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## ON TERRORISM AND WHISTLEBLOWING

Michael P. Scharf\* & Colin T. McLaughlin†

*At a Bio-Terrorism Conference at Case Western Reserve University School of Law on March 31, 2006, the government participants were asked what they would do if a superior instructed them not to disclose information to the public about the likely grave health affects of an ongoing bio-terrorist attack. In response, they indicated that they would be reluctant to become a "whistleblower." This is not surprising since, despite the federal and state laws that purport to facilitate such whistleblowing for the public good, government whistleblowers routinely have faced loss of promotion, harassment, firing, and in some instances criminal prosecution when they have gone public with their important information. Yet, without government whistleblowers who had the courage to go to the press, the public would never have learned about Watergate, the Iran-Contra scandal, the inhumane practices at Abu Ghraib prison in Iraq, the secret prisons run by the United States in Eastern Europe, or the NSA policy of wire-tapping Americans without warrants. These disclosures initiated vital public debate and prompted corrective actions and reforms. The authors argue that the government whistleblower who in good faith discloses information to the press should no longer be treated as an enemy of the state, and provide a legislative proposal to give them a greater degree of protection from retaliation than exists under current legislation.*

Excerpt from "The Fifth Plague" Bioterrorism Conference: Panel Discussion.<sup>‡</sup>

MICHAEL P. SCHARF: The students who work with Professor Guiora and me at Case School of Law prepare research memoranda for five in-

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† Colin McLaughlin, JD, Case Western Reserve University School of Law, served as Assistant to Judge René Blattmann, the Second Vice President of the International Criminal Court, The Hague.

‡ "The Fifth Plague" archived webcast is available at <http://www.law.case.edu/centers/cox/webcast.asp?dt=20060331&type=wmv>. Panelists for this discussion included: Melanie Wilt, Public Information Officer, Office of Communications, Ohio Department of Agriculture (ODA); Amos Guiora, Professor of Law and Director, Institute for Global Security Law and Policy, Case Western Reserve University School of Law; and Charles J. Couch, Public Affairs Branch Chief, Ohio Emergency Management Agency (OEMA).

ternational criminal tribunals and also for the military commission that is prosecuting al Qaeda. Many of the cases involve the “obedience to orders” defense. The general rule is that a soldier or government official has a duty to disobey a manifestly unlawful order. My question for the information officers on the panel is: let us assume that your superior tells you not to disclose the existence of a bio-terrorist health threat to the press and to mislead or lie to the press if asked about the situation in order to avoid hysteria, and you believe that it really is necessary to get the actual story out for the public good, to protect lives and safety. Would you go public and blow the whistle?

MELANIE WILT: One of the things I learned earlier on with media relations is to not become part of the story. I do not want that story tomorrow to be about me; I do not want it to be about my director; and I do not want it to be about how my department has failed. So part of my job internally—and this is not the public part of my job, but the internal part of my job—is that if my director or my superiors are sitting around a table making policy decisions, and if I see that they are making a terrible mistake in a policy decision, I am going to say that. It is my responsibility to bring it to their attention that they are making a mistake.

AMOS GUIORA: Mr. Couch, do you want to add something to that?

CHARLES COUCH: I think it is absolutely true. As information officers, we have an ethical responsibility to get that kind of information out. We will get it out or we will find new jobs.

PROF. SCHARF: And if you quit, do you then tell the press?

MS. WILT: I guess you would have to ask me that when I was faced with that decision. I think that is something that you would personally struggle with. And at some point you either make a decision that could potentially put you in jail, about what you released, or you decide to keep it to yourself. I guess I could not make that decision unless I was forced to.

## I. INTRODUCTION

In my role as Co-Chair of “The Fifth Plague Conference,” a unique bioterrorism simulation held at Case Western Reserve University School of

Law on March 31, 2006,<sup>1</sup> I asked the government members of the expert panel what they would do if their superiors ordered them not to disclose information to the public about the likely grave health affects of an ongoing bio-terrorist attack. “Would you go public and blow the whistle?” I inquired.<sup>2</sup> One of the panelists answered that her agency encouraged honest dissent, and that she would argue strenuously for public release of such information. Another said that if push came to shove, he would resign rather than be part of an unethical cover up. “And if you quit, would you then go to the press,” I asked. “I guess I could not make that decision unless I was forced to,” the official replied.

This exchange did not give me much comfort. I had served as Attorney-Advisor for United Nations Affairs at the U.S. Department of State in 1992, when we began to receive classified reports from reliable sources that the Serbs were engaged in a genocidal campaign against the Moslems of Bosnia.<sup>3</sup> Because senior Administration officials desired to keep the United States out of the Balkan conflict, my colleagues and I were rebuffed in our internal efforts to get the State Department to release this grave information to the public.

In March 1993 I helped draft a legal memorandum, which was “cleared” throughout the Office of the Legal Adviser, opining that the information we possessed was sufficient to legally conclude that a one-sided, well organized campaign of genocide was taking place in Bosnia. Notwithstanding this memorandum, Secretary of State Warren Christopher refused to use “the G word” and instead continued to publicly insist that “all sides had committed atrocities” and that Bosnia was essentially an “ethnic feud.”<sup>4</sup> “It’s somewhat different from the Holocaust. . . . I never heard of any genocide by the Jews against the German people,” Secretary Christopher asserted at a Congressional Hearing in May 1993 in response to the question, “Doesn’t ethnic cleansing qualify as genocide?”<sup>5</sup>

The several dozen intelligence analysts, foreign policy experts, and legal officers who were working with me on the Bosnian conflict at that

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<sup>1</sup> In the simulation, a virulent strain of hoof and mouth disease was introduced to a farm in Northeast Ohio, and began to spread throughout the region. Developments during the simulation were communicated to the expert participants via simulated television news broadcasts, produced by Classic Video Productions.

<sup>2</sup> As used in this article “whistleblowing” is the public release of internal information by a lower-level government official about a situation that poses a danger to public health or safety, over the objections of superiors. “Whistleblowing” is distinguishable from “leaking” in that the whistleblower publicly identifies herself as the source of the information.

<sup>3</sup> The classified information has subsequently been de-classified and released to the public.

<sup>4</sup> Editorial, *Bosnia and Conscience*, CHRISTIAN SCIENCE MONITOR, Dec. 31, 1993, at 18.

<sup>5</sup> Elaine Sciolino, *U.S. Goal on Bosnia: Keeping War Within Borders*, N.Y. TIMES, May 19, 1993, at A10.

time knew Secretary Christopher was intentionally obscuring the truth about Bosnia. The purpose of doing so was to allow the Administration to maintain that there was no moral imperative for U.S. military intervention in Bosnia. Both Secretary Christopher and President Clinton feared that American casualties in Bosnia would sink the Administration's plans for health care reform, crime prevention, and education, much as the Vietnam War had derailed President Lyndon Baines Johnson's ambitious domestic agenda.<sup>6</sup>

In the face of our superior's opposition, my State Department colleagues and I tried several tactics during the summer of 1993 to get the information to the public. First, we circulated draft press guidance explicitly acknowledging that ethnic cleansing was in fact genocide. But our superiors on the seventh floor would not approve the text. Next, a "Dissent Channel Memorandum," signed by two dozen State Department experts, was sent to the Secretary of State to make our case, but the Secretary of State still refused to budge.<sup>7</sup> Finally, several mid-level State Department officers resigned in protest—the most resignations over a policy dispute since Vietnam.<sup>8</sup> The State Department typically responded by characterizing the resignations as the impetuous actions of a few "young" Foreign Service officers who were "frustrated at being left out of the formulation of policy"<sup>9</sup> and asserting that the resignations "will not have any substantial impact on our policy-making."<sup>10</sup> Yet, if the resignations did not immediately change U.S. policy, they did turn up the heat. Finally, three years later, a CIA study

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<sup>6</sup> See PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 67 (2002).

<sup>7</sup> See generally Mary Curtius, *Foreign Service Ire on Bosnia Recalls Vietnam, Officials Say*, BOSTON GLOBE, Aug. 25, 1993, at 13 (describing the dissatisfaction in the State Department over President Clinton's Bosnia policy). A Dissent Channel Memorandum is a rarely used mechanism which provides an avenue for lower level officials to communicate directly with the Secretary of State when their superiors in the chain of command refuse to sign off on their recommendations via the normal channel of a Decision Memorandum. Resort to the Dissent Channel is extremely rare because it generates resentment on the part of superiors, who are in a position to stifle promotions.

<sup>8</sup> The resigning officials included George Kenney (age 36), Deputy head of the Bosnia Desk; Marshall Harris (age 32), head of the Bosnia Desk; Jon Western (age 30) of the Intelligence and Research Bureau; and Steven Walker (age 30), the head of the Croatian Desk. See Norman Kempster, *4th U.S. Aide Quits over Balkan Policy*, CHI. SUN-TIMES, Aug. 24, 1993; Daniel Williams, *A Third State Dept. Official Resigns over Balkan Policy*, WASH. POST, Aug. 24, 1993, at A1. One of the officials who resigned, Marshall Harris, told the press, "It's genocide and the secretary of state won't identify it as such. That's where we get beyond the political to the moral." *Id.*

<sup>9</sup> See, e.g., Steven A. Holmes, *State Dept. Expert on Croatia Resigns to Protest Policy in Balkans*, N.Y. TIMES, August 24, 1993, at A6.

<sup>10</sup> Simon Tisdall, *Resignation Reveals US Split over Bosnia*, THE GUARDIAN (LONDON), Aug. 6, 1993, at 8.

was leaked to the press, indicating that ninety percent of ethnic cleansing had been carried out by Serbs pursuant to a policy designed to destroy the Moslem population in Bosnia.<sup>11</sup> During those three years of denial and obfuscation, 250,000 Moslem civilians were systematically exterminated. Subsequently, the Clinton Administration reversed course and decided to use force against the Serbs, leading to the Dayton Peace Accord, and ultimately the downfall of Serb leader Slobodan Milosevic who was prosecuted for genocide by the International Criminal Tribunal for the Former Yugoslavia.<sup>12</sup>

Having observed well-intentioned high level government officials suppress evidence and mislead the public about the existence of genocide in Bosnia in 1993, I would not be surprised if public safety and emergency management officials instructed subordinates during a bio-terrorism attack to mislead the media in order to avoid public panic before the government was ready to deal with the crisis. As this article documents, the current laws enacted to facilitate whistleblowing and protect government whistleblowers from retaliation have largely failed to achieve their purpose. The Supreme Court, meanwhile, has held that government employees are not protected by the First Amendment if they expose government wrongdoing to the press, and the Bush Administration is aggressively pursuing the prosecution of government whistleblowers and their media outlets. Consequently, it is extremely unlikely that a lower level public safety or emergency management official would ever go public with information about a public health hazard in opposition to a superior's wishes. This article surveys the importance of past incidents of government whistleblowing and makes the case for stronger protections for government whistleblowers in the future, especially in the context of the government's war on terrorism.

## II. THE IMPORTANCE OF WHISTLEBLOWING

The Founding Fathers recognized that the Executive Branch of government would be prone to secrecy and corruption if not checked and balanced by the other branches of government.<sup>13</sup> From exposing environmental hazards in the 1970s to disclosing foreign policy scandals and Presidential abuse of power in the last five years, whistleblowing has played an impor-

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<sup>11</sup> *Id.*

<sup>12</sup> See generally MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION (2002) (detailing the events preceding Milosevic's prosecution for genocide and the prosecution itself).

<sup>13</sup> See W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 116–28 (1965); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 394–414 (1935) (describing the Founding Fathers' thoughts on separation of powers).

tant part in achieving the transparency necessary for the American system of checks and balances to operate.

In the 1970s, a courageous EPA official named Hugh Kaufman launched the first major whistleblowing effort against environmental hazards.<sup>14</sup> Kaufman was able to discover several toxic waste sites that posed severe health risks. After realizing that his superiors in the Carter Administration were not supportive of pollution control, Kaufman created a paper trail on toxic contamination at Love Canal and other locations, prompting hearings by six congressional committees.<sup>15</sup> Kaufman's revelations later led to the resignation of EPA administrator Anne Burford and the perjury conviction of Superfund chief Rita Lavelle. Yet, rather than award Kaufman for this public service, his superiors responded by denying him any more grade promotions or management responsibilities.<sup>16</sup>

Because whistleblowers are so often subjected to the type of internal retaliation that befell Hugh Kaufman, until recently, major cases of whistleblowing were considered rare. However, since the U.S. declared its "global war on terrorism" five years ago, there have been three well-publicized instances of whistleblowing: the revelations of the abuses at Abu Ghraib prison, the exposure of "CIA Black Sites" in Eastern Europe, and the disclosure of the highly controversial NSA domestic wiretap program.

The first of these cases emerged with the release of the Abu Ghraib torture photographs. In January 2004, Sergeant Joseph M. Darby of the U.S. Army's 372nd Military Police Company asked Specialist Charles A. Graner, Jr. if he could download digital pictures that Graner had taken while in Iraq. Darby had requested to see pictures of the aftermath of a prison riot that had occurred while he was on leave.<sup>17</sup> Instead, he was given the now infamous Abu Ghraib torture photos. "It violated everything that I personally believed in and everything that I had been taught about the rules of war," he said.<sup>18</sup> The decision to turn over the pictures was not easy for Darby, since it involved implicating his friends and superiors in serious military violations.<sup>19</sup> The photos, which were widely circulated on the inter-

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<sup>14</sup> See Judith A. Truelson, *Whistleblowers and Their Protection*, in HANDBOOK OF ADMINISTRATIVE ETHICS 285, 299 (Terry L. Cooper ed., 1994).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See 'Moral Call' Led GI Whistleblower: Testifies Iraqi Prisoner Abuse 'Violated Everything I Believed In,' CBS NEWS, Aug. 6, 2004, <http://www.cbsnews.com/stories/2004/08/19/iraq/printable636932.shtml>.

<sup>18</sup> John Shattuck, *On Abu Ghraib: One Sergeant's Courage a Model for US Leaders*, CHRISTIAN SCIENCE MONITOR, May 16, 2005, available at <http://www.csmonitor.com/2005/0516/p09s02-coop.html>.

<sup>19</sup> See 'Moral Call' Led GI Whistleblower: Testifies Iraqi Prisoner Abuse 'Violated Everything I Believed In,' CBS NEWS, Aug. 6, 2004, <http://www.cbsnews.com/stories/2004/08/19/iraq/printable636932.shtml>.

net and then broadcast on CBS's "60 Minutes" in April 2004, showed naked detainees stacked in human pyramids, posed in sexual positions, hooked to electrodes, and tethered to dog leashes. Darby received equal amounts of praise and grief. Officially, Darby was commended in a military report for promptly alerting his superiors.<sup>20</sup> Outside of the military, Darby was given the Kennedy Library Foundation's Profile in Courage Award,<sup>21</sup> and also named one of the People of the Year by ABC News.<sup>22</sup> Yet, at the same time, Darby and his relatives received multiple death threats, which required that they seek continuous government protection.<sup>23</sup>

Soon after the abuses at Abu Ghraib were exposed, the efforts of another government whistleblower brought the existence of "CIA Black Sites" to the world's attention. These Black Sites were established throughout Eastern Europe to enable the United States to use "extraordinary measures of interrogation" on captured suspected al Qaeda terrorists outside of the reach of United States laws and the media. Journalist Dana Priest of the *Washington Post* broke the story in November 2005 and was awarded a Pulitzer Prize for her reporting.<sup>24</sup> Her main source, Mary McCarthy, a member of the CIA's inspector general's office, did not fare as well. Instead, McCarthy was fired after failing a polygraph exam concerning the leaked information in April 2006.<sup>25</sup> CIA spokeswoman Jennifer Millerwise Dyck said that the firing was based on the fact that McCarthy had provided classified information to the media in violation of the CIA secrecy agreement, which prohibits CIA employees from discussing classified information with anyone not cleared to obtain the material.<sup>26</sup>

Then, a year later, a National Security Agency employee of twenty years named Russell Tice blew the whistle on the NSA's domestic wiretap-

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<sup>20</sup> *Praise for Iraq Whistleblower*, CBS News, May 10, 2004, <http://www.cbsnews.com/stories/2004/05/10/iraq/printable616660.shtml>.

<sup>21</sup> Shattuck, *supra* note 18.

<sup>22</sup> Elizabeth Vargas, *People of the Year: Joseph Darby: Whistleblower Revealed Abuse at Iraq's Abu Ghraib Prison*, ABC NEWS, Dec. 28, 2004, <http://abcnews.go.com/WNT/print?id=365920>.

<sup>23</sup> Shattuck, *supra* note 18; Chris Shumway, *Family of Abu Ghraib Whistleblower Gets Death Threats*, THE NEWSTANDARD, Aug. 16, 2004, <http://newstandardnews.net/content/index.cfm/items/831/printmode/true>.

<sup>24</sup> Robert Windrem & Andrea Mitchell, *CIA Officer Fired After Leak: Officer Allegedly Failed Polygraph, Admitted Giving Reporter Information*, NBC NEWS, Apr. 21, 2006, <http://www.msnbc.msn.com/id/12423825/print/1/displaymode/1098/>.

<sup>25</sup> *See id.*

<sup>26</sup> *See* R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1.



ping program.<sup>27</sup> The revelations that the NSA was tapping the phone conversations of thousands of Americans without obtaining a warrant from the Foreign Intelligence Surveillance Court led to Congressional Hearings resulting in draft legislation to modify the practice and a federal judicial decision holding that the practice violated federal law and the U.S. Constitution.<sup>28</sup> The NSA fired Tice and threatened him with criminal prosecution if he testified in front of Congress.<sup>29</sup>

### III. WHISTLEBLOWING AND THE GOVERNMENT LAWYER

None of the above cases involved a government lawyer as whistleblower. Indeed, when my State Department colleagues resigned in 1993, I knew that as a member of the Office of Legal Adviser I could not join them in publicly protesting the Secretary of State's refusal to acknowledge that genocide was being committed in Bosnia. That is because, at the time, the American Bar Association's Model Rules of Professional Conduct "forbade lawyers from revealing confidential information acquired during the course of representing a client."<sup>30</sup> This "representation" was defined to include the attorney's "supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which the agency is part, and the public interest."<sup>31</sup>

In its original form, Model Rule 1.6 stated that a lawyer must not reveal information relating to the representation of a client unless the client gives informed consent for such disclosure. The only exception to Model Rule 1.6 was that a lawyer could reveal information in order to prevent a criminal act that was "likely to result in imminent death or substantial bodily harm."<sup>32</sup> Since there was technically no criminal act in my case (Secretary Christopher's Congressional statements were misleading but did not amount to perjury), my hands were tied—though the government's non-action was certainly likely to result in imminent death on a mass scale. Nine

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<sup>27</sup> See Brian Ross, *NSA Whistleblower Alleges Illegal Spying: Former Employee Admits to Being a Source for The New York Times*, ABC NEWS, Jan. 10, 2006, <http://www.abcnews.go.com/WNT/print?id=1491889> [hereinafter Ross].

<sup>28</sup> *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). See Charles Babington, *Specter Proposes NSA Surveillance Rules*, WASH. POST, Feb. 26, 2006, at A11; see generally National Security Surveillance Act of 2006, S. 2453, 109th Cong. (2006).

<sup>29</sup> See Ross, *supra* note 27.

<sup>30</sup> Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 126 (2003). The Model Rules have been adopted by most of the State Bar Associations and are therefore binding on government attorneys throughout the United States. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1293 n.1 (1987).

<sup>31</sup> Radack, *supra* note 30, at 126–27.

<sup>32</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (1996).

years later, in 2002, Model Rule 1.6 was amended to expand the exceptions to the non-disclosure rule.<sup>33</sup> Specifically, the amended Rule 1.6(b) allows lawyers to reveal information that the lawyer reasonably believes is necessary “to prevent reasonably certain death or substantial bodily harm,” whether or not the situation was the result of a criminal act.<sup>34</sup> Under this change, government lawyers may have freer reign to blow the whistle in cases of wrongdoing or abuse or misuse of power.

#### IV. WHISTLEBLOWING PROTECTION STATUTES

As the above cases indicate, without whistleblowing, some of the major scandals of our time would never have been disclosed. Recognizing the importance of facilitating whistleblowing in appropriate cases, in 1978 Congress passed the Civil Service Reform Act, which created a formal whistleblowing disclosure channel through the Office of Special Counsel (OSC).<sup>35</sup> The Special Counsel screens whistleblowers’ disclosures for completeness, accuracy, and reasonableness, and can trigger an intensive reform process and protect whistleblowers from retaliation when the Merit Systems Protection Board (MSPB) finds that the whistleblowers’ claim has merit.<sup>36</sup>

The MSPB defines whistleblowing as “disclosing information that you reasonably believe is evidence of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>37</sup> Thus, the MSPB definition of whistleblowing is much broader than that of the ABA Model Rules discussed above. However, the Civil Service Reform Act specifically prohibits disclosure of information to the press or Congress when the information relates to national defense or the conduct of foreign affairs.<sup>38</sup> Moreover, employees of key government agencies such as the GAO, the FBI, NSA, and CIA are excluded from whistleblower coverage, thus significantly limiting the scope of this law.<sup>39</sup>

On paper, the federal whistleblowing law prohibits a federal agency official from taking adverse actions against an employee who has blown the

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<sup>33</sup> See Radack, *supra* note 30, at 133.

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003).

<sup>35</sup> See Civil Service Reform Act of 1978 §§ 101–105, 5 U.S.C. §§ 2301–2305 (2006); 5 U.S.C. § 1213 (2006).

<sup>36</sup> See Truelson, *supra* note 14, at 289 (describing the powers and procedures of the OSC and MSPB in addressing whistleblower protection claims by federal employees).

<sup>37</sup> U.S. Merit Systems Protection Board, Questions and Answers About Whistleblower Appeals, <http://www.mspb.gov/foia/forms-pubs/qawhistle.html> (last visited Mar. 1, 2007).

<sup>38</sup> 5 U.S.C. § 2302(b)(8)(A)(ii) (2006).

<sup>39</sup> 5 U.S.C. § 2302(a)(2)(C)(ii) (2000). In 1998, Congress enacted the Intelligence Community Whistleblower Protection Act of 1998, which creates a process to facilitate internal whistleblowing within the CIA.

whistle on a violation of law or rule, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.<sup>40</sup> In order to trigger the protections of the law, however, the MSPB has to find the following: (1) an employee was engaged in a protected activity; (2) the employee was subsequently treated in an adverse fashion by the agency; (3) the deciding official had knowledge of the protected activity; and (4) there was a causal connection between the protected activity and the agency's adverse treatment of the employee. Unfortunately, under the 1978 law, the burden of proof required by the MSPB to establish a reprisal action left most whistleblowers unprotected. In fact, between 1979 and 1984, only about one percent of complaints filed by federal employees against reprisals for whistleblowing met the standards of proof and resulted in any corrective or disciplinary action.<sup>41</sup> With this ninety-nine percent failure rate, few employees were protected from reprisals. Both Congress and the GAO criticized the OSC/MSPB for failing to protect whistleblowers as well as failing to discipline victimizers.<sup>42</sup>

In an attempt to ameliorate the problems created by the 1978 law, Congress enacted the Whistleblower Protection Act (WPA) of 1989. The WPA protects employees who report wrongdoing if they "reasonably believe" there is misconduct. This relaxed burden of proof was intended to facilitate an increase in whistleblowing, and a 1992 survey conducted by the MSPB indicates that whistleblowing has in fact increased somewhat. While in 1983 only thirty percent of employees who had observed or obtained direct evidence of fraud, waste, or abuse actually reported the incident, the 1992 survey found that the figure had risen to fifty percent.<sup>43</sup> Employees who did not report stated two main reasons for not doing so: (1) they did not believe anything would be done to correct the situation or (2) they thought they might be subjected to reprisals.<sup>44</sup> Of those employees that had reported some type of illegal or wasteful activity, thirty-seven percent said that they had been threatened with or had experienced some sort of reprisal.<sup>45</sup> The MSPB report also disclosed that of those employees who took actions to combat reprisals through the MSPB process, only nine percent said the threat of reprisal was withdrawn, while forty-five percent indicated that they had encountered more reprisals.<sup>46</sup> Finally, the report found that seventy-

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<sup>40</sup> See Radack, *supra* note 30, at 135–36.

<sup>41</sup> See Truelson, *supra* note 14, at 295.

<sup>42</sup> See *id.*

<sup>43</sup> See U.S. MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE (1993), [http://www.mspb.gov/studies/rpt\\_whistleblow/whistleblowing\\_oct1993\\_update.htm](http://www.mspb.gov/studies/rpt_whistleblow/whistleblowing_oct1993_update.htm).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

eight percent of employees observed another employee simply tolerating situations or practices that posed a danger to public health or safety.

Then, in 1999 the Federal Court of Appeals for the D.C. Circuit ruled that federal employees are presumed to conduct themselves in accordance with the law, unless there is “irrefragable proof to the contrary.”<sup>47</sup> This ruling had a significant adverse impact on whistleblowing cases. After this ruling, only seven percent of whistleblower cases brought to the MSPB were successful, compared to a thirty-six percent success rate prior to the ruling.<sup>48</sup> On the heels of this ruling, the MSPB conducted another survey in 2000 on whistleblowing. The results showed that forty-four percent of employees who made a formal disclosure felt that they were retaliated against, an increase from the thirty-seven percent found in the 1992 survey.<sup>49</sup> Furthermore, sixty-one percent of employees who made a formal appeal against retaliation believed they were further retaliated against for their actions, which is again much higher than the forty-five percent in 1992.<sup>50</sup>

Based on these studies, one can conclude that the whistleblowing protection framework has done little in the past two decades to protect government employees who blow the whistle or who try to combat retaliation against them for blowing the whistle. Beth Daley, an investigator for the Project on Government Oversight (POGO) explains, “The laws on the books give the impression that people have somewhere to turn and they’ll be protected, but they don’t.”<sup>51</sup> This problem is intensified during war time, as Louis Fisher, a senior specialist in the separation of powers at the Congressional Research Service, observed, “[W]hen you concentrate power, the chance of abuse and mistakes increases.”<sup>52</sup>

Despite the weaknesses of the federal legislation, whistleblower protection statutes modeled on the Federal laws have been enacted in each of the fifty states, with the same objective: “to expose, deter, and curtail wrongdoing.”<sup>53</sup> It is important to note that none of these statutes identifies the media as a proper recipient of a whistleblower’s information. And like the federal law, twenty-one state whistleblower laws do not protect reports

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<sup>47</sup> *Lachance v. White*, 174 F.3d 1378, 1381 (1999), *cert. denied*, 528 U.S. 1153 (2000) (citing *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

<sup>48</sup> Alexandra Marks, *National Security vs. Whistle-blowing*, THE CHRISTIAN SCIENCE MONITOR, Jan. 24, 2006, <http://www.csmonitor.com/2006/0124/p02s01-uspo.html> [hereinafter Marks].

<sup>49</sup> U.S. MERIT SYSTEMS PROTECTION BOARD, THE FEDERAL WORKFORCE FOR THE 21ST CENTURY: RESULTS OF THE MERIT PRINCIPLES SURVEY 2000, at 35 (2003).

<sup>50</sup> *Id.*

<sup>51</sup> Marks, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000).

to the media, designating a governmental entity as the only appropriate recipient of reported misconduct.<sup>54</sup>

#### V. RECENT SUPREME COURT PRECEDENT

While the Federal and State whistleblowing laws thus provide little real protection, one might surmise that the First Amendment would safeguard whistleblowers from retaliation for releasing information about governmental mal- or misfeasance to the media. Such a possibility was dashed this year by the Supreme Court's 5-4 decision in *Garcetti v. Ceballos*, in which the Court ruled that public employees making statements in the course of their official duties are not speaking as citizens for First Amendment purposes. In so holding, the Court declared that government employers need a "significant degree of control over their employees' words and actions [because] without [that control], there would be little chance for the efficient provision of public services."<sup>55</sup>

In *Garcetti*, Richard Ceballos, a prosecutor in the Los Angeles District Attorney's Office, wrote an internal memo claiming that a police affidavit for a search warrant had contained lies.<sup>56</sup> Ceballos then filed suit claiming he was "demoted, denied a promotion and transferred for trying to make an injustice known."<sup>57</sup> Writing for the majority, Justice Kennedy stated that when a citizen becomes an employee of the government, he or she "by necessity must accept certain limitations on his or her freedom."<sup>58</sup>

In a strongly worded dissent, Justice Souter stated, "[p]rivate and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection."<sup>59</sup> If anything, Justice Souter thought the Majority's ruling counterintuitive, noting that an employee's statement about a subject matter that falls within his duties as an employee of the government has greater value to society than mere conjecture from uninformed citizens.<sup>60</sup> The American

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<sup>54</sup> Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879, 893 (2004).

<sup>55</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006).

<sup>56</sup> See Ann McFeatters, *An Ominous Decision for Whistleblowers and the Nation*, SCRIPPS HOWARD NEWS SERVICE, June 1, 2006, [http://www.shns.com/shns/g\\_index2.cfm?action=detail&pk=WATCH-06-01-06](http://www.shns.com/shns/g_index2.cfm?action=detail&pk=WATCH-06-01-06).

<sup>57</sup> Rebecca Carr, *High Court Limits Whistleblower Right to Free Speech*, COX NEWS SERVICE, June 1, 2006, [http://www.coxwashington.com/reporters/content/reporters/stories/2006/06/01/BC\\_SCOTUS\\_WHISTLEBLOWERS31\\_COX.html](http://www.coxwashington.com/reporters/content/reporters/stories/2006/06/01/BC_SCOTUS_WHISTLEBLOWERS31_COX.html).

<sup>58</sup> *Garcetti*, at 1958.

<sup>59</sup> *Id.* at 1963.

<sup>60</sup> See *id.* at 1965.

Civil Liberties Union has warned that the *Garcetti* case “seriously undermines the rights of whistleblowers who risk their careers to protect the public interest.”<sup>61</sup> Mark Zaid, a Washington-based lawyer who represents whistleblowers warns that the Court’s ruling will lead to “a drone working environment where government employees do little to nothing to report possible misconduct out of fear of retaliation.”<sup>62</sup>

## VI. CONCLUSION AND A MODEST PROPOSAL

Without government whistleblowers with the courage to go to the press, we would not know about the Watergate scandal in the 1970s or the Iran-Contra scandal in the 1980s. We would not know that the government tried to mislead the public by denying the existence of genocide in Bosnia and Rwanda in the 1990s. We would not know that the FBI ignored information about the 9/11 hijackers in 2001. We would not know that United States personnel engaged in inhumane practices at Abu Ghraib prison in Iraq. We would not know that the United States ran secret torture prisons in Eastern Europe. And we would not know that the National Security Agency routinely engaged in domestic wiretapping without warrants. These disclosures initiated vital public debate and prompted important corrective actions and reforms.

Despite the federal and state laws that purport to facilitate such whistleblowing for the public good, government whistleblowers routinely have faced loss of promotion, harassment, firing, and in some instances criminal prosecution when they have gone public with their important information.<sup>63</sup> As described above, the Supreme Court has recently opined that the First Amendment does not apply to government whistleblowers; lower courts have required “irrefutable proof” of wrongdoing before the protections of the federal and state whistleblowing statutes will apply; and the federal and state whistleblowing protection laws do not consider journalists an appropriate whistleblowing outlet, despite the power of the media to bring about change.

To remedy this situation, federal and state whistleblowing laws should be amended to protect government officials from retaliation or prosecution when they disclose information to the media if the whistleblower (1) has a reasonably good faith belief that her allegations are accu-

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<sup>61</sup> McFeatters, *supra* note 56.

<sup>62</sup> Carr, *supra* note 57.

<sup>63</sup> The U.S. Department of Justice has launched criminal investigations to track down persons who leaked information about the National Security Agency’s domestic surveillance program and about the existence of secret CIA detention centers in Eastern Europe to the *New York Times* and the *Washington Post*, respectively. See Scott Shane, *Bipartisan Support Emerges for Federal Whistleblowers*, N.Y. TIMES, Feb. 17, 2006, at A17.

rate and that disclosure is necessary to avoid serious harm; (2) has exhausted internal procedures unless she reasonably believes that disclosure would subject her to retaliation, or that the employer would conceal or destroy the evidence if alerted; and (3) publicly identifies herself as the source of the information.<sup>64</sup> Such a provision would serve as a statutory “defense of necessity,”<sup>65</sup> specifically tailored to the case of whistleblowing.

This amendment would encourage government insiders to report government wrongdoing to the press when necessary (evaluated under an objective standard) to prevent serious harm to the public. To qualify for the protections of the Statute, the harm in question could be physical (e.g., death, disease, or physical abuse), financial (e.g., loss of or damage to property), or psychological (e.g., invasion of privacy, or inducing terror), but lower level harms (e.g., injustice, deception, and waste) would under most circumstances not be sufficient to meet this standard. The requirement of a good faith reasonable belief about the accuracy of the claim and about the need for public release of the information, together with the requirement that the whistleblower publicly identify herself as the source of the information, would ensure that neither reckless whistleblowers nor those with vindictive motives are protected. Finally, the requirement that the whistleblower must first attempt to go through established channels before publicly revealing the information in question would preclude precipitous whistleblowing or unnecessarily undermining the employer-employee relationship.

In sum, the government whistleblower who in good faith discloses information to the press should no longer be treated as an enemy of the state; rather, such a person should be viewed “like the knock at the door that wakes one in a house on fire—unwelcome, but better than sleeping till the fire reaches the bed.”<sup>66</sup>

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<sup>64</sup> This proposal is modeled loosely on the United Kingdom approach, which protects whistleblowers who disclose information to the media if the whistleblower:

[(1)] acts in good faith; [(2)] reasonably believes that his or her allegations are substantially accurate; [(3)] does not seek personal gain; [(4)] has previously disclosed substantially identical information internally or to another legally-designated recipient, unless he reasonably believes that he would be subject to retaliation for doing so, or that the employer would conceal or destroy the evidence if alerted; and [(5)] acts reasonably.

Callahan et al., *supra* note 54, at 893–94.

<sup>65</sup> Also known as the “choice of evils” defense, the “necessity” defense has been recognized by the U.S. Supreme Court. *See* *United States v. Bailey*, 444 U.S. 394, 409–10 (1980).

<sup>66</sup> Michael Davis, *Whistleblowing*, in *THE OXFORD HANDBOOK OF PRACTICAL ETHICS* 539, 561–62 (Hugh LaFollette ed., 2003).