirmed the substance of Hamel's allegations, the OPM's IG opened a case and eventually wrote a

report that rebutted the allegations—and provided grounds to fire Hamel. The OPM Inspector General and an IG investigator stated in sworn congressional testimony that they were unaware of the agency's attempts to terminate him. Four months earlier, however, that very investigator had authored a memo—received by the IG—indicating that the White House was waiting to fire Hamel "at the earliest possible time after our report is issued."

Many IGs have long histories of targeting whistleblowers. The Department of Energy Office of Inspector General is a case in point. Repeatedly, those who make disclosures of wrongdoing to the DOE IG's office have found themselves on the receiving end of an investigation. Often the whistleblower's confidentiality is breached by the DOE IG, resulting in the employee's termination.

At the Hanford Nuclear Reservation, the DOE IG was assigned to investigate whistleblower Ed Bricker's allegations of harassment for his numerous public disclosures of safety and health violations. Instead of investigating Bricker's claims, the DOE IG teamed up with Bricker's employer, the Westinghouse Hanford Company, to make Bricker himself the target of the investigation. GAP attorneys uncovered memoranda to the file indicating an agreement between Westinghouse and the DOE IG—made well before the investigation had started—that they would not find any merit to Bricker's claims. Furthermore, it was later revealed that the DOE IG attempted to persuade a personal friend of Bricker's to wear a hidden-body microphone in an attempt to gain incriminating information on Bricker. Plans to proceed with the wiring were eventually put to a stop by the U.S. Attorney's office.

The DOE IG's performance at Hanford was not an aberration. One of the more harrowing stories involves a whistleblower at the Knolls Atomic Power Laboratory, a DOE site in New York. There, the IG investigated allegations of wrongdoing in the operation of several nuclear reactors near populated areas. The IG agents took numerous statements from workers at the plant. The interview statements were allegedly altered, according to a confidential IG source, to remove any favorable or supportive evidence

of the whistleblower's allegations. These altered statements were then used to support a well-publicized finding against the whistleblower. When the whistleblower filed a Freedom of Information Act request for all of his files, the records were allegedly shredded to hide the fact of the illegal alterations. At the same plant, a health physicist contacted the DOE IG and was terminated immediately by his supervisor, who took him to task for daring to contact the IG. The IG did nothing to investigate or protect the scientist.

To some extent these traditions are changing. Further, it is unfair to generalize. Nearly every Office of Inspector General justifiably can take pride in winning numerous tough cases. The U.S. Department of Agriculture IG provides one example of an IG office that has produced promising, if mixed, results for whistleblowers. In 1994, the USDA's Office of Inspector General conducted a hard-hitting investigation into misconduct that ultimately forced the Secretary of Agriculture's resignation and sparked appointment of an independent counsel. The USDA IG also has conducted numerous audits exposing the inadequacy of the Forest Service's timber theft and law enforcement programs. Such positive developments, however, should not unduly raise whistleblowers' expectations. Even at USDA, the track record is spotty. Forest Service whistleblowers at USDA have complained of brush-offs from the IG's office, unless there is some powerful political or media constituency to make their concerns a priority. Even hard-hitting USDA IG reports often have a limited impact on agency operations: the Forest Service has a long-established pattern of paying lip service to IG recommendations but making no fundamental changes.

On balance, whistleblowers are well-advised to seek expert advice or retain an attorney—even if only for coaching purposes—before going to an Inspector General. You should clarify precisely how the IG will conduct the investigation before sharing your concerns and evidence. At least until there is a solid track record to establish trust, you should politely insist that all agreements, plans, and schedules be pinned down and confirmed in

writing—rather than agreeing to handle matters informally or relying on what appears to be a common understanding to guide the office's subsequent actions. Above all, you must be permitted to review your statements and any summary of your allegations to ensure their accuracy and completeness. Finally, as we discuss in the next section, under some circumstances it may be wise to approach the IG armed with the extra credibility of a "substantial likelihood" finding and order to investigate from the Office of Special Counsel.

Office of Special Counsel (OSC)

The Civil Service Reform Act of 1978 created a formal whistleblowing disclosure channel through the Office of Special Counsel. This responsibility exists independent of and parallel to a separate duty by that Office to defend federal employees against personnel practices that violate the merit system.

The Special Counsel has 15 days to screen whistleblowing disclosures from federal employees, applicants or former employees before deciding whether to order agency chiefs to investigate those challenges that have merit. The Special Counsel may refer for agency investigation any disclosure that reflects a "reasonable belief" of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. If the OSC judges that the disclosure satisfies only this minimum standard, then the agency chief can respond however s/he chooses.

If, however, the OSC determines there is a "substantial likelihood" that the whistleblower's charges are accurate, a more intensive reform process is triggered. The OSC must refer the charges, and the agency head has 60 days to investigate and reply. The Special Counsel can, and generally does, grant time extensions to this deadline. The agency must reply through issuing a report whose contents are specified by statute, including the issues and evidence that were investigated, the methodology for the probe, a summary of the evidence obtained, findings of fact and law, and a summary of corrective action to solve any

verified problems.

The whistleblower has a right to submit comments, after which the Special Counsel evaluates the report to determine whether it is complete and reasonable. Congress has instructed that the Special Counsel should not approve a report unless it has satisfied those criteria under a "clear and convincing evidence" standard. Then the report is sent to the President and Congress, along with the employee's comments. The Special Counsel must maintain a copy of each report and comments in a public file. Researchers, reporters, investigators and members of the public can review the resolution.

The purpose of the OSC whistleblowing disclosure channel is "to encourage employees to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction." Indeed, if administered in good faith, the Reform Act mechanism offers strategic benefits for a whistleblower to be effective in challenging misconduct. It offers an opportunity to gain the legally-binding judgment of an objective third party that the whistleblower's charges must be taken seriously. At a minimum, it promises to maximize the public whistleblower's credibility and help to reduce isolation. The OSC evaluation that there is a "substantial likelihood" the allegations are well founded is the bureaucratic equivalent of a "Good Housekeeping Seal of Approval" for that particular disclosure.

What is the Office of Special Counsel's track record for meeting its promise? At times, the combination of OSC support for a whistleblower's challenge and serious evaluations by the Special Counsel at the end of the process have helped to improve the quality of agency reports in response to whistleblowing disclosures. The Nuclear Regulatory Commission, the U.S. Department of Agriculture and the Department of Health and Human Services have confirmed the validity of employees' dissent in key cases, and have taken serious corrective action. On occasion the Special Counsel also has held agencies accountable for inadequate reports of self-investigations. In the case of Dr. Wilfredo Rosario, who challenged the USDA when it released beef carcasses—de-

spite evidence of tuberculosis—for human consumption, the Special Counsel twice flunked the agency report and sent USDA back for further investigation and disclosures.

Unfortunately, the Special Counsel seldom makes the approvals necessary to put an agency on the spot. In March 1995 congressional testimony, Special Counsel Kathleen Koch reported that the OSC made referrals for full or partial agency investigation only eight times out of 148 reviews of whistleblowing disclosures. The OSC's annual report for fiscal 1995 reveals that out of 333 whistleblowing disclosures, the office forwarded only two for agency investigation, one of which reflected a "substantial likelihood" finding.

"When I was first interviewed by OSC investigators, they were determinedly disinterested. I kept trying to give the investigators documentary evidence and they kept giving it back to me."
—Defense Department whistleblower

In addition, even full referrals generally produce only cosmetic reform. The OSC's seal of approval seldom overcomes the conflict of interest inherent when the agency targeted by the whistleblower is left to investigate itself. Good-faith agency responses have been the exception, rather than the rule. Further, the OSC typically accepts as reasonable and complete whatever report the agency produces. As a result, an OSC whistleblowing disclosure is often merely an opportunity for the agency to cover up the evidence, perfect its defenses and then issue an official self-exoneration to be approved by the Special Counsel—all before serious investigations by Congress, the media or other outside groups can be mobilized to ferret out the truth. This basic structural flaw is analogous to that of hotlines, but here the stakes are higher and the setbacks can be more severe.

Army scientist Aldric Saucier's case offers an illustration of the OSC's low standards. The OSC accepted as reasonable and complete a report by the Pentagon's Office of Inspector General that found no misconduct after investigating Saucier's charges

that the Star Wars missile defense system did not work as advertised and that the Pentagon was knowingly underestimating (by 19 times) the costs of the ballistic missile defense system's next phase. The report passed muster with the Special Counsel despite the fact that the Inspector General had: declined to investigate any misconduct except explicit illegality; rewritten the allegations; failed to summarize significant evidence; lost other significant evidence; failed to interview the primary witnesses for Saucier's dissent; rewritten statements from supporting witnesses who were interviewed, to weaken their support for Saucier; refused to seek evidence that Saucier identified as critical; failed to check the veracity of testimony by agency personnel despite evidence of false statements; and refused to pursue evidence of document destruction, including incidents involving evidence initially requested by the Inspector General.

On balance, these flaws in the system mean that an OSC whistleblowing disclosure is likely to be unproductive or even counterproductive—unless it is part of a larger strategy involving other institutions. As one part of a broader legal campaign, an OSC disclosure can be helpful. It has been in this context that OSC disclosures have been valuable elements of GAP whistleblower initiatives in food safety and other arenas. Ironically, a striking example again involved the Star Wars disclosure of Pentagon whistleblower Aldric Saucier. Despite the Inspector General's whitewash, Saucier's disclosure was significant in formally ending the Star Wars program, and decisive in eliminating one flawed component (called "Brilliant Pebbles") of the anti-ballistic missile defense system. The Pentagon and defense industry had intended Brilliant Pebbles to be the vehicle for sustaining tens of billions of dollars in pork-barrel spending well into the 21st century. What proved successful for Saucier's whistleblowing effort was the combination of extensive media coverage, congressional oversight, coordination with public interest groups, *and* an OSC "substantial likelihood" finding.

Before the Whistleblower Protection Act of 1989, the OSC channel was in many cases treacherous for whistleblowers. On

numerous occasions the Special Counsel ruled that a whistleblower's challenge was unfounded—but then sent the record of the complaint to the agency chief regardless, and without the employee's consent. These "informal referrals" meant a double whammy: they provided both advance warning of serious dissent to the agency and an invitation to retaliate with impunity, since the Special Counsel's ruling meant the dissent did not qualify as legally-protected speech.

The 1989 law made the OSC a safer channel for whistleblowing disclosures, by generally forbidding the Special Counsel from forwarding the employee's charges or revealing his or her identity. The OSC may not reveal the identity of a whistleblower "without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law." Because the OSC's failure to order a referral implies that your disclosure is not protected by the Whistleblower Protection Act, this safeguard can make a real difference in preventing reprisals. Should you pursue this channel, therefore, it is important that you wait to approve release of your identity, at least until the Office refers your charges for investigation.

Unfortunately, the law did not make the Special Counsel a more effective outlet for disclosures. The OSC's referral rate remains abysmal. Further, the OSC still tends to favor the tactic of scapegoating the small fry. In 1993, for example, the OSC informally agreed there was a "substantial likelihood" that a whistleblower was correct in alleging that military radar jammers were not airworthy—but refused to order an agency investigation unless the whistleblower agreed to delete the names of Defense Secretary William Perry and then-aide John Deutsch (who continued to try to sell the equipment despite a congressional ban). When the employee did not consent to diluting his charges, the OSC refused to take any action, and did not order an investigation at all into the whistleblowing disclosure.

CONGRESS

Whistleblowers often have been successful in using the constitutional system of checks and balances, triggering legislative oversight of Executive Branch abuses. Members of Congress, however, are pressured by all types of constituent groups, including major contributors in their states or districts. Members also often want to retain good relations with the Executive Branch, unless there is a compelling reason to challenge the bureaucracy. For these reasons, it is important to do some research before blowing the whistle to your local member of Congress. Some questions you might ask include:

- Is your employer a big supporter or major campaign contributor to this member of Congress? The member may be reluctant to do battle with an organization that helped put him or her in office or is a major player in his or her district.

- What are the member's views toward your particular agency or company? Does the member have a history of relations with or positions toward the agency or company?

- What is the member's past track record in battling the system on behalf of other whistleblowers? Call those people to see if they were satisfied with the congressperson's tenacity in challenging wrongdoing in the system and protecting their right to blow the whistle. If the office does not have a strong record of supporting whistleblowers, you may think twice about entrusting your story to that member.

Many members of Congress simply pass complaints about the bureaucracy back to the agency for self-investigation. As we have explained, this action is rarely successful, because the matter is often channeled to the perpetrators of the misconduct. To make matters worse, a member of Congress may not protect your identity even if you request it, because of a congressional staffer's inexperience in dealing with the bureaucracy, or the individual member's unwillingness to stand up to a powerful agency or corporation.

Whistleblowers often make the mistake of thinking that their best allies in exposing fraudulent activity are the authorizing and appropriations committees in Congress that allocate funds for the bureaucracy. Although some congressional committees have vigorous oversight staffs, many committee members are captured by the same influences that pressure any congressperson or agency decisionmaker.

For example, the Pentagon procurement scandals in the 1980s demonstrated the cozy relationships between some members of congressional committees and contractors. The National Security Committee in the House and Armed Services Committee in the Senate have many members who seek positions on the committees because of large defense contractors or military installations in their states or districts. An analogous dynamic exists with the Agriculture Committees. Honoraria, or payments for speeches, are a similar concern. In 1987, the Chairman of the House Armed Services Subcommittee on Procurement and Military Nuclear Systems received 80 percent of his yearly honoraria from speeches to defense contractors. His was not an isolated case: six of the other 18 members of his committee also received more than 50 percent of their yearly honoraria from defense contractors.

Keep in mind also that as an institution, Congress can prove as unwilling to hear bad news as agencies in the Executive Branch. It is true that some of the major scandals of the 1980s were exposed with the help of certain congressional committees. All too often, however, Congress as an institution fails to take the lead in passing meaningful reforms once the headlines fade.

The Congressional Accountability Act, one of the first laws passed from the 1994 "Contract with America" advanced by House Republican leaders, is an example of the limits of reform. Supposedly, the Act applied employee rights laws to congressional staff—laws ranging from race and sex discrimination to civil service merit system protection. Unfortunately, the implementing procedures skipped over the Whistleblower Protection Act. There is no disclosure channel for staff who want to blow the whistle on

a member of Congress who takes a bribe or otherwise violates the law. Nor can a staffer exercise the whistleblowing defense to challenge a retaliatory firing.

That said, there are many individual members of Congress who are sincere champions of whistleblowing. Many more will respond if your dissent is supported by a solid constituency base, or promises opportunities for media and other political visibility on an important public issue.

In addition, key members of Congress have at times provided the clout to protect individual whistleblowers from reprisal. This protection can be extremely important. Although it is technically unlawful to interfere with or harass a congressional witness, the Justice Department rarely enforces this law—which emboldens agencies to strike back at whistleblowers for their disclosures to Congress.

Sustained congressional protection of individuals is the exception. You should not assume that you will be able to secure such protection, particularly for what may be a multi-year harassment campaign against you. If you plan to go to a member of Congress, first check that individual's record very closely. If you are counting on a congressional shield from ensuing harassment, pin down whether and how far the congressional office is willing to go.

Tips on Contacting Members of Congress

The following are some suggestions on how to establish contact and work successfully with members of Congress.

1. ***Before you write to members of Congress, make sure that you have thoroughly checked their track records.*** Do not divulge any information to them before you take this important step. Find out if they have helped whistleblowers in the past and if they followed up once the headlines faded. You can do this by researching their past work in back issues of newspapers. If you find that they quickly dropped the matter, you need to be wary.

*2. **Keep your letter short.*** Many staff members do not have the time to read more than a page. If it is impossible to condense your letter to two pages or less, it is a good idea to prepare a one-page fact sheet or an executive summary. At the beginning of your longer letter, flag the fact sheet for the staff member.

*3. **Make it clear early in your letter whether you consent to having your name or documents shared with anyone in the bureaucracy.*** Otherwise, your letter is likely to be processed right back to the agency for which you work (or that oversees your private-sector contractor). Also, make it clear to your reader whether or not you need to remain anonymous. If you want to preserve confidentiality, request that the recipient take the precaution of talking to you before acting on your letter.

*4. **In a clear and concise way, state your factual case in the beginning.*** Enclose the most important documents, but do not send a large stack. Make a list of other documents that you have and *do not send originals.* Keep your story clear of jargon, and do not assume that the staff member who reads the letter will understand how your agency or company works. Again, if you need to send a longer statement, separate it from your cover letter or fact sheet. The short version should be no more than a two-page summary.

*5. **Focus on the public-interest issues raised by your allegations.*** It is all right to talk about harassment or retaliation, but put it at the end of the letter and don't dwell on it. A congressional office is much more likely to offer a legislator's support if there is something in it for the public—and not simply for you. Particularly if you are not a constituent, it is in your interest to be perceived not merely as a individual victim of injustice, but as an important source of information on an issue of concern to the voters, such as a public health or safety hazard you are exposing.

*6. **Offer guidance for follow-through.*** At the end of your letter, make suggestions on where congressional staff might go to pursue follow-up investigations or further corroborating documentation. Let the recipients of your letter know if there are any investigative agencies working on your case, and whether you think they are successfully uncovering anything of value.

*7. **Make sure that staff members have a way to reach you during working hours.*** If you can't talk to them from your workplace, find a discrete way for someone to take a message for you and return the call from an outside telephone during your lunchtime.

*8. **If you have not received a reply within two weeks, call the office in Washington and ask to speak to the Legislative Assistant who covers your issue area.*** Ask whether the staffer has received and had a chance to read your correspondence, and if so, whether you can be helpful in answering any questions. Congressional staff members are very busy and the most successful whistleblowers know when to keep calling a staff member and when to wait. Do not be a pest, but make sure that you do not fall through the cracks. Do not demand excessive attention, and be polite at all times.

*9. **Offer to act as a "ghost writer" in drafting communications for congressional staffers who are open to pursuing your allegations, and are interested in a working relationship with you.*** That ensures that the accuracy of your message will not be threatened by having it pass through another person with less background on the issue. Further, it is less burdensome for a staffer to revise and edit what you write than to draft the material.

*10. **Watchdog groups have good working relationships with various members of Congress and you may be more successful going through them.*** These watchdog groups can play the role of advocate for you and sometimes can keep your identity anonymous. They may know more about the member's relationship with your company, industry or agency, and his or her record on whistleblower cases. You may want to team up

with the advocacy group for meetings with a legislator's staff, in order to draw support from the organization's credibility or clout on Capitol Hill.

FIGHTING FRAUD: THE FALSE CLAIMS ACT

The False Claims Act offers an avenue for whistleblowers exposing fraud. Nicknamed the "Lincoln Law," the False Claims Act was passed during the Civil War. By facilitating a partnership between whistleblowers and the government, it has become the nation's most effective resource for citizens to challenge fraud in government contracts. Through this law, individual whistleblower "relators"—employees or nonemployees who are original sources of evidence of fraud—can challenge government contract fraud directly before a jury of taxpayers.

President Lincoln knew that standard government oversight mechanisms could not keep pace with unscrupulous defense contractors who were capable of producing weapons that were more dangerous to Union soldiers than to the enemy. In 1863 he discovered that the same horses were sold to the cavalry two and three times, and that sawdust was added to gunpowder. Union guns were backfiring and killing federal soldiers, instead of confederate troops. As a result, Lincoln won the right for citizens to serve as the government's eyes, ears and reinforcements through False Claims Act, or *qui tam*, lawsuits. These are private attorney general actions, literally those filed "in the name of the king." Through *qui tam* suits, whistleblowers can force the return of fraudulent earnings to the Treasury, and keep a portion for themselves. Unfortunately, the law was amended during World War II at the behest of military contractors and gradually eroded by the Supreme Court, until it lost much of its effectiveness. But by 1986, renewed interest in the prevention of fraud and waste and determined leadership by Senators Charles Grassley (R-IA) and Rep. Howard Berman (D-CA) led to an amendment that put the teeth back into the False Claims Act.

The Act allows individuals to sue private firms on behalf of the federal government when they believe there is fraud involved in contracts. There is a six-year statute of limitations for the whistleblower to act. Contracts have been defined broadly to include corporate commitments in exchange for government licenses or regulatory approval required by law. This means, for example, that a whistleblower "relator" can challenge a government contractor's fraudulent cover-up of violations of environmental or other laws in which compliance is a condition of the contract. The whistleblower can ask for three times the dollar amount of the fraud to be returned to the government, as well as $5-10,000 for each false claim. After a whistleblower initiates a suit, the Justice Department has 60 days to investigate the claims and decide whether it will take over the case, or let the whistleblower prosecute it alone. In practice, the Justice Department often takes six months, a year, or longer to decide. The entire cycle for a False Claims Act suit may range from two to five years or more.

If the government takes over a case and proceeds to recover money for the taxpayers, the whistleblower is guaranteed a "finder's fee" award of 15 percent of the recovery. If the government joins a suit to which a whistleblower has substantially contributed, the incentive award can increase up to 25 percent of the amount recovered (although the government has never agreed to the maximum). If an individual prevails without government intervention, s/he receives an award of 25 to 30 percent of the amount recovered plus attorney's fees. The average amount recovered by relators is 18 percent of the funds returned to the Treasury.

According to a 1996 report by Taxpayers Against Fraud (TAF), a non-profit organization that champions the False Claims Act and helps screen cases for private attorneys, roughly 1400 suits have been filed since 1986. The statute is becoming increasingly popular: in fiscal year 1987, relators filed 33 *qui tam* suits; by fiscal 1995 the number had skyrocketed to 278. Initially most of the suits involved Pentagon contracts; over time, the balance has shifted to contracts in health care and other areas. The Act's

scope is still evolving, as it is applied to violations of environmental and other laws whose compliance is built into government contracts.

More importantly, the record shows that the law obtains results. TAF's 1996 study revealed that since the 1986 amendments, the Justice Department has obtained some $3 billion in fraud recoveries through whistleblowers' use of the False Claims Act. Of the $3 billion recovered by the government, roughly two-thirds came from suits initiated by the Justice Department, and one-third—$1.13 billion—came from whistleblower *qui tam* suits. The deterrent effect may be even more significant. Although this effect is impossible to measure precisely, an economic study commissioned by TAF estimated that the Act has deterred some $295.8 billion in fraud since the 1986 amendments. By contrast, in 1985 the Justice Department's entire fraud effort garnered only $27 million. The Act has also outdone corporate voluntary disclosure programs: a 1996 General Accounting Office (GAO) report found that voluntary disclosure programs have recovered only $215 million for taxpayers.

Not surprisingly, the Act's success has earned it powerful enemies among large contractors, such as General Electric, who repeatedly have been caught. Several defense companies struck back by attempting to have false claims cases against them dismissed on the grounds that the law is unconstitutional. So far all attempts have failed.

In 1993, a coalition of 22 contractors, nicknamed the "fraud lobby," launched a campaign to gut the law. Since 1990, 20 of 22 members had pleaded guilty or paid fines totalling $566 million for fraud; $125 million of this came through the False Claims Act. Seventeen out of 22 were multiple offenders. During their legislative efforts, the lobby's members faced 28 active, unsealed *qui tam* suits. As Senator Grassley summarized, "They hate [the Act] because it is very effective at exposing their fraud."

The fraud lobby's legislative campaign failed—but not without stirring up significant debate over the law within the Justice Department and Congress. The Justice Department served to an

unnerving degree as industry's advocate at the outset of the legislative battle, backing proposals to impose various limits on False Claims cases—and even proposing that civil service employees be barred from pursuing cases under the Act.

Although the False Claims Act withstood this assault by the fraud lobby and its backers, the debate they initiated is far from over—and whistleblowers interested in pursuing this legal avenue would do well to follow it. In brief, the debate centered on industry's plan to ban relevant citizen suits once a company announced it was investigating itself through a voluntary disclosure program. The goal was to restore corporate and/or government monopolies on uncovering and challenging fraud. Industry's concern about a conflict between the False Claims Act and voluntary disclosure programs, however, is unfounded. A 1996 GAO report found that only four out of 129 voluntary disclosures involved overlapping *qui tam* suits. The GAO concluded that the two disclosure channels complement each other, and that *qui tam* suits help to keep voluntary disclosure programs more honest.

Equally misguided was the Justice Department's proposal to curb government employees' rights to use the False Claims Act. The proposal was motivated by the concern that public employees would bypass the chain of command to seek fortunes through False Claims Act suits. No defensible examples of this exist, however. The most publicized case involves Navy auditor Paul Biddle's suit against research fraud. Biddle went through the agency chain of command, the Defense Contract Audit Agency, Health and Human Services, NASA's Inspector General, the Air Force, and Congress. He finally turned to the False Claims Act only after learning that the Navy had limited its investigation to two of the ten years of fraud he had uncovered.

As the judge explained about another widely-maligned government employee whistleblower, Leon Weinstein, and his public interest partners: "Ultimately, what appears to have happened in this case is, after seeing no effective action taken by the government, relators filed this suit. This appears to be exactly what Congress intended, regardless of whether the relator is a govern-

ment employee or not." Far from withholding evidence, Mr. Weinstein received a letter of commendation from the FBI Director for his work on the case as a government employee before filing a false claims suit.

In the end, the campaign to neutralize the False Claims Act was the catalyst for a media spotlight on whistleblowers and on big business fraud. The fraud lobby could not find any office to introduce its proposals. Almost certainly, the fight is not over.

Understanding the background of and controversies over the False Claims Act is important for any whistleblower considering the Act as a legal avenue. But it is only the first step. Filing a false claims suit is a big, and expensive, move. You need to find a competent lawyer who has the financial resources to fund a case that could run into five or six figures in costs and fees. If the government decides not to take your case, you and your lawyer must be prepared to go through the long and expensive process of legal discovery in order to continue the lawsuit. Don't underestimate the ability of a company to finance a large number of lawyers to fight you. You and your lawyer must be mentally prepared to follow through on a case that could drag on for years. In some cases, a law firm will agree to limited representation—filing a complaint and advocating that the Justice Department take over the case, but not committing to litigate independently if the Justice Department turns it down.

The high costs of litigation are perhaps the greatest constraint facing whistleblowers who seek to file false claims suits, but they are not the only consideration. To follow through, you will eventually have to go public in a false claims suit, and there is a chance that you could be permanently blackballed in your field. The whistleblower protection clause is an important part of the False Claims Act, but it will take time and money for a lawyer to go to court and fight for your rights.

The Act imposes other limits. During the 60 days to more than a year that the case is "under seal" for Justice Department review, you cannot discuss the evidence. This estimated time lag is conservative; delays have exceeded five years. Ironically, this

means that after filing a false claims suit, you are gagging yourself from public dissent until the Justice Department makes a determination. You must make any media disclosures *before* filing the case: courts will dismiss a case if a whistleblower "breaks the seal" by talking to the press. If you do speak to a reporter before filing a false claims suit, beware that if the reporter does not credit you with exposing the fraud, you may be disqualified from credit as the original source of the evidence, and thus be ineligible to file suit.

Similarly, the government can engage in the False Claims Act equivalent of plagiarism. Even if the government is ignorant of the fraud before you expose it to relevant officials, the Justice Department can beat you to the punch by filing a False Claims Act suit on your own disclosure, and you will be disqualified. The lesson to be learned is to be ready to file expeditiously and then remain mum after making any disclosures to the government or the public.

Other factors may limit the effectiveness of using the False Claims Act to blow the whistle, particularly in cases in which the government itself has acquiesced to the company's wrongdoing. Often, when a favored contractor finds itself in trouble over procurement, the government agency is more interested in hiding the problem than solving it: scandals in government contractor programs can create problems for the government's program managers. Therefore, a government agent may hand out waivers, contract changes, or some other form of approval for the company's misconduct, even though it formally violates the agency's regulations. The Justice Department, moreover, rarely prosecutes a government agent for giving waivers, and often uses the waivers as an excuse not to prosecute the companies.

One way to counter this threat to your legal challenge is to forego alerting company leaders or government program managers. Silence on your part, however, brings risks. To begin with, blindsiding your employer or the relevant government agency may not be the most efficient way of challenging problems, particularly when a contractor's leadership is acting in good faith and

would take responsible corrective action if given the chance. Further, this approach can draw a severe backlash and damage your credibility. Equally significant, without some formal record of your prior opposition to the fraud, you may become the scapegoat for the company, the government, or both. If you are convinced that corporate and government bureaucracies are not acting in good faith, another solution is to find a lawyer willing to take on the government agent involved in the wrongdoing as well as the company: bureaucrats do not have the legal authority to obligate the government against its own rules and regulations.

A final note of caution is to be sure that you know and understand the rules and regulations that you believe are being violated. Government regulations are sometimes written so loosely and vaguely that it is difficult to prove illegality. An illustration of this problem is the case of the now infamous $435 hammer. After Congressman Berkeley Bedell was tipped off to the overpriced hammer by a whistleblower, he asked the Navy to audit the program and expose the fraud. The Navy responded that the price for the hammer was "exorbitant but legal," because the company used "government-approved purchasing and estimating systems."

THE NEWS MEDIA

One of the most obvious whistleblower outlets is the news media. Indeed, it can be very effective when handled properly through a responsible reporter. The media is indispensable for making a difference when the political stakes are high. None of the success stories listed at the beginning of this handbook could have occurred without the active role of the media.

At first blush, going to the media to blow the whistle appears to be the easiest and quickest way to warn the public about a threat to their health and safety, or to let taxpayers know their dollars are being wasted. But as in any field, there are groundrules in media work that participants should know and respect. Not all whistleblowers do, and those who do not are generally less successful. Keep in mind that not all reporters are willing to take

the time and effort necessary to publish your allegation, or to maintain the anonymity of their source. Going to the media is a serious and significant part of the whistleblowing process. It may not be sufficient, but it is generally a necessary part of any effective whistleblowing effort. It is worth your time and attention to design a careful media strategy.

To protect yourself, you need to choose a reporter carefully. That involves doing some research. Identify journalists who cover your area of expertise for each of the major newspapers and radio or television networks. There are several excellent media guidebooks that can help. Computer searches of periodicals at your local library can also provide leads. Once you have identified a number of reporters who cover your area, research some of the stories each has written in the past. If you are thinking about working with a broadcast journalist, you may have to request videocassettes of some of their work, because most libraries do not routinely keep this kind of material on file.

It is important to develop an idea of how a reporter will handle your story before you make contact. If you find that the reporter's past stories seem largely to echo reports from the relevant government agency or corporate public relations office without adequately questioning statements or assumptions, that journalist is not likely to ask the tough questions or conduct the thorough investigation you may need. Keep looking until you find one whose track record and way of doing business reflect what you hope to achieve by blowing the whistle.

You must also decide whether to contact a local reporter or the national press. There are advantages and disadvantages to each. A local reporter will be more interested in your story because of its home-town implications, but may also face more pressure to stay away from your whistleblowing allegations, if the government agency or company has a powerful economic base in the local area. Another advantage to the local approach is that those reporters are better able to follow up on leads: they generally have immediate access to witnesses who can back up your claims and perhaps provide more documentation. If you do land

a good local media story, it will get the attention of the company or bureaucracy. But if the story does not make a significant enough splash in Washington DC, the net effect once again may be detrimental: the news may trigger a cover-up or reprisals against you, rather than serve as a catalyst for corrective government action.

A national story inherently has the greatest potential for impact, but it is often hard to get the national press in Washington to pay attention to issues that do not have a clear and immediate effect on the political scene in the capital. To be confident that a national outlet will be interested in your story, you must be able to identify the ways in which your allegations directly involve or affect a large government program or agency, or a major corporation. Keep in mind, too, that it may be more difficult for reporters in Washington to verify your story from there; you should not assume that Washington reporters will have the time or the money to travel to your area.

In some cases, your best approach to the local/national question is a compromise: consider working with a local paper that is part of a national newspaper chain with a Washington office or a national newswire connection. This will give your story a hearing beyond your local news orbit. Newspapers in a chain are also less likely to be intimidated by local political or economic pressures, and your story may appear nationwide. Well-known chains include the Cox, Gannett, Hearst, Knight-Ridder, Newhouse, Scripps Howard and Thompson syndicates. Examine your local papers (particularly the front or editorial pages) to find out if any of them belong to a chain that has a national office or are on a major newswire such as *The New York Times* or *The Washington Post/Los Angeles Times* newswires. The Associated Press, United Press International and Reuters are news services that sell stories to papers throughout the nation. The Associated Press is the biggest, with news bureaus in every state.

Another important consideration in selecting a media outlet is how time-sensitive your information is. Are you trying to ward off an imminent disaster, or do you have the luxury of allowing the reporter more time to research and develop your story? If you have time to spare, a magazine writer, broadcast producer for a weekly investigative show or an investigative reporter may be your best option. If you need immediate turnaround, network news or a daily newspaper reporter are good choices.

Once you have selected a media outlet and reporter, it is important to understand how best to approach the reporter or broadcast producer, and what s/he can and cannot do for you. Before providing the reporter any information, be sure to clarify and reach agreement on the terms of your working relationship. Whistleblowers often have unrealistic expectations of reporters, and this can undermine your ability to work together effectively.

One of the most important issues to clarify with a reporter is whether you expect anonymity. A good reporter will not reveal his or her sources, even before a court of law. Before you tell your story to a reporter, you must set clear rules for how you want to be identified.

> *"It makes all the difference whether you blow the whistle to an audience that is hungry for your information, instead of threatened by it."*
> *—Department of Agriculture whistleblower*

Always specify the terms of your communication with the reporter. Be clear about whether or not you are speaking "on the record." If so, the reporter can identify you by name and position in the government or industry. If you choose to speak "on the record," be sure to make it clear that you are speaking only for yourself, and not as a representative of your government agency or company.

You can decide to speak "off the record," which means that the reporter cannot use your name, but can characterize your position (for example, a quality engineer in the MX program). Unless you are careful, such characterizations can be very revealing to those people who may try to identify the source of the leak. You should come to a mutual agreement on such characterizations in advance.

When you provide information "on background," the reporter

is not supposed to characterize you in any way but must write about the information in a generic fashion. This approach is the safest, but makes it harder for the reporter to write a story that will be interesting and specific enough to get published.

Sometimes the facts alone are the functional equivalent of your signature. This is the case, for example, when only a few people (including you) could possibly be aware of the information you have released. In that case, if a reporter uses your information at all, your identity will be revealed. If you want to remain anonymous in such cases, it is wisest to communicate only on "deep background," to educate the reporter on the issue. This agreement generally means that none of your information is to be used, except as a foundation for asking more generalized questions. Of course, this means the information is much less likely ever to be publicly disseminated. It still may prove valuable for an independent investigation of the issue, however. Knowing what questions to ask in pursuing a lead or interviewing a key player can be very useful. Further, the extra knowledge from deep background can facilitate a reporter's ability to judge the veracity or reliability of statements made by witnesses and officials in the reporter's investigation.

Of course, reporters prefer to speak to you on the record and will assume you are on the record unless you specify differently. Be aware, too, that many reporters have different definitions for the above terms, so it is critical that you define your terms—*before* you release your information. Don't expect the reporter to accept retroactive limitations on information you already have shared. Make sure that the terms of your agreement apply to your entire conversation, and clarify whether you expect them to apply to subsequent conversations. Above all, you must weigh your need for protection against the need to tell the reporter enough for him or her to write the story; this is invariably a difficult but important judgment call.

You also need to pin down whether you are offering an "exclusive." This means that you will not talk to other members of the media until your reporter airs or publishes the story. Obviously, it is in the reporter's best interest for you to make that commitment. This can be useful for you, because the reporter will have a motivation to work harder on it. But it can also backfire. The reporter may think that because s/he "owns" the story, there is unlimited time to work on it. Meanwhile, your whistleblowing initiative can wither on the vine or be overtaken by events.

When you meet with reporters, they often will assume that you are working with them exclusively. Ask at the beginning of your meeting whether or not the reporter expects an exclusive arrangement. Most will say yes. To protect yourself, you should then work out the terms before going further. For example, see if the reporter can set a reasonable time limit for your exclusive relationship. The length of time will depend on the nature of the story. In general, you should agree on a timeframe that is long enough to allow the reporter to cover the story thoroughly but does not drag out until the issue becomes stale. Setting a time period may irritate the reporter, so be sure to suggest it in a courteous and reasonable way. Remember that you can always agree to extend the deadline. One approach for a particularly "hot" story is to grant a temporary exclusive while the reporter seeks approval from editors to make a desired commitment, such as front-page publication within a specified period.

Often, you can pursue print and broadcast reporters simultaneously. You must be sure that each knows the other is also doing your story. They may agree to release their stories close together because their audiences are different. This reduces the sense of competition.

Even after you have established clear terms for the working relationship, you are likely to encounter a maze of decisions and stumbling blocks in attempting to use the media effectively as your whistleblowing outlet. Be realistic and avoid false expectations. For example:

Be prepared for the fact that a story may not be published or broadcast, despite a substantial investment of resources. Reporters have to sell their stories to editors and publishers. The more

controversial the issues, the more the managers of the newspaper or television station will get involved. Sometimes owners or key institutional stockholders may be tied in some way to the targets of your whistleblower disclosure, or even be implicated directly. In the absence of a conflict of interest, the owners and managers of newspapers and television stations may feel political and monetary pressures; they may fear a lawsuit, for example. As a general rule, when reporters invest a significant amount of time and resources, it is a good indicator that their employer wants to break a major story. But don't count on it.

If the story is run, do not expect reporters to be crusaders for your cause. Most reporters will resent it or withdraw if you pressure them to editorialize or to act as your advocate. Of course, they will form opinions about the issues, and about who is playing games with them and who is playing it straight. In most cases, however, the professional standard is to let the facts speak for themselves.

Do not expect reporters to locate a lawyer or to contact the government for you—although some will offer to help in order to maintain your loyalty. To maintain objectivity and professional credibility, most want to remain uninvolved in your personal concerns and activities. Their focus is on reporting the relevant factual elements of your case. When your dissent is clearly on behalf of the public, there may be common ground. If reporters believe your information is credible and significant, they may seek more information from attorneys with relevant expertise. They may contact the government to find out what is being done about your allegations. You should not expect reporters to take these steps, however.

Do not assume that since you are working closely with a reporter, s/he is your friend. Part of a reporter's job is to put you at ease so that you are willing to speak openly, and preferably on the record. Keep in mind that work with a reporter is above all a business relationship. A reporter who is gracious and understanding is being a professional. Friendship may evolve, but do not assume it. Be sure to be professional in turn: for example, if you

meet with a reporter at a bar or a restaurant, do not make the mistake of losing good judgment after relaxing. It is not the reporter's fault if you lose your self-control, and many will have less respect for your credibility if you do. As a general guide, it may be wise to stick to tea or coffee and forego alcoholic beverages.

Once you and the reporter have selected each other, the effectiveness of your working relationship—and your whistleblowing—will depend to a significant extent on how you organize and conduct your whistleblowing.

Tips on Working with the Media

Based on our experience, below are twelve suggestions for successful working relationships between whistleblowers and members of the media.

1. Be prepared. It is necessary but not sufficient that the reporter be adequately impressed with your expertise to take you seriously. Have your documents organized in an understandable order, and speak from an outline that you have prepared and practiced, to avoid rambling or taking too long to get to the heart of your story. Try not to tell the story in excessive detail. Open with a basic overview, offering documents as you go, and then go into detail in areas in which the reporter expresses interest. A good rule is to limit introductory summaries to a minute in a phone call, and to ten minutes in a meeting with a reporter. The conversations can go on much longer, but your prepared summary should not.

Practice delivering your message, taking into account the suggestions offered here. While these tips will help you communicate more effectively, in most cases they will not come naturally. Unless you practice until you are comfortable, your delivery may sound stiff or stilted, which may hurt your credibility. Practice is especially useful to help you get over the jitters and allow you to become more familiar with your material. Often, someone from a concerned non-profit group or congressional office can help you prepare for your media interviews—asking you tough questions and giving you feedback on your answers.

This does not mean memorizing or preparing a script, unless you and/or your coach decide that is the best way for you to communicate. Relatively spontaneous, extemporaneous speaking normally is best. It is more credible, sounds more natural and, because it is easier to listen to, is more effective at communicating the point. A good balance can be struck by speaking from an outline, where concepts are listed and reinforced with key facts, punch lines and statistics.

*2. **Provide a timeline.*** A skeletal chronology organized around dates can be a concise, easy-to-understand summary that highlights milestones in your story. The spotlight on dates is particularly useful to identify patterns or causal relationships. Reporters, congressional staff and lawyers alike generally appreciate a timeline to help them organize the facts of your narrative. Prepare the timeline before your initial interview.

*3. **No matter what, keep your cool.*** The calmest person in the room is usually seen as the most credible. The point is not to be emotionless or uncaring, but to stay poised. It leaves the impression of self-confidence. This is extremely hard, since you probably are nervous about being a public figure, opening up to a stranger, and above all, about the public policy and personal issues at stake. But there are few suggestions more important for media interviews—or in other settings in which credibility is essential. Especially when a reporter tries to bait you, strive to stay unruffled and unflappable.

*4. **Don't exaggerate or dramatize.*** Make sure that you never embellish your information. A common mistake by whistleblowers, once they have finally convinced someone to listen to them, is to tell the reporter 110 percent of the story to make their point. The problem is that once the reporter—or another source, such as agency or company officials—detects the ten percent that is embellished, the rest of the story becomes suspect. Depending on the context, it may be best initially to understate or limit your conclusions to those based on facts that cannot be credibly disputed. At the same time, don't shortchange the

significance of your whistleblowing. Identify all the issues and provide leads so the reporter can make his or her own judgment calls on tougher questions. It helps your credibility when investigators conclude for themselves that the situation is really worse than you initially asserted.

Once you have reviewed and prepared the information you wish to present, be sure not to deliver an overly dramatized presentation. High drama erodes the patience of long-time reporters, many of whom may feel that they have "seen it all." Television reporters will be particularly concerned with your delivery if they are trying to judge how credible and articulate you will be on camera.

*5. **Be an advocate for the story, not for yourself.*** Do not try to convince reporters that you are a hero or a martyr. The relevance of your personal stature, or even reprisals against you, will depend on how the reporter evaluates the significance and credibility of your evidence. Do not start your conversation, for example, by reciting all the injustices that you have had to endure. The best way to impress a reporter with your story (and your motivations) is to give the factual information on the misconduct that you witnessed, and let him or her ask about your personal hardships. Only volunteer the personal problems that you have had at the end of the meeting, if the reporter has not asked, and keep your statements brief.

Even if reporters ask you about your personal fight with the organization, try to keep the focus on the subject of your whistleblowing—the threat to public health or safety, or the fraud and abuse you seek to expose. You can discuss incidents of repression by raising questions about why the organization is trying to silence you or others: what is the employer afraid of ? If and when you do discuss retaliation, do not come across as bitter, defensive or paranoid, and do not dwell on the subject.

A reporter may well decide, however, that the harassment is part of the story, so be ready and able to summarize what happened to you—and why people should believe you despite your employer's efforts to discredit you. If you go public, part of the

territory is successfully defending yourself when reprisals have occurred.

*6. **Speak in "sound bites."*** Few things are more precious to a reporter than time and space. If you can't make a point crisply in 15 to 30 seconds, you may lose the opportunity to share it at all with the public. Since this is probably your only chance, practice and prepare "sound-bite" statements. It is a good idea to combine at least one key fact with your most powerful rhetoric. View the sound bite as analogous to the topic sentence in a paragraph, or the lead in an article. In-depth explanations may help educate the reporter, but a detailed discussion seldom will be practical to broadcast or print as is: the reporter will most likely condense and paraphrase that part of the interview. In many cases, all you will be permitted to communicate directly to a public audience is a sound bite or two—so offer several good ones, to provide the reporter with a menu of points you want to make.

*7. **Start with the bottom line.*** When you add up a column, you work toward the bottom line instead of starting with it. Your approach to an interview should be precisely the opposite. In a media interview, it is usually better to start with the conclusion, and then explain its basis. Otherwise, reporters and public audiences may feel you are trying to evade a question, or may get restless waiting for you to get to the point.

*8. **Paint a picture with your words.*** Try to express yourself with words that create a picture in the reader or listener's mind. Creating a mental image is generally more compelling than an abstract or wordy academic approach, even if the audience understands your point. More commonly, your audience may not comprehend the significance of your words, particularly if you are a scientific or technical expert and rely on jargon. Jack Lemmon's frustration at his inability to be understood during the climax of the movie *The China Syndrome* is one shared by many whistleblowing experts. Demystify the jargon. Often an analogy to the principles in common household technologies or personal finances simultaneously can demystify technical language and

create a mental picture.

*9. **Get it right the first time.*** Don't count on a second chance to correct inaccuracies. Don't assume you will have an opportunity to "revise and correct" your mistakes through after-the-fact editing. Be sure of your facts and in command of them, or don't take the risk.

*10. **Be available.*** Within reason, reporters should have ready access whenever they need to reach you. This may take effort. With rare exceptions a government employee, for example, is not free to speak with the press as a private citizen on the taxpayers' time. But there is no barrier beyond inconvenience to returning a call during your first break, or to letting the reporter call you at home. If you are not determined enough to brush aside inconvenience, you probably should not be blowing the whistle.

*11. **Monitor the story, without being pushy.*** This advice applies both before and after the story is completed. During the research and writing phase, it is acceptable etiquette to call with an offer to be helpful and answer any questions that may have accumulated if you have not heard from the reporter for some time. But don't assume that you own the reporter's time, and back off if your offer is not accepted immediately. After the story is written and published, you should keep the reporter informed about how the scandal is progressing, but avoid becoming a pest in his or her eyes. Reporters often are pressured by their editors to move on to the next story. They frequently have to fight for the time and newspaper space for follow-up stories on their exposes.

*12. **Do not attack the reporter if you have to correct a mistake.*** Realistically, reporters must absorb far too much information to get everything absolutely accurate the first time. Often their job is to develop functional expertise about a subject, starting with a zero knowledge base. The most fortunate receive a few months' time; more often they have only a few days or even hours for the whole story. If something is inaccurate or an agreement in your working relationship is breached, assert yourself,

but civilly. There is no rule of journalistic courtesy that says you must silently endure mistakes. A good journalist will want to get it right and appreciate your initiative, so that an inaccuracy is not repeated. But keep the reporter's circumstances in mind. Don't let your criticisms get personal; recognize the overwhelming majority of fresh data that the reporter got right; and respect the hard work that almost all journalists invest in their profession.

As a final note, you should be prepared for what may come *after* you have successfully blown the whistle to the media. If you have been anonymous in your whistleblowing, it is important to remain calm and not do anything that casts suspicion on yourself. Once a story hits the media, your agency or company will begin "damage control." Depending on your position, you may be asked to sit in on meetings to address the issue or even to help plan a cover-up. This may put you in a good position to continue telling the reporter whether the company or the agency is legitimately trying to solve the problem.

If you are going public with your whistleblowing, you may receive more publicity and requests for interviews after the story appears. It is good to take advantage of the extra publicity to shed more light on the subject of your whistleblowing, but approach your new-found status with caution. It becomes quite flattering suddenly to receive all this attention, but remember: one of the ways that a bureaucracy or a company can discredit you to others is by portraying you as a self-glorified publicity-hound. Don't give them any ammunition by letting the publicity go to your head. A little humility can go a long way in making your case.

ADVOCACY ORGANIZATIONS

Non-profit advocacy organizations can be a vital resource for whistleblowers. These groups can provide advice, share their own research and knowledge on issues of concern to you, act as allies, or even serve as your main channel for blowing the whistle. Particularly if the idea of blowing the whistle to a member of Congress, the press or a hotline seem too risky or unpromising—or if

you aren't quite sure yet about going public but do not want to remain silent—consider calling upon advocacy groups.

Ultimately, these organizations are a vital link in the chain of political constituencies that turns your whistleblowing information into power. It often takes a coalition effort to overcome the political clout of large government agencies and private corporations. Most of the success stories in this handbook would not have occurred without solidarity and support from constituencies mobilized by advocacy groups.

This link is a critical element of your defensive as well as offensive strategies: solidarity with affected constituencies is often a key prerequisite for a whistleblower's survival. The resulting political base is the most effective shield available to prevent or resist retaliation, more powerful than legal rights in isolation. A letter of support from a coalition with hundreds of thousands of members can be far more impressive in changing a government official's mind than even the best legal brief an attorney can produce.

There are relatively few experienced organizations that specialize in working directly with whistleblowers. In addition to the Government Accountability Project (GAP), which has a twenty-year track record of work on behalf of whistleblowers, the Project on Government Oversight (POGO) (formerly the Project on Military Procurement) has lent invaluable assistance to whistleblowers for many years. Other groups, such as Public Employees for Environmental Responsibility (PEER), work with whistleblowing employees in specific fields. The American Civil Liberties Union Workplace Rights Project is another knowledgeable resource. To contact these groups, see Appendix B.

GAP, POGO and PEER can help you build a support network of constituency groups and other whistleblowers. These organizations have developed strategies that not only enable you to prepare and bring your dissent to public attention in a professional way, but also offer support and guidance from other whistleblowers. They may produce and release issue reports or "white papers" based on whistleblowers' findings: these reports

are a vehicle for releasing information provided by groups of employees without exposing their identities. A related tactic is to expose bureaucratic bluffs through surveying agency employees on issues raised by whistleblowers' findings.

Beyond these groups, there are a range of advocacy organizations that may not work extensively with whistleblowers but can help nonetheless. These range from issue-oriented public interest groups to labor unions and professional associations. Organizations vary in their approach to whistleblower concerns, and in the type and degree of assistance they have to offer. Generally, advocacy groups tend to team up with whistleblowers when doing so advances a shared agenda. A public interest environmental group may choose to help you fight your battle because you have information critical to exposing bureaucratic or industry wrongdoing. A consumer organization may view your information as important in warning its members against unsafe products, or in mobilizing a political counterattack. A union may work with you because you are a dues-paying member, or because you have information about a corporation that can be used in collective bargaining or an organizing campaign. A professional association or society is likely to be concerned about issues affecting the profession's credibility.

The possibilities for partnership, and political leverage, are numerous. To take one example, both government agencies and multinational corporations repeatedly have blinked when faced with the alliance between whistleblowing meat inspectors and Safe Tables Our Priority (S.T.O.P.), an advocacy and support organization for families of food poisoning victims. This partnership has operated through a coalition of consumer, labor and public interest organizations. The team has issued its message through joint participation in press conferences, solidarity letters, formal public hearings, briefings of agency decisionmakers (including the Secretary of Agriculture), and informal public symposia sponsored by members of Congress.

Although many do admirable and important work, advocacy groups also can be self-serving: their primary loyalties are to their

missions (and occasionally to their own institutional advancement), not to you. You must remember that your disclosures to them are not automatically covered by the attorney-client privilege. That means that unless you work out a confidentiality agreement first, your information becomes theirs to use. You should understand what their agenda is before you put your cards on the table. To do this, you will need to do a little research. Before you go rushing to an organization with your whistleblowing disclosures, do some homework to learn its reputation, and how it has worked with whistleblowers in the past. The most common types of advocacy organizations are summarized below.

Public Interest Groups

Public interest groups cover the spectrum of public concerns—and of ideological positions on these issues. Think through the types of groups that might be concerned about the consequences of the wrongdoing you have witnessed. Be sure that you understand a group's position on an issue, and that it is in line with your own. If you are blowing the whistle on a faulty component of a car engine that could harm people, for example, you may want to contact consumer groups and/or organizations dealing with auto safety. If you are blowing the whistle on a government drug-testing experiment on unwitting patients, you may want to contact health organizations and patient right-to-know groups. Do not be discouraged if you cannot find help right away. Even if a particular group cannot help you, be sure to ask for referrals to other organizations, as well as subject matter experts and *pro bono* lawyers who specialize in your issue.

Once you find an organization interested in your information, you will need to find out if it is willing to help with your case, and if assistance is conditioned on your providing the contents of your whistleblower disclosure. In many cases, a group will respect and admire your courage in speaking out against injustice and want to help. They may have only meager resources and face severe limitations on what they are able to do for you, however. It is also possible that an organization will seize upon your

important information, and unintentionally or not, expose you or put you at risk without your consent in order to advance a larger political goal. This is why it is critical to research an organization well before you approach it, and to clarify the terms of your working relationship.

Some public interest donors or organizations offer awards for courageous individuals who have contributed to their cause. Being nominated for these awards can be helpful, because it increases your visibility and credibility to be publicly honored for your whistleblowing. Sometimes the recognition includes modest cash awards, and almost all of them generate at least some publicity that can put pressure on your bosses not to retaliate.

Ideally, you will be able to establish a mutually beneficial relationship, in which your information helps their cause and vice versa. In order for this to happen, these organizations should be experienced in working with whistleblowers. Their understanding of a whistleblower's needs, such as legal assistance to pursue a wrongful discharge case, will help to avoid or successfully overcome retaliation.

Employee Organizations

Labor unions, employee federations and professional associations are the primary types of employee organizations. All have employee-based memberships and work to further their members' interests. Unlike public interest groups, they are generally not wedded to furthering a particular issue, but rather to serving their members. Therefore, it is likely that you will require membership in order to secure assistance from these organizations.

Unions can be a great resource for whistleblowers. In exchange for paying dues, union members are often entitled to receive certain services. For example, a union may provide legal counsel to members facing employment disputes. Membership in a union may also trigger legal options you would not have otherwise—such as binding arbitration through a hearing in which you have equal say with management in choosing the arbitrator who will decide your case.

As potential allies in your whistleblowing, however, unions vary tremendously. Some can be counted on to stand up for their members who blow the whistle. They may also work in partnership with other groups, to link their whistleblowers with affected constituencies: the union of federal food inspectors is one example of a union that takes this approach. Others are so closely aligned with management that they would be reluctant to challenge your employer. Still others may support you in principle but may make a strategic decision not to push on the ethical issues you are raising, because they are in a protracted battle with management over pay, benefits or other issues of higher priority to the union. Supportive local union leaders, moreover, may not be able to deliver for you if their efforts are vetoed by superiors cozy with management on the national level. As with other groups, you should check out your union's track record on assisting whistleblowers before you approach it for help. Be aware that if the union is unsympathetic to whistleblowers, a union official might alert management to your activities.

> *"There are support systems out there that can keep you from being isolated. Find them early on; I wish I had."*
> *—Local government whistleblower*

Depending on your job, you may also consider approaching a professional association, such as the National Association of Social Workers, the American Academy for the Advancement of Science, the American Society of Marine Biologists and state bar associations for attorneys. These associations vary greatly in size and mission. Most provide dues-paying members with up-to-date information about developments in the profession, through newsletters, invitations to educational events, conferences and job listings. Others will go further in defending the interests of members and the integrity of the profession. Those organizations that are independent and have large memberships can be credible and powerful friends in your battle to tell the truth and keep your career intact.

A note of caution: professional associations often have large budgets, but many acquire some of their funding from industry. Make sure to investigate where the association gets its funding by requesting a copy of its annual report. These reports should list the primary contributors and provide general information about the association's program. Check with your peers to see what they think about the association and its leadership, and if they have ever sought help from it. Often, even the most cautious and conservative associations have a token ethics committee whose members may be kindred spirits.

Employee Support Organizations

There is a unique if rare hybrid that combines the missions of an issue-oriented public interest group and an employee organization. These groups consist of employees from a particular government agency or industry that have joined together to champion a common agenda. Groups such as Public Employees for Environmental Responsibility (PEER), the Association of Forest Service Employees for Environmental Ethics (AFSEEE), and the Center for Women's Economic Alternatives (a self-help group for women working in the poultry industry) have conducted public interest advocacy work. Because they are employee-focused, they are more likely to understand and be sensitive to whistleblower concerns.

If one exists in your field, an employee support organization may be of particular importance because it is able to connect you with other like-minded professionals—including current and former whistleblowers—in your area of expertise. These organizations represent a collective of employees, which can both lend credibility and facilitate anonymity if you wish. Such groups frequently serve as a voice for employees who cannot speak publicly. Like whistleblower support groups and unions, they are natural vehicles to channel, cloak and/or amplify dissent through solidarity tactics, such as surveying other employees on the issues relevant to your dissent, and then publicizing the survey results. Keep in mind that the question of how much control you

have over the public release of your information is something you will want to negotiate in advance. For example, it may be acceptable to you for a group to use your information in framing tough survey questions based on your disclosures, even if you would object to having the organization assert that it knows the answers.

Tips on Approaching Advocacy Organizations

How you approach an advocacy group can be decisive in your working relationship. Never go in with demands. Although your issues are very important, remember that there are a lot of competing issues and priorities for these groups, and you do not want to alienate staff by being too pushy.

The first step is to do your homework. Research potential organizations to make sure they are reputable and will be sympathetic to your cause. If you already have a lawyer, ask him or her for advice about whether it is wise to approach a particular organization.

The second step is to write up the basis of your whistleblowing concerns and the details of your case in a two- to three-page summary. You may use the same basic summary that you prepare for reporters—but tailor it to highlight what you can do for the organization (such as provide information for a public interest group's campaign on food safety, or help a union expose corruption in a company). In this introductory summary, do not include anything that you would not want your employer to know you are disclosing—at least not until there is mutual agreement and a commitment by the group on how your information will be used. After scouting the terrain through introductory telephone inquiries, send your summary, with a short letter of introduction stating what you hope to achieve, to the appropriate contact person at the organization.

As you begin communicating with an organization, keep in mind that protecting your attorney-client privilege is critical if you want your information or identity to remain confidential. Remember that advocacy groups are not automatically covered

by the privilege. Therefore, you may be waiving this legal right unless you talk only through one of the group's lawyers on the condition that s/he maintains your attorney-client privilege. If you fail to protect your attorney-client privilege by disclosing your information to a non-attorney, that person could be required to produce your disclosures in legal proceedings. The safest route is to seek counsel first from your own attorney, who can conduct initial negotiations with the group or its lawyers on how your information will be used. At a minimum, an attorney could negotiate the organization's commitment to legally defend your anonymity through First Amendment freedom of association rights in court, if necessary.

The next step is to make a follow-up call to the contact person to ensure that your information was received and to try to set up an in-person meeting. Be firm and polite in your conversations. If they are not interested, ask for referrals to other organizations.

If the group is concerned and wants to help, make sure to establish clear parameters for defining your relationship. The sooner you communicate your mutual expectations, the less chance there will be for misunderstanding and potentially career-damaging mistakes.

Making an organization a valuable ally takes work and patience. The following are some questions you may want to ask:

- What are your funding sources?
- Have you worked with whistleblowers before? If so, who, and may I contact them about their experience?
- What benefits do you provide to members (if you are speaking to a union or professional association)?
- How will you use my information? What are your goals in using my information? To further what ends?
- Are you willing to protect my identity as the source of the information (if applicable)?
- Will I be able to fact-check public documents you produce to ensure accuracy? (This is especially important if disclosures are of a highly technical nature.)
- Is there one person who will be my primary contact?
- Are you comfortable working with my lawyer (if applicable)?
- What sort of financial commitment, if any, is expected of me?

CHAPTER FOUR

Choosing and Working with an Attorney

It should be clear by now that to blow the whistle safely and effectively, you need help. You need support from groups and constituencies positioned to assist you in exposing the wrongdoing you have discovered. But you also need legal expertise.

A lawyer is an indispensable expert, regardless of whether your whistleblowing experience leads to a lawsuit. A well-informed and sympathetic attorney can offer guidance at every step in the whistleblowing process, and can help you avoid serious missteps. An attorney can help you prevent reprisals from occurring in the first place, through supervising and monitoring your disclosure through the safest channels. If retaliation is inevitable, an attorney can ensure that you are on solid legal ground by screening your whistleblowing disclosure to provide an expert opinion on whether it is "legally-protected speech." Otherwise you may forfeit your rights: if you say too much or do not have enough corroborating evidence, what you intend as whistleblowing may not qualify for protection under the law.

Whether a whistleblower's story has a happy or tragic ending depends to a significant degree on picking the right lawyer and maintaining an effective working relationship with that person.

In the eyes of the law, the attorney and client are as one. The attorney is the client's "mouthpiece," and the client automatically receives both the benefits and the liabilities of the attorney's statements and decisions. Selecting a lawyer is a decision as significant as any other in the whistleblowing cycle.

Unfortunately, many whistleblowers are so anxious to get their cases into the hands of an "expert" that they accept the first lawyer who will take them on affordable terms, without truly knowing the partner upon whom not only their whistleblowing experience but also their professional future may depend. Such an arrangement poses unacceptably high risks to future happiness, financial well-being and legal success.

Ultimately, trust and intuition are as important as a catalogue of "dos" and "don'ts" in selecting and working with an attorney. Like any partnership, to be effective the attorney and client should like each other and have a rapport based on mutual respect, at least within the context of their professional relationship. After all, they must rely on each other in a high-stakes conflict in which they are both "underdogs" by any conventional measure. But the smart whistleblower will follow both intuition and the guidance of a checklist based on the lessons learned by others who have gone through the same experience.

Our advice to whistleblowers who need legal representation is summarized below in two sets of suggestions. The first set focuses on selecting an attorney, the second on maintaining a good working relationship with him or her. Not all of the suggestions may be relevant to your case. More importantly, these tips are not all-inclusive. They represent a composite of experiences shared by those who have been represented by GAP or sought help from similar groups, such as the Project on Government Oversight and Public Employees for Environmental Responsibility. Please let us know if you have items to add to the list. We receive a steady stream of requests from new whistleblowers who could benefit from lessons learned.

Tips on Choosing an Attorney

The following are suggestions on how to locate and select a good attorney.

1. Check with others who have first-hand experience with employment attorneys. Do not overlook referrals from friends who may have had similar experiences and enjoyed good attorney-client relationships. Contact GAP for suggestions. A routine part of our service to whistleblowers is to provide attorney referrals.

2. Contact issue-specific public interest or community organizations. In addition to contacting GAP, you may find it useful to locate an attorney with the help of non-profit organizations that have an interest in the particular issues behind your whistleblowing. You may contact local groups or affiliates, or the Washington offices of national groups. Remember that the principle of confidentiality that seals an attorney-client relationship will not apply during your discussions with lay representatives at such groups, so be careful about how much you say; unless you want to make a whistleblower disclosure to them, you should avoid discussing your allegations. You may simply point out, for example, that you have suffered retaliation for pursuing the same values on the job that reflect their organization's mission in the larger community. Then ask for their help in finding an attorney with a good track record in employment law, the topic of your dissent, or preferably both.

3. Traditional sources such as the local bar association or relevant committees of the American Bar Association can help identify respected specialists. Your local public library also should have a copy of the lawyer's directory, Martindale-Hubbell, which describes the specialties of attorneys under a variety of cross-references. When seeking referrals, ask for attorneys who specialize in wrongful discharge. If that fails to produce an adequate list, broaden the scope to employment law.

4. Get to know each other. One common reason that attorney-client relationships sour is that each entered the partnership with differing expectations. An essential step in deciding on an attorney is to clarify—and then communicate—your own expectations, in as much detail as possible.

5. Before even talking to a prospective lawyer, take time to summarize your story in writing. Be concise: limit yourself if possible to less than two single-spaced, typed pages and certainly less than five. Take your time preparing this document. Keep in mind that you may be able to edit and re-use this statement later as a fact summary for outreach to members of Congress or the media. Prospective attorneys will appreciate the time they save by reading it before meeting with you. They can then get down to asking you the hard questions with some background knowledge of the dispute and its context. Remember that your case summary supplies an attorney's first impression of you and your communications skills. Perhaps more importantly, it allows the attorney to test your credibility, by questioning you to determine whether you tend to exaggerate. Stick to the facts and avoid unnecessary conclusions. Lawyers like to draw their own conclusions.

6. Identify solid candidates as supporting witnesses for your whistleblowing case, and be prepared to describe how their testimony could help. Similarly, prepare a list of relevant documents currently or potentially available. It takes a near-miracle to win without either strong supporting testimony or documentary evidence.

7. Remember that a primary goal of your initial interview is to sell yourself to build the attorney's confidence in your prospects for winning. Prospective lawyers may be wary of someone who immediately cross-examines them on too wide a range of topics; remember that the attorney needs to form an initial overall impression of you. Before you get serious about signing a retainer, however, you will need to know where you both stand on a range of issues—so you will need to ask questions, including some of those discussed below.

8. Find out in advance if there is a fee for the initial consultation with the lawyer, and if so, what it is. If you do not make a point of inquiring, you may find yourself unable to afford up to four-figure composite bills incurred in your effort to make an informed choice.

9. Confirm that the attorney-client privilege applies to what you discuss. Ensure that the information will not be revealed without your consent.

10. Even if you have confirmed the confidentiality of the discussions, check for conflicts of interest. Take the following two steps to learn whether the attorney has any other clients related to your dispute. First, before your introductory meeting, check the list of "representative clients" in Martindale Hubbell. (Old copies may have more complete listings.) Then, if you see any potential conflicts of interest, ask the attorney about them before you disclose confidential information. For example, one whistleblower at a poultry slaughter plant later learned that his powerful lawyer represented the state's poultry trade association. Not surprisingly, the lawyer allowed the statute of limitations to lapse on the whistleblower's case. Also not surprisingly, the employee could not find anyone to take a malpractice case against the lawyer in the state, which was dominated by the poultry industry.

11. Make clear your goals and objectives. This includes not only issues involving the attorney's representation, but also matters concerning the larger public policy issue that triggered your whistleblowing. Some lawyers, for example, will be uncomfortable if you continue to speak out publicly about your whistleblowing allegations during the lawsuit. Other lawyers, who are advocates for the values you were defending with your dissent, will support your efforts to continue your public advocacy. Similarly, one firm may be appropriate for a whistleblower who wishes to settle a dispute quietly, while a different firm would

better serve a whistleblower whose goal is to have his or her day in court. The point is that legal organizations and individual attorneys vary tremendously in their values, priorities and work styles. To illustrate, GAP only accepts clients who first pledge not to accept financial settlements that "gag" them from cooperating with ongoing government investigations into the alleged wrongdoing they exposed through blowing the whistle.

12. Determine the attorney's willingness to work with groups helping to champion your whistleblowing concerns, if you want to keep making a public policy contribution. Some attorneys are unwilling to relinquish control of valuable information they learn from legal depositions or subpoenaed documents until the lawsuit is over. This could mean that evidence may not reach the public realm for years—even if that evidence could prevent needless tragedies or scandals.

The issue is a complex one. There are often valid legal reasons to keep significant evidence secret. The use of secrecy is a necessary tactic in litigation. For example, premature public disclosures may rule out future voluntary cooperation by your former employer or colleagues in pretrial efforts to gather necessary facts for the trial. Alternatively, such disclosures could preclude settlement as an option by forcing your employer to neutralize your attacks by discrediting you in the lawsuit. In some cases, willingness to keep damaging information "under seal" could increase the value of a settlement in your case.

In short, the best way to win a lawsuit is not always the best way to expose and correct the wrongdoing that led you to blow the whistle in the first place. These dilemmas are inherent in whistleblowing; they are tough choices to make, and ultimately, they are your choices. The important point here is that you should pick an attorney who shares your perspective as much as possible, to avoid the possibility of serious conflicts when they would be highly damaging, at a critical point in the case.

13. Work out what your financial burdens and options are. Disgruntlement with a client for failing to keep up with

expected payments is a major reason that lawyers reduce the time and energy they put into a case.

14. Pin down who will handle the case. The lawyer who discusses the case with you initially may not be assigned to your case. Don't make a decision until you meet and have confidence in the specific attorney who will be responsible for defending your rights and interests.

15. Find out how much time the attorney has and will commit to your case. Even the best lawyers are inadequate if they are so burdened by an overextended docket of cases that they cannot give your case the attention it needs. On the other hand, many clients have an entirely unrealistic expectation of how much time truly is needed on a particular case.

16. Determine how much time and effort the attorney expects from you as a participant in preparing your case. Some attorneys prefer their clients to be functional partners, while others view the same client initiatives as interference. Whistleblowers, too, range from those who cannot stay away from their cases to those who prefer to get on with their lives and not be bothered unnecessarily.

17. Get a commitment on how much notice you will receive of developments, information and decisions that make a difference for your case. It can be poison for a working relationship and fatally undermine a client's rights if an attorney withholds key developments from a client. On the other hand, it is unrealistic to expect a lawyer to do his or her job if s/he must review daily developments with each client. Facilitate a relationship of trust that you both can count on by establishing this balance up front.

18. Learn the attorney's track record in handling cases similar to yours, such as win-loss records and significant precedents or benefits obtained for other clients. There is nothing rude about simply asking. Another way to gather this

information is to review public court documents, such as briefs and relevant judicial decisions in similar cases that the attorney has handled.

19. Pin down your role in any potential settlement negotiations. Remember that the great majority of cases settle before trial. You should request advance notice of proposals before they are made or of offers from the other side before any response is issued, and the attorney's willingness to respect your authority as the final decisionmaker in the settlement. A client is in a position of comparative weakness if an attorney threatens to quit unless settlement terms are accepted on the eve of trial. Be careful to remember, though, that your lawyer is the partner on your team who has unique expertise. Most of us have unrealistic expectations of what we deserve to achieve in a settlement, which by definition is a compromise in which both parties will be partially disappointed. From a lawyer's standpoint, a client is being unreasonable if s/he rejects a settlement that is comparable to what s/he would receive if the case were won in court. If the primary motivation for a whistleblower is to have his or her "day in court," the lawyer needs to know this at the outset.

20. When you sign a retainer agreement, remember that it is a contract. Treat this agreement with as much respect as you would any other contract. It may be one of the most important you ever sign. Read the terms carefully to make sure its provisions reflect any informal agreements reached on items listed above or from your own checklist. If you don't understand a term, ask the attorney to explain it and to replace the "legalese" with an English translation you understand. If the attorney balks, that is a warning sign to consider.

Tips on Maintaining a Good Working Relationship

Like any other relationship, the attorney-client version requires regular tending. It is liable to sour if either party takes the other for granted. The suggestions below illustrate ways you can do your share to maintain a healthy partnership.

1. Pay your bills on time. If there is a financial crisis, give your lawyer as much warning as possible and conscientiously try to make alternative arrangements. This is not only a matter of respect for your attorney's financial needs but also a strategy to preclude a common excuse by attorneys for tardiness or unenthusiastic advocacy.

2. Respect your attorney's time burdens and responsibilities to other clients. Do not cry wolf about emergencies or demand instant attention for non-emergencies. When possible, put developments in writing instead of demanding a phone or personal conference with your attorney. Confirm periodically, however, that the lawyer has read, understood and properly filed your written contributions.

3. Be a master of the facts. Your attorney should be able to count on you as the human encyclopedia of the record. Be available to provide complete, reliable information on the facts of your case and disclosure, when your attorney requests it.

4. View your lawyer as a human being who has a family and gets tired like everybody else. Attorneys understandably do not appreciate being seen only as instruments to bring their clients legal success, and may become resentful periodically if they feel that this is your only perception of them. Keep in mind that it is not to your advantage for your champion to resent you.

5. Do not insist on dealing only with the lawyer running the case. Get to know the junior attorney, administrative assistants and law clerks who are important parts of that attorney's team. Work through them whenever necessary. They may in fact be putting in a majority of the actual time invested in your case, and may be more familiar with some of the details.

6. Make sure that you and your lawyer continue to be clear about your comparative responsibilities and divisions of labor. Sometimes adjustments are necessary during the course of a case.

*7. **Do not assume that progress is being made or that nothing has happened if you haven't heard from your attorney for an extended period.*** Communication gaps are often innocent, but they may be damaging lapses.

*8. **Inform your attorney of any initiatives that you may wish to take to advance your whistleblowing or to secure additional help.*** That way you won't surprise your attorney by publicly disclosing information that s/he may have planned to use strategically in court, or end up either duplicating or working at cross purposes with him or her.

The attorney-client partnership unites a whistleblower's values with a lawyer's expertise. Remember, your lawyer is working for you. Feel free to read and research the legal arguments so that you understand the basis for a decision. If necessary, get a second opinion. Be aware, however, that your attorney has only limited time to teach you about the legal process, and will expect respect for professional judgment calls. Although you may be the boss, your attorney is the one with the expertise to lead you through largely unknown and potentially treacherous territory.

CHAPTER FIVE

Understanding Your Legal Protections—And Their Limits

Despite admonitions, warnings and threats you might receive, it is your right under the Constitution and numerous laws to blow the whistle and not to suffer discrimination for doing so. Government employees are protected under the First and Fourteenth Amendments of the Constitution, which prohibit federal, state and local governments from retaliating against workers who express reasonable dissent on matters of public concern. A host of laws reinforce this right. Depending on the information's sensitivity, a federal whistleblower may make disclosures internally or publicly—and still be entitled to the same legal protection. Protection for employees in the private sector, meanwhile, has developed over the past 25 years through statutes and under the common law.

Unfortunately, these protections are neither comprehensive nor well-enforced by government agencies and the courts. Inadequate remedies are the fatal flaw in whistleblower protection law. In some respects, what has evolved is a patchwork of specific employee legal protections covering environmental, health and safety, labor relations, and civil service issues. The following section provides a short introductory guide to your options under

these legal protections, beginning with general whistleblower protection laws, and then moving to more specialized statutes. This brief legislative and political summary confirms what employees who have tried to exercise their rights already know: the laws and institutions created to shield whistleblowers from retaliation are inadequate and often fail to live up to their stated goals. Understanding how whistleblower protection laws and structures have operated—or failed to operate—to protect whistleblowers in the past can help you develop a legal strategy that is realistic and savvy.

As a conclusion to the background discussion of each law, we have summarized the track record of results for those seeking whistleblower protection using the law. Overall, the odds of winning a reprisal lawsuit are not good—but they are improving. A review of published legal decisions reveals that the rate of success for winning a reprisal lawsuit on the merits in administrative hearings for federal whistleblower laws has risen to between 25 and 33 percent in recent years. Only a few years ago, whistleblowers won less than 10 percent of reported decisions under the same laws. It is important to keep in mind, however, that this is only part of the story. Whistleblowers tend to fare worse in decisions that do not make it into the law books. Further, many lawsuits are thrown out on procedural grounds or because of loopholes: whistleblowers lose these cases without having their day in court for a decision on the merits.

THE CIVIL SERVICE REFORM ACT

The foundation for federal employee protection is the Civil Service Reform Act of 1978 (CSRA). That law created a shield for the principles underpinning the civil service, known as the "merit system," by prohibiting eleven personnel practices (5 U.S.C. sec. 2302(b)). Specifically, the CSRA outlaws particular forms of harassment by employers, called adverse personnel actions. These range from failure to hire or promote, to reassignment, loss of duties, demotion and termination. The law prohibits agencies from recommending, threatening to take, or taking listed personnel actions against employees for whistleblowing disclosures, exercise of appeal rights, or off-duty conduct that does not affect job performance. It also bans personnel actions that violate the Constitution or other laws relevant to the merit system, such as the Privacy Act. The CSRA was expanded and strengthened by the Whistleblower Protection Act of 1989 and 1994 amendments, discussed below.

Institutionally, the Civil Service Reform Act erased a perceived conflict of interest within the old Civil Service Commission by separating the tasks of personnel management from the responsibilities for adjudicating employee disputes. The new law created three new agencies—the Office of Personnel Management (OPM) to manage the civil service system; the Merit Systems Protection Board (MSPB) to hear due process administrative appeals of personnel actions, including alleged prohibited personnel practices; and the Office of Special Counsel (OSC) to protect and defend employees who allege prohibited personnel practices. As discussed earlier, the OSC was charged with a parallel duty to screen whistleblowing disclosures and to order agency investigations of those with merit. The system was designed to allow an employee who was dissatisfied with the MSPB's ruling to appeal the decision to the appropriate U.S. Circuit Court of Appeals. When Congress created the U.S. Court of Appeals for the Federal Circuit in 1982, however, it gave the new court a monopoly on MSPB appeals.

Although the Civil Service Reform Act may have been a well-intentioned effort to strengthen employee rights, it has evolved into a system that is inadequate at best—and counterproductive at worst—for civil service employees. Most fundamentally, the law has deprived federal employees of access to the courts and a jury trial to defend their basic constitutional rights. Instead, civil servants have largely been shunted to a bureaucratic agency, the Office of Special Counsel, and an administrative law forum, the Merit Systems Protection Board. Often, employees have virtually no control over their cases. Their protection against reprisals is entirely at the mercy of the Office of Special Counsel.

Previously, federal workers had access to the courts to challenge constitutional violations: they could pursue suits for punitive damages against individual employers in a jury trial before their peers. Although Congress did not state that it was abolishing constitutional remedies for civil servants when it passed the 1978 statute, it also did not take explicit steps to preserve those remedies. Faced with this ambiguity, in 1983 the Supreme Court removed the courts from the process of handling federal employment disputes on constitutional rights. In *Bush v. Lucas*, the Court held that when a Civil Service Reform Act remedy is available, an employee cannot seek damages for constitutional violations. Although the Reform Act's primary congressional sponsors filed a "friend of the court" brief protesting that they had not intended to limit the rights of employees, Congress has not acted to counter the *Bush* ruling. Even employees without access to civil service protections, such as hybrid workers on joint federal-state projects, do not necessarily have access to constitutional remedies; some are restricted to filing internal grievances. The only minimum guaranteed access to the courts is limited judicial review of agency decisions under the Administrative Procedures Act.

"Congress has given us dozens of protected disclosure laws—and no quick way to get into federal court with any of them."
—Justice Department whistleblower

The net result has been a loss for whistleblowers: the record to date shows that a woefully inadequate and often politicized administrative forum, the MSPB, is no substitute for a jury in determining the fate of whistleblowers who claim reprisals for defending the public. In reported MSPB decisions during its almost twelve years of operation before passage of the Whistleblower Protection Act, federal employees seeking to defend themselves as whistleblowers won on the merits only five times. The record of the Federal Circuit Court of Appeals toward those employees who appealed these MSPB rulings was even more abysmal: whistleblower defenses prevailed on the merits only twice in the seven years before passage of the Whistleblower Protection Act.

The cornerstone of the Civil Service Reform Act was the Office of Special Counsel, created as a watchdog to protect the merit system and to champion the rights of reprisal victims. The evolution of the OSC is the key to understanding the failures and limitations of the law. By stripping whistleblowers of the right to defend themselves in court in most cases, the new law left them at the mercy of an agency that—despite its mandate to serve as an advocate for employee rights—quickly emerged into an agency hostile to whistleblowers.

The CSRA gave the Office of Special Counsel a broad mandate and almost total discretion, in large part to defend freedom of speech. But the agency failed to use these powers to serve whistleblowers. At its worst, the OSC served instead as a "legalized plumber's unit," in the words of one Senate staffer—the Executive Branch's most effective weapon to identify and silence dissenters in federal agencies. The record is sobering: for the first decade after its creation, the OSC turned down 99 percent of whistleblower cases without attempting disciplinary or corrective action. Since 1979, the Special Counsel has only pursued litigation through one corrective action hearing to restore a whistleblower's job.

The roots of the problem lie in the political constraints facing government oversight agencies. The Office had an inspired start under H. Patrick Swygert. But after filing a whistleblower suit against the Department of Justice during the Carter Administration, the OSC had its budget rescinded during the next fiscal year, and nearly all of its staff had to be furloughed. The OSC barely survived, and no Special Counsel since has challenged seriously the powerful federal bureaucracies. In fact, the agency became overtly hostile to whistleblowers in many cases.

Although the Office was created to guard against the use of Watergate-era techniques to harass employees out of their jobs, former Special Counsel Alex Kozinski used precisely these tactics during his tenure in the early 1980s. Kozinski orchestrated a

Further, frustrated whistleblowers continued to report that the OSC was failing to serve as an effective investigator or advocate. Among other charges, whistleblowers argued that the OSC channeled evidence of wrongdoing back to the agencies that were the targets of reprisal charges; delegated the investigative authority for key witnesses to the office in the target agency that was responsible for defending the agency against the reprisal charges; failed to create a verifiable record and then misrepresented the position of supporting witnesses; refused to inform the complainant of evidence that had to be rebutted; and generally appeared to invest more resources in investigating the whistleblower and his or her supporters than in investigating the alleged retaliation.

The story of Veterans Administration police officer John Berter captures the experience and frustration of many whistleblowers. Berter was fired after blowing the whistle on police brutality against minorities and veterans. The OSC boasted that the Berter case was one of "the most extended and intensive investigations we've ever done." In fact, the OSC stood by passively until Berter testified in congressional hearings organized by former Representative Pat Schroeder (D-CO). At that point, the OSC went to work. But according to a House Civil Service Subcommittee staff investigation, the OSC's investigation quickly became an attack on Berter's "motives, his allegations, his doctors, his supporters, his witnesses, the victims, his skills, and a prior FBI report that found substance to his charges." Six witnesses submitted affidavits repudiating the OCS's characterization of their testimony. Finally, in a closeout letter that failed to discuss any of the 27 affidavits submitted by Berter from victims or witnesses, the OSC dismissed all of his charges, conceding only some "peripheral" validity.

One result of these failures in the whistleblower protection system was an increase in fear of reprisal among prospective whistleblowers in the early 1980s. In 1980, 19 percent of surveyed federal employees who witnessed but did not report fraud, waste and abuse, cited fear of reprisal as the reason for remaining silent. By 1983, the figure had jumped to 37 percent. In 1985, the MSPB admitted in a press release that "[t]here has been a significant increase in the fear of reprisals, the reason given for not having reported fraud, waste, and abuse." The numbers were a clear indication of the failure to adequately protect government employees from reprisals for speaking out against wrongdoing.

THE WHISTLEBLOWER PROTECTION ACT

After 1982 Congress increasingly recognized that the 1978 Civil Service Reform Act was not living up to its intent—and had even backfired in many cases by providing a channel for increased harassment. In 1982, Special Counsel Alex Kozinski resigned, after public exposure that he had created a course instructing federal managers in how to fire whistleblowers without getting caught. President Reagan subsequently appointed Kozinski as Chief Judge of the Claims Court and then to the Ninth Circuit Court of Appeals—a confirmation he barely survived because of controversy over his record as Special Counsel. Former Representative Pat Schroeder (D-CO) even introduced a bill to abolish the OSC during this period. Although this legislative effort died, Congress did turn its attention once again to the question of federal whistleblower protection, and held a series of hearings on potential new legislation.

In September 1986 the House of Representatives unanimously passed a Whistleblower Protection Act for federal employees. The Senate did not act on the legislation, however, due to time pressure and an administration veto threat. After two more hearings, in October 1988 the House and Senate unanimously passed a nearly identical whistleblower protection bill. President Reagan, however, waited until Congress adjourned and then pocket-vetoed it. Congress did not back down. Congressional negotiators led by Senator Levin and Representative Schroeder persuaded the incoming Bush Administration to accept an even stronger bill, and on March 19, 1989 it passed—again unanimously. The law became effective on July 9. It was one of the few laws that was

passed unanimously twice, and that was strengthened by Congress after a presidential veto.

The Whistleblower Protection Act (5 U.S.C. sec. 1201 note) contains ten major provisions that strengthen the Civil Service Reform Act rights of public servants. Specifically, the Whistleblower Protection Act;

1. *Enforced the Government Employees' Code of Ethics.* The 1989 law forbids agencies from acting against any employee for declining to engage in activity that is illegal. Previously, employees were expected to follow orders, and only had the right to protest after the fact—which effectively meant that they could be fired for refusing to be lawbreakers. The change gives teeth to the principles of the Government Employees' Code of Ethics (see Appendix H).

2. *Closed the loopholes in legally-protected dissent.* The law was changed to specify that "any" whistleblowing disclosure is protected if the contents are significant and reasonable. Prior law lacked clarity on this point, enabling the Office of the Special Counsel, MSPB and Federal Circuit Court of Appeals to impose technicalities creating a series of loopholes disqualifying genuine whistleblowing disclosures from the law's protection. They decided, for example, that a disclosure could be excluded from protection unless the whistleblower: 1) was the first to expose a problem; 2) could prove his or her motives were to help the public, and not self-interest; 3) was accusing specific officials of intentional misconduct; 4) first went through the agency chain-of-command; and 5) phrased the dissent as an accusation rather than a question or request for information. If Congress had not acted, the list of potential bureaucratic loopholes would have been limited only by the imagination.

3. *Defanged the Office of Special Counsel.* The Act requires the OSC to protect whistleblowers and not act contrary to their interests. More specifically, the OSC must: provide status reports to employees seeking help; refrain from giving evidence from or about the complainant to the employer or others during or after the investigation unless the employee consents; refrain from disclosing the identity of an employee making a whistleblowing disclosure without consent, even if the Special Counsel contends violating confidentiality is necessary for the OSC to carry out its duties; refrain from settling a case without including the employee's comments; explain the evidence supporting as well as opposing the employee's reprisal charges in any letter closing out a case; and refrain from intervening in related appeals without the employee's consent. Further, any negative OSC findings cannot be introduced in the subsequent MSPB appeal without the employee's consent. In the reports and speeches that create the law's "legislative history," moreover, Congress has explained that OSC employees who exceed these boundaries on their authority are acting as individuals, not in their capacity as government officials. That means that offending OSC staff can face damage suits for violating a victim's rights. To date, however, there has not been a test case of personal liability for OSC staff.

4. *Gave whistleblowers control of their cases.* Under the 1978 Civil Service Reform Act, whistleblowers facing many common forms of reprisal had only one avenue for relief—the OSC. Since 1989, all federal workers or applicants can act individually to challenge the same personnel actions as the Special Counsel, through an on-the-record, evidentiary hearing at the Merit Systems Protection Board. Employees who use their hearing rights must first file complaints with the Special Counsel for 120 days, but if there is no decision after that time the employee is free to take control of the case by filing an Individual Right of Action (IRA) with the Board. Similarly, if the OSC turns down the complaint, the employee can file for a hearing within 60 days. Further, employees can file their own action to seek temporary relief through an administrative "stay" against a threatened or ongoing whistleblower reprisal. Significantly, there is no statute of limitations to file a whistleblower complaint with the OSC, which can evolve into an IRA. If you are simply appealing a termination or demotion without the reprisal defense, the Board must receive your appeal within 35 days, or you may lose the rights.

5. *Eliminated the legal motives test.* Under prior law,

whistleblowers had to prove that an employer's act against them was in "retaliation" for legally-protected whistleblowing activity. But it is almost impossible to prove that a manager had a hostile state-of-mind—and thus had retaliatory motives—without a confession. Under the 1989 Whistleblower Protection Act, a whistleblower must prove only that the action against him or her occurred "because" of protected whistleblowing, and is explicitly relieved of having to prove that the agency had retaliatory motives.

6. Reformed unrealistic legal burdens of proof. The 1989 law makes two changes in the legal burdens of proof facing employees. First, the law reduces employees' burdens of proof. Before the Act, constitutional law determined that whistleblowers had the burden throughout their legal challenge to prove that reprisal is the substantial or predominant motivating factor for a personnel action against them, by a "preponderance of the evidence." The 1989 legal groundrules shrink an employee's burden to proving that his or her protected whistleblowing disclosures are a "contributing factor." Congressional leaders were careful to define the term broadly: it means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."

Second, the Act shifts the burden of proof once an employee establishes an initial *prima facie* case that whistleblowing was a contributing factor in the personnel action. The burden of proof then shifts to the agency to prove by "clear and convincing evidence"—one of the most difficult standards in civil law—that it would have taken the same action anyway, independent of the employee's whistleblowing. The requirement that the agency "would" have acted anyway is particularly significant. Congress repeatedly has emphasized that it is insufficient that an employer "could" have acted on grounds independent of whistleblowing; this would create an unacceptable loophole in the law.

7. Provided interim relief. Under prior law, employees who prevailed at an initial MSPB hearing remained off the job without salary while the agency pursued an appeal to the full Board. Under the 1989 law, whistleblowers or others who win at the initial hearing must be returned to their jobs—or at a minimum, to the payroll—during the appeal.

8. Provided transfer preference. Legal victories for whistleblowers have been hollow when employees were returned to hostile supervisors, who were even more vengeful after being defeated. Repeatedly, employees who won were promptly fired again on new charges. The new law allows victorious whistleblowers to receive placement preference for a new job and a fresh start.

9. Strengthened whistleblower disclosure channels. The Act forbids the Special Counsel from sending a whistleblower's charges back to the relevant agency, unless the OSC has the employee's consent or rules that the dissent is reasonable and orders the agency to investigate and report back. When the report comes in, moreover, the Act requires that the whistleblower's critique be included in all public releases and files—an important provision given the tendency of agency self-investigations to produce self-exonerations.

10. Protected alternative statutory remedies. As discussed above, the *Bush v. Lucas* Supreme Court ruling held that an employee's right to file suit in district court for constitutional violations was canceled by duplicative civil service remedies in the Civil Service Reform Act. In addition to canceling constitutional remedies for civil servants, judges often canceled out parallel statutory remedies as well. The 1989 law explicitly protects all other statutory remedies that could be alternative options to the Whistleblower Protection Act.

1994 AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

The Whistleblower Protection Act, as written, was the strongest free speech law that government employees had ever seen. Unfortunately, it did not live up to its promise. Because it was not adequately enforced, the law too often created a false sense of security for whistleblowers by providing the illusion but not the

reality of protection. At worst, it created new reprisal victims at *a far greater pace than it protected them.*

A 1993 MSPB survey found that the rate of eyewitnesses challenging fraud, waste and abuse had increased from 30 to 50 percent since the last survey in 1983, taken before the passage of the Whistleblower Protection Act. In 1993 the General Accounting Office reported that 60 percent acted within the chain of command instead of outside the system—but 20 percent were harassed within 24 hours of reporting wrongdoing. Overall, the rate of ensuing retaliation increased from 24 percent to 37 percent. Less than ten percent of those who exercised legal remedies received assistance, and 45 percent reported that acting on their rights got them into more trouble. The MSPB survey found that, by a 60-23 margin, employees did not believe their rights would protect them, and fear of reprisal remained as strong an incentive for would-be whistleblowers to remain silent as in 1983.

The reason that the Whistleblower Protection Act had failed to meet its promise was no mystery. Agencies responsible for the Act's implementation were unwilling to enforce it. Whistleblowers' official champion, the OSC, remained unresponsive or worse. Despite the fact that the OSC received 400-500 cases yearly and had the most sympathetic legal standards ever, the Office failed to litigate a single case to restore a whistleblower's job. The GAO concluded that the OSC had not improved on its traditional record of obtaining formal or informal relief for only five percent of complainants. Meanwhile, 59 percent of whistleblowers reported to the GAO that the Office undercut their rights by sending information without permission about their cases back to their employers; 76 percent concluded that the Office of Special Counsel in practice acts to serve agency interests, rather than the civil service merit system.

The MSPB litigation record of the Whistleblower Protection Act was equally bleak. In the first two years after the Act's passage, whistleblowers won approximately 20 percent of decisions on the merits. After fiscal year 1991, however, that rate dropped to five percent.

After four more congressional hearings, two GAO reports and an MSPB study, Congress responded. Just after midnight on October 8, 1994, the last day of the session, lawmakers—led by Senator Pryor (D-AR) and former Representative Frank McCloskey (D-IN) and their staffs—added at least 20 new "teeth" to the Whistleblower Protection Act. The amendments are scattered throughout the Act, but can be found as a package at 140 *Cong. Rec.* S.14668-70, H.11419-22 (Oct. 7, 1994). The bill took effect on October 29. The amendments offer significant improvements, although gaps remain.

Perhaps the most important development was that 65 percent of federal workers covered by collective bargaining agreements now receive state-of-the-art administrative law protection through arbitration hearings. Employees not only have an equal voice in picking the arbitrator who decides their case, but also can seek immediate relief through a legal action to temporarily stop (or "stay") the adverse personnel action. They can counterattack for discipline against managers who attempt reprisals, and they can have their cases governed by the more favorable Whistleblower Protection Act legal standards. Congress also restored normal judicial review for arbitrations. The provision permitting whistleblowers to seek—and arbitrators to impose—disciplinary sanctions on managers was particularly innovative even if controversial.

> *"Learn the legal lay of the land before you blow the whistle."*
> *—Department of Agriculture whistleblower*

Power to sanction agency managers who retaliate against whistleblowers was reinforced through the 1994 amendments. In addition to empowering arbitrators, the amendments require the Merit Systems Protection Board to refer managers for disciplinary investigations whenever there is a finding that reprisal was a contributing factor in a personnel action. For the first time, agency officials stand to lose personally before the MSPB or arbitrators if they choose to retaliate against employees.

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

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

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

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

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

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

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

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

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

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

THE FALSE CLAIMS ACT

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

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

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

In theory, it is important that the whistleblower protections of the False Claims Act could be provided through a jury trial in U.S. District Court, rather than a government administrative forum such as the Merit Systems Protection Board. Because of their independence, the federal courts should be better able to protect a whistleblower without direct pressure from the whistleblower's company or agency.

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

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

PROTECTIONS UNDER STATE LAW FOR PRIVATE AND PUBLIC SECTOR EMPLOYEES

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

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

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

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

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

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

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

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

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

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

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

PIECEMEAL FEDERAL PROTECTIONS FOR PRIVATE AND PUBLIC SECTOR EMPLOYEES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

One explanation for DOL's erratic rulings under environmental statutes may be a 1996 internal reorganization within the Department of Labor. On April 17, the Secretary of Labor delegated authority to review recommended decisions by Administrative Law Judges to an Appeals Review Board. Prior to that date, decisions on the merits by the Secretary in 1996 had favored whistleblowers by a 9-5 margin. Nuclear whistleblowers had won six of eight cases. After April 17 through year's end, however, employees were 1-13 for reported decisions on the merits, including 0-12 for nuclear whistleblowers under the Energy Reorganization Act.

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

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

under current law.

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

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

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

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

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

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

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

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

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

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

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

THE MILITARY WHISTLEBLOWER PROTECTION ACT

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

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

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

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

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

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

WHISTLEBLOWING WITH A SECURITY CLEARANCE

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

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

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

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

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

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

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

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

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

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

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

One of the most common problems confronting employees with security clearances involves the use of gag orders. Potential whistleblowers should know the political and legislative history behind various efforts to impose gag orders as a condition of obtaining or retaining security clearances, and how to protect themselves.

The most serious effort to restrict whistleblowers through gag orders arose in 1983, when President Reagan introduced Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER SIX

The Need for Reform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

About the Government Accountability Project

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

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

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

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

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

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

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

Resources for Whistleblowers: Public Interest Organizations

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

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

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

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

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

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

American Civil Liberties Union
National Taskforce on Civil Liberties in the Workplace
166 Wall Street
Princeton, NJ 08540
(609) 683-0313 / Fax: (609) 683-1787
E-mail: maltbyclu@aol.com
Internet: http://www.aclu.org

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

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

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

Resources for Whistleblowers: A Select Bibliography

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

Glazer, Myron and Penina Glazer. 1989. *The Whistleblowers: Exposing Corruption in Government and Industry.* New York: Basic Books.

Graham, Jill. 1986. "Principled Organizational Dissent." *Research in Organizational Behavior* 8: 1-52.

Greenberger, David B., Marcia P. Miceli, and Deborah J. Cohen. 1987. "Oppositionists and Group Norms: The Reciprocal Influence of Whistleblowers and Co-workers." *Journal of Business Ethics* 6: 527-42.

Jermier, John. 1988. "Sabotage at Work: The Rational View." *Research in the Sociology of Organizations* 6: 101-34.

Jos, Philip, Mark E. Tompkins and Steven W. Hays. 1989. "In Praise of Difficult People: A Portrait of the Committed Whistleblower." *Public Administration Review.* November/December: 552-61.

Miceli, Marcia P. and Janet P. Near. 1992. *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees.* New York: Lexington Books.

Miethe, Terance D. and Joyce Rothschild. 1994. "Whistleblowing and the Control of Organizational Misconduct." *Sociological Inquiry* 64 (Summer): 322-347.

Perrucci, Robert M., R.M. Anderson, D.E. Schendel, and L.E. Tractman. 1980. "Whistleblowing: Professionals' Resistance to Organization Authority." *Social Problems* 28: 149-64.

Rothschild, Joyce. 1994. "Whistleblowing as Resistance in Modern Work Organizations: The Politics of Revealing Organizational Deception and Abuse." In *Resistance and Power in Organizations: Agency, Subjectivity and the Labor Process*, ed. John Jermier, Walter Nord and David Knights. London: Routlege, Kegan Publishers.

U.S. Merit Systems Protection Board. 1984. *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings.* U.S. Merit Systems Protection Board, Office of Merit Systems Review and Studies, Washington, DC.

Valentine, Carol A. 1995. *Stop Thief! What Happens When a Citizen Takes on the Federal Fraud Machine.* Washington, DC: Fund for Constitutional Government.

Wall Street Journal. 1992. "Tipsters telephoning ethics hotline can end up sabotaging their own jobs." 28 August 1992.

Westin, Alan F. 1981. *Whistleblowing: Loyalty and Dissent in the Corporation.* New York: McGraw-Hill.

Resources for Whistleblowers: An Internet Index

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

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

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

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

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

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

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

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

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

Guide to Clarion Calling: Association of Forest Service Employees for Environmental Ethics (AFSEEE)
http://www.afseee.org/Publications/Reports/Clarion.Calling/Clarion.html

Integrity International
http://www.nicom.com/~helpline

Jim D'Elia's Whistleblower Home Page
http://members.aol.com/jdelia2667/whistle.htm

Jobs with Justice: A national coalition fighting for the rights of working people
http://www.igc.apc.org/jwj

LawMall: Self-help pamphlets for dealing with legal problems
http://www.lawmall.com/lm_pamph.html

Merit Systems Protection Board website
http://www.access.gpo.gov/mspb/

Office of Special Counsel website
http://www.access.gpo.gov/osc/

Project on Government Oversight (POGO)
http://www.mnsinc.com/pogo

Public Employees for Environmental Responsibility (PEER)
http://www.peer.org

Taxpayers Against Fraud: Information on the False Claims Act
http://www.taf.org

Whistleblowing Outlets
http://www.reporter.org/hillman/courage/outlets.html

Responsible Whistleblowing: A Whistleblower's Bill of Rights

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

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

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

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

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

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

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

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

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

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

Text for a Model Citizen Enforcement Act

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

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

THEREFORE BE IT RESOLVED:

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

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

SECTION 3: EMPLOYEE PROTECTION:

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

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

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

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

Model Anti-Gag Statute and Addendum

No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Form 312 and 4355 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with or otherwise alter the employee obligations, rights or liabilities created by the Constitution, Executive Order 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 3230(h) of Title 31 (governing disclosures challenging fraud in government contracts); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); section 3729 *et seq.* of title 31, United States Code, as amended by the False Claims Act (governing disclosures challenging fraud in government contracts); the Intelligence Identities Protection Act of 1982 (50 U.S.C. sec. 421 *et seq.*) (governing disclosures that could expose confidential Government agents), and the statutes which protect against disclosure that may compromise the national security, including sections *504 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. sec. 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this agreement and are controlling."

Code of Ethics for Government Service

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

Any Person in Government Service Should:

I. Put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.

II. Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.

III. Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.

IV. Seek to find and employ more efficient and economical ways of getting tasks accomplished.

V. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.

VI. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

VII. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

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

IX. Expose corruption wherever discovered.

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