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An Assessment of Constitutional and Statutory Protection of Whistleblowers in the Federal American Public Sector

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Abstract. The concern of this article is with one of the growing but poorly understood actions by public employees, going outside of their organizations to expose what they are illegal, inefficient, immoral practice of their organizations. Going public has come to be known as "whistleblowing".

This article focuses on the paradox between two positions that of management and employees. First, management has certain interests to which they are entitled in the form of efficiency and loyalty from those who are in their employ. On the other hand, employees as citizens and employees have the right to revel any misconduct they believe is determinal to the organization or society.

The vehicle for discussion is studying the American federal government, by an examination of the substantive grounds, both constitutional and statutory, for the right of employee disclosure against management prerogative. In addition, there is an examination of the procedural protection that must be adhered to when the government seeks to sanction an employee for making a disclosure. Finally, an assessment of the tradeoffs between management prerogatives and employee rights are outlined.

The analysis presented in this article suggests that whistleblowers employed by the federal government enjoy substantial protections Constitutionally and Statutorily. However, whether these protections are successful is an open question. To date they have not been very successful.

Introduction

The concept of "whistleblowing" has been treated by many writers, politicians, professionals, and interests alike. Executives, legislators, professional associations, public interest groups, and journalists, to name a few, have all either written or attempted to define whistleblowing [1; p. 25]. Many of these writers or professionals have even attempted to sort out the connotation associated with the term.

What many have discovered is that the principles surrounding whistleblowing read much like "Miles' Law« -- "where you stand depends on where you sit"[1]. Like "Miles" Law," the study of whistleblowing depends on whether you are concerned with management's or employee's rights and interests. Both management and employees are entitled to certain rights -- rights which are based in law and rights which are based in principle.

Management's rights or prerogatives are to prevent employees from "blowing the whistle". Management has certain rights to which they are entitled in the form of efficiency and loyalty from those who are in its employ. Employees -- as taxpayers, citizens, and employees -- may have a moral obligation to reveal any misconduct they believe detrimental to the organization, society, or their own interests.[2] Thus there exist two positions: One of balancing management's prerogatives against employee rights.

This paper focuses on the paradox presented by the two "rights." The vehicle for discussion is an examination of the substantive grounds, both constitutional and statutory, for the right of employee disclosure against management prerogative. In addition, there is an examination of the procedural protection that must be adhered to when the government seeks to sanction an employee for making a disclosure that has harmed his agency's interest. Finally, an assessment and summarization of the tradeoffs between management prerogatives and employee rights are outlined.

The Concept and Emergence of Whistleblowing

The act or art of "whistleblowing" is certainly not new. The courts have dealt with whistleblowing for the last century. However, in the past few decades whistleblowing has gained prominence in public administration circles. The late 1960's and 1970's witnessed the initiation of the "age of the whistleblower." As Bowman writes[3] [1; p. 28]:

> It was the C-5A military transport, the New York City Police Department, the Vietnam War, Watergate, and the Kerr-McGee Oklahoma nuclear plant that dramatized whistleblowing: Erne A. Fitzgerald exposed defense contract overruns; Frank Serpico spoke out against corruption in city government; Daniel Ellsberg made the famous Pentagon Papers public; the mysterious Deep Throat was instrumental in uncovering the misdeeds of the Nixon administration;

(1) Of course by referring to "Miles Law," I am referring to whether one takes the perspective to management or the employee.

(2) See: [2; p. 530]; [3; 559]; [4, p. 1001]; and, for an excellent summary, see [5].

(3) Also see [6; p. 617].

Karen Silkwood's death represented the danger in trying to reveal information to the public.

The events of the 1960's and 1970's dramatized to scholars, the public, and politicians alike the fact that whistleblowing was a subject requiring great study, invention and action. It became clear that whistleblowing was both a subject and action that had to be dealt with, and within the proceeding decade many articles discussing the subject of whistleblowing began appearing. Law reviews, social science journals, and major newspapers alike began devoting time and effort to the subject. Likewise, Congress enacted statutory provisions designed to protect whistleblowers. The courts, as in many instances, began reversing their earlier decisions as if in line with public opinion. In short, there appeared frequent attention given to whistleblowing.

Yet despite its frequent attention, mention and occurrence, there developed much controversy over just what whistleblowing entailed. In varying degrees and not surprisingly, many definitions were proffered. Alan Campbell, Director of the Office of Personnel Management, for example, said during the 1980 Congressional oversight hearing on the subject:

> Quite simply, I view whistleblowing as a popular shorthand label for any disclosure of a legal violation, mismanagement, a gross waste of funds, an abuse of authority, or a danger to public health or safety, whether the disclosure is made within or outside the chain of command [1; p. 91].

Lindauer [2; p. 530] went one step further and wrote that whistle blowing is the act of a civil servant who "subjects himself to a variety of possible sanctions by employer agency, ranging from dismissal, suspension and official reprimand to more subtle measures such as denial of promotions or benefits," all in the name of disclosure of conduct-hence whistleblowing. Andrew Baran [7; p. 97] wrote that "a bureaucrat becomes a "whistleblower," [when he or she] discloses information pertaining to some illegality or some embarrassing and otherwise undisclosed fact concerning the government ...". Similarly, Tim Leech states that whistleblowing is the practice whereby employees disclose "situations where they know about or suspect the involvement of other employees, the organization, or an area of the organization, in illegal, unethical or unacceptable activities [8; p. 79].

Regardless of the definitions offered, it was clear that several discernable events culminate when one decides to "blow the whistle." First, an employee, whether the motivation is selfish or selfless, discloses some sort of information which exposes the

practices, procedures, acts or shortcomings of management [6; p. 617]. Second, in doing so, the employee subjects both management and himself to public scrutiny. Third, the employee jeopardizes the relationship between himself and management.[4] Finally, the result becomes balancing individual rights and protection under the law with compliance to the principles of responsibility and loyalty as associated with the traditional prerogatives of the organization and those who manage.

It is with this final point that this paper devotes the most attention, for the Courts and Congress have been instrumental in striking the balance between management and employee. The right of government employees to make certain work-related disclosures without being sanctioned by their agency employers, arises from two distinct sources. The first includes the constitutional guarantees of freedom of speech and petition. The second source is the body of federal and state statutes that bar dismissal of employees except where cause for removal has been established. The focus of the constitutional right is protection for employee's speech activities, while the focus of the statutory right has become the vindication of the government's interests in restricting other conduct of its employees. "The two sources thus present different aspects of the same fundamental problem-that of providing workable criteria for determining which disclosures are protected and which are not" [2; p. 531].

Constitutional Protection

First Amendment Rights of Public Employees

The court's analysis of public employees' constitutional rights against their governmental employers has passed through three major stages over the past century, each characterized by a particular emphasis on one of three interests -- the employer, the employee, and the public.[5]

During the first stage, which lasted until the early 1950's, the court maintained that "a public employee has no right to public employment and the employer could condition employment on any reasonable terms, including the employee's surrender of certain constitutional rights" [10; p. 1739]. Under this very narrow view of the first amendment rights of public employees, public employment was considered a privilege that government could bestow on its own terms. Anyone entering the pub-

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[4]In a survey conducted in 1989 to study the phenomenon of whistleblowing, it was found that the majority of the respondents reported that they had lost their jobs, and even larger proportion said that they had been harassed or transferred and faced reductions in their salary and job responsibilities. See [9].

[5]For a review of the historical development of the court decisions regarding the constitutional rights of public employees, see [10].

lic sector was held to accept the accompanying restrictions on his exercise of constitutional rights [3; p. 563, 11; p. 340, 2; p. 532].

This doctrine, known as the "right-privilege" distinction, was best articulated by Mr. Justice Holmes's often-quoted statement that a policeman fired for political activity "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman" [12]. Holmes, writing in 1892, articulated a decision that would stand for decades, and by 1952, the Supreme Court, in *Adler V. Board of Education* (1952) [13], reaffirmed Holmes decision and once again treated public employment as a conferred privilege which the government could condition upon relinquishment of the constitutionally guaranteed freedoms of association and belief. As privileges they could be offered on any condition the government imposed including the sacrifice of constitutional rights [14; p. 700]. Teachers, the court recognized in Adler, "have the right ... to assemble, speak, think and believe as they will ... they have no right to work for the state ... on their own terms," and if public employees "do not choose to work on such terms, they are at liberty to retain their beliefs and association and go elsewhere." The court was referring to a New York Law disqualifying from employment in the State's Civil Service and educational system any person advocating, or belonging to any organization advocating, the violent overthrow of the government. In short, the court considered government employment and other forms of government largess privileges, not rights.

The decision in Adler was not unanimous and in *Keyishian v. Board of Regents* (1976) [15], the United States Supreme Court challenged the right-privilege doctrine by rejecting the premise that "public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."

Thus the Court set the tone for the second stage which would last from the early 1950's until the late 1960's. During this stage, the Court recognized that, "even as an employer, the government is subject to the limitations imposed by the Constitution; accordingly, the court aggressively applied conventional constitutional analysis to protect the right of individual employees" [10; p. 1739]. The Court thoroughly repudiated the notion that government can condition a privilege or benefit, such as public employment, upon the waiver of first amendment rights [11; p. 341]. The right-privilege distinction held by the court's earlier reviews was put to rest and the constitutional rights of belief and association afforded government workers was vastly expanded [11; p. 341].

In *Garrity V. New Jersey* (1967) [16], decided the same term as *Keyishian*, the

Court held that public employees retained certain constitutional rights. "There are rights of Constitutional Stature [including the right of free speech] whose exercise a State may not condition by the exaction of a price".

In *Pickering v. Board of Education* (1968) [17], a landmark case on the issue of whistleblowing, the United State Supreme Court recognized the interests of both the employee and the public in the speech of public employees but stated that these interests must be weighed against the interests of the government in efficient administration. The Court decided that a basic test was to be applied in expressive conduct cases. Only when the balance favors the employee's speech should first amendment protection apply. Pickering listed several specific examples of legitimate employer concerns: discipline and harmony in the work place; confidentiality; protection from false accusations that may prove difficult to counter when the employee's supposed access to inside information; freedom to discharge an employee whose speech has impeded the proper performance of his or her duties or is so lacking in foundation as to call his or her competence into question; and protection of close working relationships that require loyalty and confidence.

The Pickering opinion, however, did not elaborate on the causal showing an employee had to make to establish a constitutional violation. As expected, disagreement soon arose among the lower courts, as to whether the employee's speech merited remedy if it was the sole, predominant, or only partial reason for the government's sanction.

The conflict was resolved by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle* (1968) [18]. The court outlined the standards of proof which must be met by an employer urging such a dismissal. Justice Rehnquist, writing for a unanimous court, stated that "the burden was initially upon the plaintiff to show that his constitutionally protected conduct was a 'substantial' factor behind his firing. After this showing, the burden of proof shifted to his employer, to show by a preponderance of the evidence that it would have reached the same decision to dismiss in the absence of protected conduct".

In *Givhan v. Western Line Consolidated School District* (1979) [19], the Court held that "a public employee who arranges to communicate privately with their employer does not lose first amendment protection for doing so". Where the court of appeals had extended coverage of speech delivered only publicly, Justice Rehnquist, writing for a unanimous Supreme Court, disposed of a 'public forum' requirement articulated by the court of appeals. The court held speech delivered in the workplace to be constitutionally protected. But Justice Rehnquist noted that

"private expression might bring additional factors, such as the manner, time and place in which the speech was delivered, into the Pickering calculus." He did not, however, elaborate. A review of the principles stated in Pickering, Mt. Healthy, and Givhan indicated that a public employee's dismissal, executed in retaliation for his speech, "can only be sustained if the government prevails in a Pickering balancing of interests or if it demonstrates by a preponderance of the evidence that it would have fired the employee even in the absence of his constitutionally protected conduct" [11; p. 346].

The unanimity present in Mt. Healthy and Givhan disintegrated with the Court's decision in *Connick v. Myers* (1983) [20]. Justice White interpreted Pickering and its progeny to require that an employee's speech pertain to a matter of 'public concern' as prequisite for balancing of relevant interests. Thus, the Supreme Court in Connick has held that government has greater latitude to regulate on-the-job employee speech unrelated to "any matter of political, social, or other concern to the community"; and less latitude to regulate such speech if related to matters of "public concern" [10; p. 1743]. Accordingly, first amendment safeguards depend on the court's view of the "value or importance of particular speech rather than focus on the adequacy of the government's justification to regulate speech" [14; 702-703]. Thus, in this third stage, which really began in the late 1960's and continues today, the court has "ostensibly maintained the analysis developed during the second stage; its application of that analysis, however, reflects a heavy emphasis on the importance of protecting the public interest in the efficient provision of government services" [10; p. 1739].

Statutory Protection of Public Employees

Background

In the early years of the United States, civil service positions were predominantly reserved for the intellectual elite, with political considerations gradually becoming more important in the selection of workers. During much of this time, government employees enjoyed what was basically a tenure system, being infrequently removed once appointed.

The election of Andrew Jackson ended this practice, and brought with it the rise of the spoils system. What followed was a wholesale turnover of personnel in many parts of the government after every election defeat. Eventually reformers grew to abhor the spoils system, the corruption which accompanied it, and the appointment and removal powers over federal employees it gave politicans [21; p. 310]. The result was the Pendleton Act, passed in 1883, which laid much of the groundwork for the

Civil Service System. Subsequent acts and Presidential Orders (Lloyd-La Follette Act of 1912; Veterans' Preference Act of 1944; Executive Orders 10987 and 10988, The Federal Freedom of Information Act) combined with the increasing involvement of the Supreme Court, public reaction to government abuses, especially in the 1960's and 1970's, led to the present provisions for whistleblowers [17; pp. 98-101, 6; p. 617, 10; p. 1633].

During President Jimmy Carter's term, sweeping changes occurred with the passage of the Civil Service Reform Act (CSRA) of 1978 [22]. In particular, where whistleblowers had previsouly relied mostly on protection in the first amendment and subsequent court decision, the 1978 act, for the first time provided statutory protection for employees who elect to "blow the whistle." Specific protection and procedures were outlined in the act.

On April 10, 1989, President Bush signed a whistleblower protection bill, similar to one pocket vetoed by President Regan in 1988. On July 9, 1989, the Whistleblower Protection Act of 1989 became effective [23]. The Congress enacted this law to strengthen protection for federal employees, former employees, and applicants for employment who claim that they have been subject to personnel actions because of their Whistleblowing activities.

Protection

Among other things, the passage of the Civil Reform Act of 1978 provided for a wide range of personnel actions, including disciplinary actions that may not be taken for certain improper reasons [24; p. 6,25; p. 360, 7; p. 106, 6; p. 620, 10; p. 1634]. Under Title I of the Act, federal provisions provide for the broad protection of whistleblowers. The provisions recognize "the legitimacy of many forms of whistleblowing, provide a means of legal control of public bureaucracies, and serve as a model for similar protection of other public employees. The act is an effort to strengthen the processes by which wrongdoing can be expected and dealt with by establishing a channel for reporting fraud, waste and abuse" [1; p. 26]. In short, there are special provisions for dealing with possible agency retaliation against a whistleblower [6; pp. 642-43].

As for disclosure, any employee may disclose information that the he or she reasonably believes is evidence of (1) a violation of any law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The act sought to preserve the interest of government and of third parties and therefore it limited the disclosure by

requiring that disclosure of this information must not be specifically prohibited by law and if the information must not be kept secret under an Executive Order in the interst of national defense or in the conduct of foreign affairs. The "reasonable belief" provision is an important provision because, by "reasonably," the whistleblower is "protected even if no wrongdoing exists so long as the circumstances indicate that such a belief is reasonable -- an objective requirement, focusing upon the circumstances in which the particular employee acts, [and a subjective] 'belief' component or one based on good faith principles" [6; p. 625-26].

As to whom the disclosure may be made, the act does not specify. Subsequently, two possible interpretations exist. First disclosure is protected when it is made to any other person or organization including the public, the press, members of Congress or their staff, officials or employees of other agencies, provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs. An alternative interpretation of the protection of disclosure applies only to disclosures outside the government [6; p. 620]. The issue, at this writing, has not been settled.

Finally, the act contains several exemptions and general exceptions which restrict application of the whistleblower provisions. Specifically all Schedule C employees (those excepted for the competitive service) and those for whom the President chooses to exclude are not provided whistleblower protection.

Procedures[6]

Set in charge of the overall administration of the Civil Service System is the Office of Personnel Management (OPM), while the Merit Systems Protection Board (MSPB) is to protect the merit system. The MSPB, as an independent agency in the executive branch of the federal government, is empowered to hear appeals on adverse personnel actions taken by federal agencies against employees. When they occur, allegations are investigated by a Special Counsel[7] who is to receive and investigate charges of prohibited personnel practices, especially those involving whistleblowers. Prohobited personnel practices are defined as "personnel actions taken for a prohibited purpose" -- hence, whistleblowing [7; p. 106]. A timetable of 15 days has been set for special counsel investigation and special counsel has explicitly been empowered to launch an investigation even when no specific allegations have been submitted. Counsel is also empowered to withhold the name(s) of employee(s) who blow the whistle.

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[6]Procedures is based for the most part on the Board's final Part 1209 regulation published on July 12, 1990 [26].

[7]In July 1989, the Special Counsel became an independent executive branch agency.

The Whistleblower Protection Act of 1989 made significant changes affecting appeals by whistle blowers to MSPB. Prior to the Whistleblower Protection Act, a whistleblower could appeal directly to the Board only if the personnel action being appealed came within the Board's jurisdiction. Actions that are directly appealable to the Board include adverse action, performance-based removals or reductions in grade, denials within-grade salary increases, reduction-in-force actions, and denials of restoration or reemployment rights.

The Special Counsel has jurisdiction over prohibited personnel practice complaints with respect to a broader range of personnel action, including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. Therefore, a whistleblower could file a complaint with the Special Counsel with respect to most personnel action allegedly based on whistleblowing. If a whistleblower filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board, no further recourse was available, unless the action was directly appealable to the Board.

Under the Whilsleblower Protection Act, a whistleblower gained the right to appeal directly to the Board if he or she first complains to the Special Counsel and the Special Counsel does not seek corrective action on his or her behalf. This right exists with respect to any personnel action that can be the subject of a prohibited personnel practice complaint to the Special Counsel, even though the action may not be directly appealable to the Board. [23].

The Whistleblower Protection Act does not affect the right of a whistleblower to appeal directly to the Board if he or she is subject to a personnel action that is appealable to the Board under any other law, rule, or regulation.

There are two kinds of whistleblower appeals. The principal difference between the two is in the way they reach the Board. The first kind of case, the individual is subject to a personnel action that is directly appealable to the Board and the individual claims that the action was taken because of his or her whistleblowing. This kind of case is referred to by the Board as an "otherwise appealable action," and the individual may file an appeal directly with the Board after the action has been effected. [27; p. 7].

The second kind of case was created by the "Individual Right of Action" provision of the Whistleblower Protection Act. In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of his or her whistleblowing, but the action is not one that is directly appealable to Board. In this

kind of case, the individual can appeal to the Board only if he or she files a complaint with the Special Counsel first and the Special Counsel does not seek corrective action on the individual's behalf. This kind of case is referred to by the Board as an "individual right of action" appeal [28; p. 10].

An individual who is subject to a personnel action that is directly appealable to the Board, and who claims that the action was taken because of his or her whistleblowing, may choose to file a complaint with the Special Counsel rather than appeal to the Board. If the Special Counsel does not seek corrective action on his or her behalf, the individual may then appeal to the Board. While this is considered an "otherwise appealable action," the time limits for filing are the same as for an "individual right of action" appeal [23].

Because an individual right of action appeal can be filed with the Board only after the individual has first complained to the Special Counsel, the individuals eligible to file this kind of appeal are the same as those who may file prohibited personnel practice complaints with the Special Counsel. Under the prohibited personnel practices statute, covered employees include competitive service employees and most excepted service employees in an Executive agency, the Administrative Office of the U.S. Courts, and the Government Printing Office, except for employees of a Government corporation, the General Accounting Office, the FBI, and various intelligence agencies. Former employees of and applicants for employment with covered agencies may also file complaints with the special counsel. If the special counsel does not seek corrective action on behalf of a whistleblower covered by the statute, the individual then becomes eligible to appeal directly to the Board [29].

In the case of an otherwise appealable action, any employee eligible to appeal the particular action can appeal directly to the Board. Covered employees vary for each appealable action. The law, rules, or regulations applying to the particular action being appealed govern who may appeal that action. In general, competitive service and preference-eligible employees have Board appeal rights with respect to most appealable actions. Most excepted service employees may appeal adverse actions and performance based actions. Former employees and applicants for employment can appeal some action. Certain categories of employees, such as political appointees, and employees of certain agencies, are excluded with respect to some actions [26].

The specifics of the investigation are as follows: While investigation, the special counsel makes a determination as to the existence of reasonable grounds that a prohibited practice has taken place, exists, or is about to take place. After the initial fif-

teen-day investigation, if it is established that a violation has occurred, the special counsel may ask the agency head to conduct an investigation and submit a written report within 60 days or other agreed upon time period.

Protection is given to the whistleblower in a number of ways. Where the special counsel identifies reasonable grounds that a prohibited personnel practice took place and some corrective actions should be taken, the findings are to be given to the Board, (OPM) and the agency involved. The agency needs to take the recommended corrective action in a reasonable time or the Special Counsel can ask the Board to consider the matter. After comment from the (OPM) and the agency, the Board can order the action be taken.

Further protection is provided to the whistleblower in that he can not be disciplined for alleged actions or ones that are being investigated without approval by the special counsel. This keeps the investigation procedure from being circumvented. Following completion of the necessary procedures and a hearing on the matter, should the Board decide a valid charge has been made, it has the authority to impose a number of penalties including dismissal or a civil fine of up to $1,000.

The Special Counsel may, where reasonable grounds exist, request a fifteen day stay which can be extended another 30 days. This provides additional time to have the adverse action rescinded. Should this fail, the employee can pursue the regular adverse action procedures.

The Act also limits the judicial review process by only allowing appeals from the Merit System Protection Board to go to the Court of Claims or Court of appeals. Further, the Appellate Court may set aside findings or conclusions found to be "arbitrary, capricious or an abuse of discretion otherwise not in accordance with law"; "obtained without procedures required by law, rule or regulation having been following"; or "unsupported by substantial evidence" [25; p. 369].

An important feature of the Act is that all employees are given the same guarantee with respect to the procedures followed in an adverse action case. In certain instances, it provides for those making successful appeal to recover reasonable attorney fees. The scope of the charges has been expanded to include areas other than crime such as mismanagement, abuse of authority, and other similar disclosures.

Evaluation and Conclusions

It would appear that an evaluation of the tradeoffs associated with management prerogatives and employee rights, at least those who blow the whistle, would be

rather straight-forward. Determining the extent to which protection should be given to employees who elect to blow the whistle would depend on a fixed number of principles. A closer evaluation, however, reveals that certain other tradeoffs are associated with whistleblowing and unlike many writers' analysis, whistleblowing is not based exclusively in law. Certainly, it requires, as one writer suggest "weighing the government's and the public's interest in confidentiality against the first amendment interest of the public, press, and government employees," [30; p. 111] and, at least since 1978, the inclusion of specific rights guaranteed in statutory law against employer rights of reprisals for the disclosure of information.

But much more concern is based on the whistleblower himself who must weight his individual responsibility to serve the public against his responsibility to colleagues and the institution in which he works. As Bok points out, while "professional ethics require collegial loyalty, the code of ethics often stresses responsibility over and above duties to colleagues and clients." [31; p. 2]. The point that Bok makes is well taken. Many conflicts confront anyone who is considering whether to speak out about abuses or risks or serious neglect. Many of the conflicts are based not only in law but are also based in moral, ethical, and personal principles. A prime example rests in the fact that "while the employee may in theory sense a strong duty to blow the whistle, the employee knows, in practice, retaliation is likely" [31; p. 3].

A perusal of the literature then suggests that whistleblowing carries several connotations, consequences, and conflicts. Certainly the Court and Congress have recognized this for it is clear that federal employees have an umbrella of protection when it comes to blowing the whistle. Both constitutionally and statutorily, the employee who elects to blow the whistle is afforded special protection.

Before the Civil Service Reform Act of 1978, employee rights were based exclusively in the first amendment. It was the courts which provided relief, if any was provided to employees who blow the whistle. It was the courts which had to balance "an individual's duty to his/her employer with his/her duty to the commonweal" [32; p. 271]. The balance came in a series of cases which are continually evolving.

Justice Holmes made it clear in 1892 that public employees had no "right to public employment and conditions of employment on any reasonable terms by employers was a prerogative of the employer" [12]. For Holmes, as for the generation of judges who perpetuated the right-privilege doctrine, public employment was a privilege that the government might bestow or withhold at its pleasure; those who were in the public sector might have to make reasonable sacrifices, including sacrifices of their constitutional rights, in order to continue to receive the benefits of government employment.

The right-privilege distinction articulated by Holmes would remain in balance until the 1967 case of *Keyishian V. Board of Regents.* With this case, the Supreme Court reversed its long standing decision in *McAuliffe V. Mayor of New Bedford.* Subsequent cases provided further protection to employees in the form of employee "speech." The speech protection, however, afforded by the court was subject to a basic test applied by the court. It was, so the court said, "only when the balance favored the employee's speech should first amendment protection apply" [6; p. 638].

Besides other clarifications, the courts' position remained the same until recently. *In Connick V. Myers* decided in 1983, the court once again placed certain restrictions on an employee's speech; at least it is now more concerned with weighing the "public interest in the efficient provisions of governmental services" [10; p. 1739].

On statutory grounds, employees who elect to blow the whistle have received special provisions. Though the statutory provisions are vague in certain instances, wide latitude has been provided to whistleblowers. Congress has not only provided substantive protection for whistleblowers but it has also provided rather specific procedural protection for those employees who blow the whistle and are subjected to adverse reprisals. The Civil Service Reform Act helped to strengthen the processes by which wrongdoing could be exposed and provided for the Merit System Protection Board and the Office of Special Counsel to investigate prohibited personnel practices, including reprisal against whistleblowers [1; p. 27].

In 1989, the Congress enacted the Whistleblower Protection Act. This law to strengthen protection for federal employees, former employees, and applicants for employment who claim that they have been subject to personnel actions because of their whistleblowing activities. Under the Act, the Board must order corrective action if the individual demonstrates that his or her whistleblowing was a contributing factor in the personnel action threatened, proposed, taken or not taking against him or her. The new law modifies the existing burden of proof by requiring only that the individual prove by a preponderance of the evidence that his or her whistleblowing was a "contributing factor" in the personnel action, rather than a "significant" or predominant" factor.

The Board does not order corrective action, however, if the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the individual's whistleblowing.

The Congress intended that these provisions would ease the whistleblower's burden of providing that an action was taken because of his or her whistleblowing,

and at the same time, would hold the agency to a higher standard in proving that it would have taken the action in the absence of the whistleblowing.

Thus, taken together, both the courts and Congress have been interested in the balancing of rights for the government as an employer and the whistleblower as an employee. Both have particularly focused on the exercise of free speech and the authority of government to discharge employees for the good of the service or the methods necessary to "balance an individuals duty to his/her employer with his/her duty to the public" [1; p. 26].

How successful have they been? According to Vaughn [6; p. 662], statutorily the assessment rests upon both "ethical and instrumentalist foundations." "Using instrumentalist standards (encouraging employees to expose wrongdoing) and "ethical standards" (protecting employees most deserving of protection) "critics claim cases continue to arise in which employees ... do not receive protection [and] enforcement (against reprisals) particularly through the Office of Special Counsel is underfunded."(8)

On the positive side, Vaughn notes "protection of whistleblowers encourages both ethical conduct and exposure of wrongdoing ... [but] the most important contributions of the whistleblowing provisions ... is not the protection it provides, but the legitimacy which it affords whistleblowing." [6; p. 663]. Similar conclusions are drawn by others.(9).

As whether or not the measures taken by the Whistleblower protection Act of 1989 encourage more whistleblowing action or improve the protection of those who blow the whistle, it seems that at least some committed employees will continue to call attention to wrongdoing with little regard for the personal consequences.

Constitutionally evidence is mixed. On the one hand "when an official supplies the public with information, he creates the possibility of a popoular check on government decision making .. [and] the first amendment right to know supports this notion of public accountability and representative democracy" [25; p. 584].(10) On the other hand, there is the question of the "efficient operation of government agencies" or the unduly impediment of agency performance due to "an unqualified right of immunized disclosure ..." [2; p. 560].

(8)See for example [32].

(9)See, for example [7].

(10)Also, see [4].

In general then, evidence is mixed. This paper has, however, only attempted to present the substantive provisions, both constitutionally and statutorily for a right of employee disclosure. It has been the intention to allow the reader to form his/her own impressions concerning the right of whistleblowers. Evidence presented here should make it clear that the courts and Congress have particularly afforded the whistleblower protection, though we are seeing the courts shift positions. It will be interesting to see any decisions in the future.

Finally, it is still early to evaluate the effect of the new whistleblowers act of the 1989 on the public employees' rights. No doubt that under the Act the whistleblowers employed by the federal government enjoy substantial protections. However, whether these protections are successful is an open question. Future cases will measure the effectiveness of the new procedures.

Implications for Saudi Arabia

The purpose of this study is to investigate the protections available to whistleblowers in the federal civil service of the United States. Therefore, the study should be useful to those concerned with the American experience regarding the issue of whistleblowing. The study, however, provide a better understanding and enrich the study of whistleblowing in public administration in general. It is hoped that this study will serve as a foundation for future comparisons with other systems and an an incentive for students of public administration to conduct more studies that deal with the issue of whistleblowing in other countries.

We can conclude this study, however, by shedding some light on the current status of the issue of whistleblowing in one of the developing countries, namely Saudi Arabia.

Under the Saudi laws that regulate public employees' affairs, there are no special provisions which deal directly with the issue of whistleblowing. While the law support the practice whereby employees disclose situations where they know about or suspect the involvement of other employees, or the organization in illegal, unethical or unacceptable activities, it does not provide a clear whistleblowing mechanism.(11)

The 1977 Civil Service Act and its regulations regulated the responsibilities and obligations of public employees. Article 11 of the Act provides that public employee should act in a proper manner with the public, his superiors, colleagues, and subordi-

(11)Look at articles 11-15 of the Civil Service regulations that deal with employee duties.

nates.[12] He should, also, devote his working time exclusively to performing the duties of his position and implement orders accurately, honestly, according to the law and regulations.[13] If the employee's superior orders him to do any thing illegal, the employee should inform his boss in writing of the illegality, and, by doing so, will not be responsible jointly with his boss. If the employee fails to follow this procedure, he will be responsible, too. In either case, he must do what he has been ordered to do.

Public employees are not allowed to disclose secrets of their jobs or to criticize their agencies or their heads.[14] Article 11/1 of the act states that public employees are "prohibited from criticizing the government by using any internal or external media".[15] Article 12 of the Act provides that employees must not disclose secrets regarding the position.[16]

The regulations did not provide for grievance and appeal procedures that employees could invoke specifically for any kind of complaint related to possible agency retaliation against a whistleblowing. The employee, however, like other citizens may use different channels to complain when he is subject to personnel actions because of his whistleblowing activities. Every head of a public agency should assign at least an hour a week to hear grievances from citizens.[17] Public employees could use this channel when his superiors seek to sanction him for making a disclosure about his agency. In addition, article 8 of the Grievances Bureau Act gives jurisdiction to the Grievances Bureau (Diwan Al Mazalim) over administrative disputes related to public sector. The bureau is authorized to handle all cases related to public employees rights.[18] The Bureau is empowered to appeals on adverse personnel actions taken by government agencies against employees. When they occur, allegations are investigated by the Bureau which is to receive and investigate charges of prohibited personnel practices. Therefore, a whistleblower could file a complaint with the Bureau with respect to any personnel action allegedly based on whistleblowing.

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[12] *The Civil Service Act*, Part II, Article 11/b (1977).

[13] *The Civil Service Act*, Part II, Article 11/c (1977).

[14] See [33, p. 223].

[15] *The Civil Service Act*, Part II, Article 11/1 (1977).

[16] *The Civil Service Act*, Part II, Article 12 (1977).

[17] *The Civil Service Act*, Part II, Article 12 (1977).

[18] Diwan Al Mazalim Act, Article 8 (1982).

Although public employee has the right to file a formal grievance, like any other citizen, this right, however, is restricted, and should be practiced in reasonable manner. The reason for the complaint should be to redress of inequities, and should not be just for the sake of filling charges without any bases.(19) The civil service regulations emphasize that public employee must respect, obey, and execute the orders of his superiors within the limit of the law. Therefore it would be a violation of the regulations when the employee contact with other than his immediate superior concerning matters related to his position, or burden higher authorities with matters related to his position with goal of just making trouble.(20)

In sum, in the Saudi Civil Service there are no special provisions for dealing with possible agency retaliation against a whistleblower. Furthermore, the Saudi public employees do not have the flexibility that American public employees have to blow the whistle nor they have enough protection when they blow it.

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تقويم للحماية الدستورية والقانونية «لنافخي الصافرات» في القطاع العام الفيدرالي الأمريكي

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ملخص البحث. تركز هذه المقالة على ظاهرة متزايدة ويساء فهمها في كثير من الأحيان، وهي قيام موظفي القطاع العام بالكشف عما يعتقدون أنه ممارسات غير قانونية أو غير أخلاقية في منظماتهم. ومثل هذا التصرف أصبح يعرف بـ«نفخ الصافرة».

وتركز المقالة على موقفين متناقضين هما موقف الإدارة وموقف الموظفين. ففي المقام الأول فإن للإدارة حقوقا تتمثل في توافر قدر من الكفاءة والولاء من جانب الموظفين. كما أن الموظفين من ناحية أخرى لهم الحق، كمواطنين وموظفين، في الكشف عن سوء التصرفات التي يعتقدون أنها قد تؤثر على المنظمة والمجتمع بشكل عام.

وتناقش هذه المقالة هذين الموقفين من خلال دراسة الخدمة العامة في الحكومة الفيدرالية الأمريكية وتمحيص الحقوق القانونية والدستورية للموظفين والإدارة. كما تقوم باستعراض الإجراءات المتبعة عندما يحدث أن موظفا «نفخ الصافرة». وفي الختام نقوم بتقويم وتلخيص التعارض بين حقوق الموظفين والإدارة في هذا الصدد.

ويظهر التحليل في هذه الدراسة أن الموظفين الحكوميين يتمتعون نظريا بحقوق جوهرية عندما يقومون بنفخ الصافرة من الناحية القانونية والدستورية. ولكن مسألة نجاح مثل هذه الحقوق في توفير الحماية الفعلية للموظفين هو أمر آخر، إذ أنه إلى الآن لم تثبت مثل هذه الإجراءات فعاليتها في حماية حقوق الموظفين.