Whistleblower and First Amendment Protections for Federal Employees

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"Whistleblower and First Amendment Protections for Public Employees
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From outside Washington, it looks as though an unprecedented number of whistleblowers have emerged to report illegal activities of the Trump administration. From inside Washington, it was the Trump administration that started a war on career civil servants who were merely performing their jobs, and ensuring the laws were being followed. From the National Security Council to the Department of State, Department of Homeland Security, Department of Health and Human Services, the Federal Bureau of Investigation, the Department of Justice, and the Environmental Protection Agency, this administration has retaliated against career civil servants dedicated to doing their job. In some cases, the administration and its congressional allies have allied with right-wing media to make death threats against these career civil servants to deter them from disclosing publicly what they know about the administration's illegal actions. In yet other cases that do not make the headlines, the government employees remain silent, or remain tied up in confidential investigations. The full story of this period will not be told until after long after this administration ends and whistleblowers are able to tell their heroic stories.

I. Whistleblower Protection Act.

The federal Whistleblower Protection Act (WPA) is the primary or even sole remedy for the vast majority of federal civilian employees who allege that they were retaliated against for having reported, protested, or otherwise opposed government conduct that they reasonably believe or know to be illegal. The federal civilian employees who are covered are those who are career employees in the GS (General Schedule) or SES (Senior Executive Service).

As a threshold matter, however, the federal WPA does not protect all federal employees. It does not cover those in the military (enlisted or officers), or the FBI (*see* Part I.C, *infra*), and also excludes high level positions that are "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character," 5 U.S.C. § 2302(a)(2)(B), as well as political appointees. *Id.* Thus, when "it is the President who is given the authority to make the appointment" to a position, and the President has the authority to remove that person, those persons are excluded from the protections of the WPA. *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 230-31 (M.S.P.B. 1986). These "political appointees" are part of a cadre of officials whom the President appoints to assist him in executing administration goals. "In executing certain administration goals, the President is entitled to certain noncareer policy aides who can be brought into the civil service and moved out without the usual procedural protections." *Id.* at 231-32.

A. What the Federal WPA Protects.

The federal WPA, 5 U.S.C. § 2302, is actually broader in the scope of the disclosures that are protected than are most comparable state whistleblower statutes that cover state and local government employees.

(1) WPA Protection for Non-Classified Disclosures.

The WPA, last amended in 2019, protects three categories of disclosures. The first and broadest category covers:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

5 U.S.C. § 2302(b)(8)(A). However, this provision does not cover whistleblowers in the "intelligence community," and if the information being disclosed is classified or prohibited from public disclosure, then the whistleblower will be limited in her ability to litigate that claim.

(2) WPA Protection for Classified Disclosures.

The second category covers disclosures to the Office of Special Counsel (OSC), or to an agency Inspector General, and those disclosures can include classified or secret information:

> (B) any disclosure to the [Office of] Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

5 U.S.C. § 2302(b)(8)(B).

Thus, whistleblowers can disclose any nonpublic information to the OSC or their agency Inspector General, even if it is classified. *See Jacobs v. Schiffer*, 47 F. Supp. 2d 16, 24 (D.D.C. 1999) ("Mr. Jacobs can, under the protection of the Whistleblower Protection Act, divulge to the OSC whatever nonpublic information he wants.") (citing 5 U.S.C. § 2302(b)(8)(B)). That said, if the OSC receives a disclosure "involving foreign intelligence or counterintelligence information," and if that disclosure, "is specifically prohibited by law or by Executive Order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate." *See* 5 U.S.C. § 1213(j). Currently, only one employee in OSC is authorized to receive classified information in a SCIF (Sensitive Compartmented Information Facility).

The third category, enacted on December 20, 2019, covers disclosures to Congress, thereby partially addressing any perceived or actual gap in coverage under subsection (b)(8)(A):

> (C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—
>
> (i) not classified; or
>
> (ii) if classified—
>
> (I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. § 3003)); and
>
> (II) does not reveal intelligence sources and methods.

5 U.S.C. § 2302(b)(8)(C).

First, the provision allowing disclosure of classified information only applies to information that was <u>not</u> classified by a component of the intelligence community, yet it is the intelligence community that is the source of the majority of classifications. Second, even as to information that was classified by an agency that is not part of the intelligence community, this provision may still be difficult to apply if the agency asserts that the information does, in fact, "reveal intelligence sources and methods." As this provision is so new, it has not yet been fully tested in the courts.

How would this Congressional provision have applied to the whistleblower who provided information to Congress in 2019 about the Trump Administration's efforts to get the Ukraine government to provide false "information" about Joe Biden and the Russian involvement in the 2016 Presidential election? This whistleblower initially contacted the House Permanent Select

Committee on Intelligence, which told him that he had to submit a complaint to the Inspector General of the Intelligence Community (ICIG) for review before sending it to Congress, pursuant to 50 U.S.C. § 3033(k)(5)(A). However, the Acting Director of National Intelligence initially refused to allow the complaint to be transmitted to the congressional Permanent Select Intelligence committees, on the grounds that the Department of Justice blocked its release. 50 U.S.C. § 3033(k)(5)(B). At that point, the whistleblower could have directly contacted the congressional intelligence committees after providing notice to the Inspector General. 50 U.S.C. § 3033(k)(5)(D). Ultimately, the existence of the complaint was publicly reported in late August 2019, and the complaint was officially released to the congressional Intelligence committees in late September 2019. *See* "The Trump-Ukraine Impeachment Inquiry Report," Report of the House Permanent Select Committee on Intelligence, at 142-44 (Dec. 2019). The disclosures in that complaint, along with other evidence, including reports made by yet other federal employees, led to the impeachment of President Trump. *Id.*

President Trump promptly retaliated against the anonymous whistleblower by threatening to charge him or her with treason and the death penalty:

> In addition to his relentless attacks on witnesses who testified in connection with the House's impeachment inquiry, the President also repeatedly threatened and attacked a member of the Intelligence Community who filed an anonymous whistleblower complaint raising an "urgent concern" that "appeared credible" regarding the President's conduct. The whistleblower filed the complaint confidentially with the Inspector General of the Intelligence Community, as authorized by the relevant whistleblower law. Federal law prohibits the Inspector General from revealing the whistleblower's identity. Federal law also protects the whistleblower from retaliation.
>
> In more than 100 public statements about the whistleblower over a period of just two months, the President publicly questioned the whistleblower's motives, disputed the accuracy of the whistleblower's account, and encouraged others to reveal the whistleblower's identity. Most chillingly, the President issued a threat against the whistleblower and those who provided information to the whistleblower regarding the President's misconduct, suggesting that they could face the death penalty for treason.
>
> The President's campaign of intimidation risks discouraging witnesses from coming forward voluntarily, complying with mandatory subpoenas for documents and testimony, and disclosing potentially incriminating evidence in this inquiry and future Congressional investigations.

Id. at 32-33. During the closed-door depositions, the Republican members and staffers kept trying to "out" the whistleblower(s):

> GOP members and staffers have repeatedly raised the name of a person suspected of filing the whistleblower complaint that exposed Trump's effort to pressure Ukraine to conduct investigations into his political adversaries, officials said. . . .
>
> The questions appeared driven at least in part by Derek Harvey, a senior advisor to [Rep.] Nunes who worked on the National Security Council early in the Trump presidency before being removed by [National Security Adviser] McMaster amid allegations that Harvey was compiling lists of suspected disloyal colleagues.

See G. Miller and R. Bade, "In Impeachment Inquiry, Republican Lawmakers ask Questions about Whistleblower, Loyalty to Trump, and Conspiracy Theories," Wash. Post (Oct. 26, 2019).

Here, since this whistleblower was disclosing information that was likely classified by the CIA, the National Security Agency, and probably yet other agencies in the Intelligence Community, his or her disclosure would still not be protected under the WPA since it falls within the "classified" exclusion of subsection (b)(8)(C). It is expected that if a new President is elected, legislation will be proposed to provide greater protection for intelligence community whistleblowers, including giving them the ability to provide information to Congress.

During the impeachment investigation, several Republican representatives and staffers also attempted to out the identity of other suspected whistleblowers:

> Derek Harvey, who works for Nunes, the ranking Republican on the House intelligence committee, has provided notes for House Republicans identifying the whistleblower's name ahead of the high-profile depositions of Trump administration appointees and civil servants in the impeachment inquiry. The purpose of the notes, one source said, is to get the whistleblower's name into the record of the proceedings, which committee chairman Adam Schiff has pledged to eventually release. In other words: it's an attempt to out the anonymous official who helped trigger the impeachment inquiry…

See S. Ackerman, "Devin Nunes Aide is Leaking the Ukraine Whistleblowers Name, Sources Say," Daily Beast (Oct. 29, 2019).

Yet other career government employees are being retaliated against for having reported or opposed Administration efforts to provide inaccurate or misleading intelligence threat assessments to Congress and the public. For example, Brian Murphy, a career employee who formerly headed the Office of Intelligence and Analysis in the Department of Homeland Security (DHS), protested the fact that the then-Secretary of DHS and several other high-ranking DHS officials were knowingly presenting perjured testimony to Congress regarding alleged risks of

terrorists entering through the Mexican border. Mr. Murphy also protested the fact that Kenneth Cuccinelli, who was then the Deputy DHS Secretary, improperly ordered him (Murphy) and a colleague to identify the names of "deep state" individuals who compiled intelligence reports regarding conditions in Central America that would justify granting asylum to refugees, so that DHS could fire or demote those "deep state" operatives. Mr. Murphy also protested directives to change threat assessments regarding protestors, to be consistent with Trump's descriptions of those protestors. Mr. Murphy also made other classified disclosures regarding improper administration of intelligence programs. In response, DHS demoted Mr. Murphy from the Principal Deputy Under Secretary position to be an assistant to the Deputy Under Secretary in another division where he no longer has the ability to discover and report comparable illegal conduct. *See In re Murphy*, Whistleblower Reprisal Complaint, Department of Homeland Security, Office of Inspector General (Sept. 8, 2020); *see also* Z. Kanno-Youngs & N. Fandos, "DHS Downplayed Threats from Russia and White Supremacists, Whistle-Blower Says," *New York Times* (Sept. 9, 2020).

B. Other Protections for Intelligence Community Employees and Contractors.

However, the protections available to employees in the "Intelligence Community" under statutes other than the WPA are significantly limited.

The so-called Intelligence Community Whistleblower Protection Act of 1998 – which was a misnomer since it actually provided *no* protection to whistleblowers, does set up a procedure whereby whistleblowers in the intelligence community, whether employees or contractors, can make disclosures to Congress. *See* 50 U.S.C. § 3033(k)(5) (intelligence community employees and contractors); 50 U.S.C. § 3517(d)(5) (CIA employees and contractors); 5 U.S.C. App. 3, § 8H (employees and contractors of the FBI, DIA, NSA, and other components of the intelligence community).

Under these statutes, whistleblowers may first submit their report to their agency's Inspector General (or the Inspector General of the Intelligence Community), who has 14 calendar days to "determine whether the complaint or information appears credible," and if so, the IG is to transmit the complaint or information to the agency head, who then has 7 calendar days to "forward such transmittal to the intelligence committees, together with any comments the [agency head] considers appropriate." If the IG "does not transmit, or does not transmit in an accurate form, the complaint or information … the employee may submit the complaint or information to Congress by contacting either or both of the intelligence committees directly," but "only if the employee" notifies the IG of his intent to do so, and follows "direction on how to contact the intelligence committees in accordance with appropriate security practices." 50 U.S.C. § 3033(k)(5), § 3517(d)(5); 5 U.S.C. App. 3, § 8H.

However, this statute provides no protection to whistleblowers, and any action taken by the IG or the agency head "shall not be subject to judicial review." 50 U.S.C. § 3033(k)(5)(F), 50 U.S.C. § 3517(d)(5)(F); 5 U.S.C. App. 3, § 8H(f). A whistleblower may try to argue, in response to a proposed disciplinary action, that she complied with this statute as a way to mitigate the agency's adverse actions, but no public court decisions address this issue.

Another statute protects disclosures to Congress by active duty members of the Armed Forces. The primary remedy to anyone who protests misconduct is that an Inspector General can recommend that certain actions be taken, although it is up to the Secretary to decide whether to take those actions. *See* 10 U.S.C. § 1034. However, a current or former military service member can file a request with the Board for the Correction of Military Records of his or her service, and if that entity does not agree to amend the records, the service member can file a petition for review with the U.S. District Court. *See, e.g.*, *Penland v. Mabus*, 181 F. Supp. 3d 100, 105-07 (D.D.C. 2016) (remanding to Board of Correction of Naval Records; "Ms. Penland's Amended Complaint alleges retaliation in violation of the MWPA — a ground for clemency that the BCNR expressly (though wrongly) refused to consider.").

As for the WPA itself, the advantages for national security whistleblowers include:

- The WPA protects any disclosure made to the agency IG or the Office of Special Counsel, even if the disclosure includes classified information or other secret information protected by statute or Executive Order.
- The remedies under the WPA now include compensatory damages.
- The WPA protects employees and applicants who do not work for the intelligence agencies, such as the Department of Homeland Security, and the non-intelligence components of the Department of Defense.
- The employee can file an appeal from the MSPB to the appropriate regional circuit court of appeals, and is not limited to appealing to the Federal Circuit.

The disadvantages of the WPA for national security whistleblowers are:

- The WPA only covers employees and applicants, and does not protect contractors.
- The WPA specifically excludes employees and applicants at the FBI, CIA, NSA, and several other intelligence agencies and components.
- The WPA excludes disclosures made outside the agency or OSC if those disclosures are "specifically prohibited by law," either by statute or Executive Order.

C. Protection for FBI Employees.

The federal WPA does not cover employees of the FBI, who are instead covered by a separate statute that does not create a right for judicial review. 5 U.S.C. § 2303. FBI employees who make reports either internally or to the OSC (external reports are not protected, except to the OSC), are limited to internal procedures to address retaliation. 28 C.F.R. Part 27. They must report the retaliation to either the DOJ Inspector General or the DOJ Office of Professional Responsibility, which conducts an investigation and makes a recommendation. 28 C.F.R. § 27.3. The employee can appeal an adverse finding to the DOJ Office of Attorney Recruitment and Management, which operates as the equivalent of the MSPB in adjudicating the retaliation complaint and ordering corrective action, if any. 28 C.F.R. § 27.4. Any further appeal is only to the Deputy Attorney General. 28 C.F.R. § 27.5. There is no right to review by either the MSPB or the federal courts. *Parkinson v. Dept. of Justice*, 874 F.3d 710 (Fed. Cir. 2017).

FBI contractors are covered by the Whistleblower Protections for Contractors of the Intelligence Community Act, Section 110(b) of Public Law 115-118 (2018), but that legislation does not provide for an enforcement mechanism and instead states that "The President shall provide for the enforcement of this section." 5 U.S.C. § 2303 note. As of October 2020, neither DOJ nor FBI have proposed any enforcement mechanism for FBI contractors.

D. How the Federal WPA Works (or Does Not Work).

The real world experience is that historically it has been difficult for federal employees to prevail in litigating a federal WPA claim, due to the mandatory administrative exhaustion requirements under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, which requires the vast majority of government employees with whistleblower claims to go through an agency process as opposed bringing a lawsuit in court. Originally, the Supreme Court, in *Bivens*, recognized a cause of action against the federal government for constitutional violations. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Supreme Court stated that obtaining damages for violations of constitutional rights by federal officials was a proper remedy: "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395. Thus, "it is . . . well settled that, where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). However, 12 years later, the U.S. Supreme Court, in *Bush v. Lucas*, precluded federal employees from bringing constitutional *Bivens* claims for damages. *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983) (NASA employee precluded from bringing First Amendment retaliation claims in court).

Typically, protection under the WPA is asserted in either of two ways: (1) when a government agency formally proposes to take an adverse action against a federal civilian employee, and the employee asserts, as a defense, that the adverse action is retaliation for having engaged in protected conduct under the WPA; or (2) when a federal civilian employee files a retaliation complaint with the U.S. Office of Special Counsel (OSC).

In the first scenario, the federal employee will have to proceed before the U.S. Merit Systems Protection Board (MSPB), an entity whose Administrative Judges historically have ruled in favor of the government, often in 90 percent or more of the cases. Any appeal from an adverse decision of an MSPB AJ would go to the Board itself (an entity that has not had any board members for several years), and then to the U.S. Court of Appeals for the Federal Circuit, a court better known for its jurisdiction over and expertise with breach of contract claims brought against the federal government and patent law claims. Few judges on the Federal Circuit have had past experience with federal employee claims, and those tend to be former government attorneys who defended against those claims.

In the second scenario, especially given that there are currently no board members on the MSPB, the federal employee will have to wait months or longer for the OSC to issue a decision, and the OSC rarely issues a "stay" of the adverse action pending resolution of its investigation. Typically, the OSC finds in favor of the federal agency, so that the federal employee will have to appeal the OSC's determination to the MSPB.

Only if the federal employee has a "mixed case" – one that has both WPA claims and other claims, such as race or gender discrimination or retaliation under Title VII – can the federal employee bring a "mixed case" in the U.S. district court for the district in which she worked, so that all of her claims will be heard in a single forum. Relatively few such cases have led to reported opinions or verdicts from the U.S. district courts. In order to go to court on a "mixed case," the federal employee must have exhausted administrative remedies before either the MSPB or the EEOC before filing in the district court. *See Webster v. U.S. Dept. of Energy*, 267 F. Supp. 3d 246, 268-69 (D.D.C. 2017) (dismissing WPA claim for failure to exhaust); *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 13 (D.D.C. 2010) (same), *aff'd in relevant part*, 666 F.3d 1344, 1349-50 (D.C. Cir. 2012). The appellate courts have ruled that some WPA claims, brought in district court as part of a "mixed case," should have survived summary judgment and proceeded to trial. In *Coons*, the Ninth Circuit held that it was error to grant summary judgment on an IRS employee's WPA claims in a mixed case, which also included disability discrimination claims. *Coons v. Secretary of the U.S. Dept. of the Treasury*, 383 F.3d 879 (9th Cir. 2004). The Ninth Circuit held that his allegation that some "taxpayers were receiving favorable treatment" and that the IRS was making "unauthorized disclosures" to a taxpayer's attorney were sufficient to plead and prove a WPA claim. *Id*. at 888-89. Similarly, in *Bonds*, the Fourth Circuit held that it was

error to grant summary judgment on an NIH physician's WPA claims, brought as part of a mixed case with Title VII claims. *Bonds v. Leavitt*, 629 F.3d 369 (4th Cir. 2011). The Fourth Circuit held that her allegations that cell lines were improperly collected and maintained without patient consent were sufficient to plead and prove a WPA claim. *Id.* at 380-83.

E. Protection for External Disclosures: Federal Employees versus State and Local Government Employees.

The protections available to state and local government employees vary significantly across the 50 states and the District of Columbia. However, there is one area in which the federal protection can actually be broader than that available to state and local employees. The federal WPA protects disclosures to non-governmental individuals and organizations, including the press, while most state statutes – including Connecticut, New Jersey, and New York – only protect disclosures made to government agencies. That said, the broader scope of the federal WPA is counterbalanced by the procedural hurdles involved in bringing a federal WPA claim.

The federal WPA's statutory text covers any disclosure other than those that are prohibited by law from being publicly disclosed. 5 U.S.C. § 2302(b)(8). The courts have held that the federal WPA protects disclosures made externally, including to the press or other non-governmental third parties. *Chambers v. Department of Interior*, 602 F.3d 1370, 1377-79 (Fed. Cir. 2010) (disclosures to the *Washington Post* are protected under the WPA).

In contrast, most state statutes do not protect state employee whistleblowers who go outside the government. *See* Gerard Sinzdak, "An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements," 96 *Cal. L. Rev.* 1633 (2008); Elletta Sangrey Callahan & Terry Morehead Dworkin, "Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers," 32 *Am. Bus. L.J.* 151, 162-63 (1994). Instead, many state statutes require reporting either internally within the same agency or to another agency in order for the state or local government employee to be protected. New York and its neighboring states illustrate this limitation – all cover only reports made to the government, and they diverge significantly in the procedures required to invoke their protection.

New York. New York state and local government employees are protected if they make a disclosure about "improper governmental action" to "to a governmental body," which includes not only the employee's agency, but also other agencies, the legislative branch, the judiciary, or law enforcement. N .Y. Civ. Serv. § 75-b. If an employee believes that she was retaliated against because of her disclosure, and the employee is covered by an arbitration provision or a similar procedure under a collectively negotiated agreement (*i.e.*, unionized employees), then the employee must proceed under the arbitration provisions. Only those government employees who are not covered by arbitration can file a *de novo* civil action in court. *Id.*, § 75-b(3). One other

difference with the federal WPA is whether a disclosure made only to the alleged wrongdoer is protected. The New York courts are split on whether such a disclosure qualifies as a notice to a governmental body. *Compare Castro v. City of New York*, 36 N.Y.S.3d 113, 118, 141 A.D.3d 456, 461 (1st Dept. 2016) (statute protects disclosure even though only made to alleged wrongdoer and another individual in the same agency) *with Hastie v. State Univ. of N.Y.*, 902 N.Y.S.2d 239, 240, 74 A.D.3d 1547, 1548 (3rd Dept. 2010) (statute does not protect disclosure made only to alleged wrongdoer).

Connecticut. State government employees who want to make a disclosure that will be protected under the Connecticut government whistleblower statute must report the alleged illegal conduct to the state Auditors of Public Account, who will review the allegations, and make a report to the state Attorney General, who can then conduct an investigation. Conn. Gen. Stat. § 4-61dd(a). If an employee believes she has been retaliated against for her report to the Auditors of Public Account, she can file a complaint with either the Chief Human Rights Referee who will conduct a hearing and issue a decision or with the Employees' Review Board. Conn. Gen. Stat. § 4-61dd(e)(2)(A), (3). There is a private cause of action for a review of the decision of the Chief Human Rights Referee, but that is limited to review of the administrative agency decision, and it is not a *de novo* action. *Id.* (citing Conn. Gen. Stat. § 4-183).

New Jersey. New Jersey is unusual in having one statute, the Conscientious Employee Protection Act (CEPA) which protects both public and private sector employees. *See* N.J. Stat. Ann. 34:19-1 to 19-8. CEPA, one of the nation's broadest state whistleblower statutes, protects disclosures or threats to disclose to either a supervisor or a public body, along with objecting to or refusing to participate in activity that the employee believes to be illegal. *Id.* at 34:19-3. However, the employee must provide advance written notice to the supervisor to give the employer an opportunity to correct the issue before making a disclosure to a public body, unless the employee either knows that the illegal activity is already "known to one or more supervisors of the employee" or the employee "reasonably fears physical harm as a result of the disclosure provided, however, that the situation is emergency in nature." *Id.* at 34:19-4. The employee can bring a *de novo* civil action in court for retaliation under CEPA. *Id.* at 34:19-5.

F. State and Local Government Employees: Two Key Issues.

There are two key issues for which the courts have to address First Amendment whistleblower retaliation claims brought by state and local government employees. First, the court looks to whether the plaintiff can plead or prove her claim – the former at the motion to dismiss stage, and the latter at summary judgment or trial. The critical issue at this stage is the "*Garcetti*" defense, *i.e.*, that the speech was made as part of the plaintiff's job duties and hence not protected. Second, the defendant may argue that the defendant should be entitled to "qualified immunity" on the grounds that the plaintiff's speech was not recognized as being

protected under the First Amendment at the time the plaintiff made it, so that the defendant could not have knowingly retaliated in violation of the First Amendment.

The following description is based on *Hunter, et al. v. Hughes, et al.*, a whistleblower retaliation case that our firm is currently litigating on behalf of the plaintiffs. Our clients, former police officers in the town of Florence, Arizona, allege that they were retaliated against after they reported and protested multiple efforts by their supervisors to cover-up crimes committed by friends or relatives of other police officers and town employees, including returning evidence to the suspects and other tampering with evidence. Their reports began in 2010 and the retaliation began in 2012. The U.S. District Court for the District of Arizona denied the defendants' motion for summary judgment on the First Amendment claims, and several other claims, and denied qualified immunity to the individual defendants. The individual defendants then initiated an interlocutory appeal with the Ninth Circuit on the denial of qualified immunity. After oral argument, the Ninth Circuit held that qualified immunity was properly denied, as discussed *infra*. *Hunter v. Hughes*, 794 Fed. Appx. 654 (9th Cir. 2020).

First, the court needs to address whether the speech is a matter of public concern, which is a matter of law, and can be resolved at the summary judgment stage. In *Hughes*, the court readily recognized that "allegations of wrongdoing, misconduct, or illegal activity by government employees; the competency of the police force; the manner in which a governmental agency treats complaints of misconduct; and issues relevant to the public's evaluation of its police department" are all matters of public concern, and hence protected under the First Amendment. *Hughes*, 794 Fed. Appx. at 654.

Then, the court needs to address the Supreme Court's *Garcetti* decision, which held that "duty speech," *i.e.*, speech made as part of a government employee's job responsibilities, is generally not protected. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This is a mixed question of law and fact. In *Hughes*, the district court had "found that there were genuine disputes of material fact as to the scope and content of Plaintiffs' job responsibilities," so that summary judgment could not be resolved as to whether their speech was part of their job duties, which the Court of Appeals could not review on an interlocutory appeal. *Hughes*, 794 Fed. Appx. at 655. The remaining issues – causation and the employer's proffered defense(s) – are also factual questions that generally cannot be resolved at the summary judgment stage.

Where a defendant also argues "qualified immunity" as a defense, then the court has to look to whether the plaintiff's speech was "clearly established" as protected under the First Amendment at the time that he made it. Here, the Ninth Circuit readily found that a government employee's right to speak on matters of public concern, free of retaliation, was "clearly established at least by 2000," over a decade prior to the initial retaliation that the plaintiffs experienced. *Hunter*, 794 Fed. Appx. at 655. The Ninth Circuit also found that it "was clearly

established at least by 2009 that the scope and content of Plaintiff's job duties are questions of fact," *i.e.*, whether they engaged in non-duty speech, and hence could not be decided on summary judgment. *Id.* (citations omitted).

II. First Amendment Claims by Federal Employees.

Some federal employees, including government appointees, may be able to bring a claim for a violation of the First Amendment, provided that they are not seeking monetary damages and that they are in a jurisdiction that recognizes the existence of a constitutional claim for federal employees who are only seeking equitable relief. These cases are exceedingly rare.

A recent example is Andrew McCabe, the former Deputy Director of the FBI, who was fired on the same day that he would have qualified for a full government pension – the same day on which he submitted his formal retirement. He alleged that his firing, which substantially reduced his pension, was taken in retaliation for his perceived political affiliation (based on his wife's having lost a local election in Virginia while running as a Democrat), and for refusing to pledge his personal loyalty to President Trump. *McCabe v. Barr*, No. 19-2399 (RDM), __ F. Supp. 3d __, 2020 WL 5668711, at *1 (D.D.C. Sept. 24, 2020). President Trump had tweeted criticisms of McCabe on multiple occasions, including after his wife lost the election, and after McCabe announced his upcoming retirement, which allegedly led to the Department of Justice terminating his employment. McCabe brought both due process claims under the Fifth Amendment as well as retaliation claims under the First Amendment. U.S. District Judge Randolph Moss recently denied the government's motion to dismiss those claims. *Id.*

Federal employees cannot seek damages under *Bivens*. However, under some circumstances, they can seek equitable relief. McCabe argued that since he was only seeking equitable relief , *i.e.*, a very brief reinstatement in order to qualify for full retirement, he did not have to go through the OSC route. *See McCabe v. Barr*, Pls. Opp. to Def. Mot. to Dismiss, at 14-16 (ECF No. 27) (D.D.C. Dec. 23, 2019). This was based on D.C. Circuit precedent, which held that federal employees who were only seeking equitable relief, *e.g.*, reinstatement without back pay, could bypass administrative processes and instead go directly to court on their constitutional claims. *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986), *aff'd in relevant part, vacated on other grounds*, *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (*en banc*). The D.C. Circuit's *en banc* decision in *Spagnola*, although holding that the two employees in the consolidated cases could not bring their *Bivens* claims for damages, did emphasize that other federal employees remained free to obtain equitable relief:

> While we decline to extend *Bivens* remedies to Hubbard and Spagnola, we do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether. . . . On the

> contrary, **time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights**. *See*, *e.g.*, *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986); *Williams v. IRS*, 745 F.2d 702, 705 (D.C. Cir. 1984); *Cutts v. Fowler*, 692 F.2d 138, 140–41 (D.C. Cir. 1982); *Borrell v. United States Int'l Comm. Agency*, 682 F.2d 981, 989–90 (D.C. Cir. 1982).

Spagnola, 859 F.2d at 229-30 & n.13 (emphasis added).

The Third Circuit, in an opinion by then-Judge Alito, addressed the First Amendment claims of a Veterans Administration employee who complained about patient care issues. The Third Circuit agreed with the D.C. Circuit that equitable relief for constitutional claims was not removed by the existence of the CSRA and the WPA:

> On balance, we think that the District of Columbia Circuit has taken the better course. The power of the federal courts to grant equitable relief for constitutional violations has long been established. *See*, *e.g.*, *Osborn v. United States Bank*, 9 Wheat. 738, 838-46, 859 (1824); *Ex parte Young*, 209 U.S. 123, 156 (1908). **Thus, as the District of Columbia Circuit observed, there is a "'presumed availability of federal equitable relief against threatened invasions of constitutional interests.'"** *Hubbard*, 809 F.2d at 11 (quoting *Bivens*, 403 U.S. at 404 (Harlan, J., concurring in the judgment)).

Mitchum v. Hurt, 73 F.3d 30, 35 (3d Cir. 1995) (emphasis added).

In contrast, a majority of the circuit courts have refused to recognize the existence of a constitutional claim for equitable relief. These include the First, Second, Fourth, Ninth, Tenth, and Eleventh Circuits. The holding of the Second Circuit is typical, in acknowledging but rejecting the contrary approach of the D.C. and Third Circuits:

> The circuits are divided as to whether equitable relief such as reinstatement is available to federal employees notwithstanding their general agreement that the CSRA precludes *Bivens* claims for damages. The First, Fourth, Ninth, Tenth, and Eleventh Circuits have concluded from the comprehensive nature of the CSRA that Congress did not intend for federal employees to pursue supplemental judicial relief, even in equity, for classic employment disputes. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571, 1575–77 (11th Cir. 1990); *Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 961–62 (10th Cir. 1989); *Berrios v. Dep't of the Army*, 884 F.2d 28, 31 (1st Cir. 1989); *Pinar v. Dole*, 747 F.2d 899, 910–12 (4th Cir. 1984); *Hallock v. Moses*,

731 F.2d 754, 757 (11th Cir. 1984).

Dotson v. Griesa, 398 F.3d 156, 179 (2d Cir. 2005).

The Second Circuit did acknowledge the Third Circuit's recognition that "sound arguments can be mustered both in favor of and against preclusion of a federal employee's equitable challenge to employment discrimination," *id.* at 180, but instead stated: "because we conclude that the majority view is more convincing, we today align ourselves with those circuits that have held that employees covered by the CSRA—including judicial branch employees—may not sue in equity for reinstatement of employment, even when they present constitutional challenges to their termination." *Id.* Although *Dotson* involved a probation officer (a judicial branch employee), the Second Circuit's opinion concluded that this principle applied to all federal civil service employees:

> From these facts and circumstances, we conclude that Congress has clearly expressed its intent to preclude federal civil service personnel, including judicial employees, from attempting to supplement statutory remedies (and those afforded by the judiciary itself) with separate suits at equity raising constitutional challenges to adverse employment actions.

Id. at 182.

Therefore, currently federal employees can only bring First Amendment claims for equitable relief if they work in the D.C. or Third Circuits.

III. Protection for Agency Inspector Generals.

President Trump has brought public attention to the role of agency Inspectors General through his firing or replacement of at least five IGs over a period of six weeks, with four of those firings clearly viewed as retaliation for the IG's findings about illegal conduct:

1. April 7, 2020, Michael Atkinson, Inspector General for the Intelligence Community ("IG IC"). Trump specifically fired Atkinson after Trump called Atkinson disloyal for sending the Ukraine whistleblower's report to Congress, which led to his impeachment trial.

2. April 7, 2020, Glenn Fine, Acting IG for the Department of Defense.

3. May 1, 2020, Christi Grimm, Acting IG for the Department of Health and Human Services. Trump had criticized Grimm for issuing a report on inadequate PPE and coronavirus testing supplies at hospitals, before removing her.

4. May 15, 2020, Steve Linick, IG for the Department of State. Linick was conducting multiple investigations relating to (a) weapons sales to Saudi Arabia and (b) Secretary Pompeo's conduct in using government resources for personal purposes. Although Linick had self-censored a number of his issued reports, Trump still fired him.

5. Mitch Behm, acting IG for the Department of Transportation. Behm was conducting an investigation into whether Secretary Elaine Chao was favoring Kentucky, the home state of her husband, Senate Majority Leader Mitch McConnell. Trump fired him before he could complete this investigation.

Could any of these five IGs, or any other IG fired or replaced after doing investigations that found wrongdoing on the part of the President, a Cabinet Secretary, or a congressional supporter of the President, bring a claim that the termination was in retaliation for reporting illegal conduct? The answer is no. The only requirement is that the President give 30 days' notice before removing an IG.

The Inspector General Act of 1978 was enacted in order to provide for an ostensibly independent mechanism for investigating and auditing agency operations, including preventing and detecting fraud and abuse in the government. *See* 5 U.S.C. App. 3, § 2. The IG Act applies to the majority of government agencies in the Executive Branch, *i.e.*, the Cabinet-level agencies and to most other independent agencies, although some government corporations and other entities are not covered. The Inspectors General for 29 agencies are appointed by the President, subject to confirmation by the Senate, and is supposed to be a non-political appointment. *See* 5 U.S.C. App. 3, § 3(a) ("without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations"). For another 29 executive branch agencies, there is an Inspector General who is appointed by the agency head; there are also four congressional agencies which have Inspectors General. While an Inspector General nominally reports to the head of the agency, that person cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation or from issuing any subpoena during the course of any audit or investigation." *See* 5 U.S.C. App. 3, § 3(a).

The weak link in the independence of IGs is that the President has the sole authority to appoint, transfer, or remove an Inspector General from his or her position. The only restriction on that authority is that "the President shall communicate in writing the reasons for any such removal of transfer to both Houses of Congress, not later than 30 days before the removal or transfer." *See* 5 U.S.C. App. 3, § 3(b). The IG Act does <u>not</u> create a private cause of action or a remedy for an IG who wishes to challenge her removal.

In *Walpin*, the Inspector General of the Corporation for National and Community Service

was removed by President Obama in 2009 following complaints that he "was confused, disoriented, unable to answer questions and exhibited other behavior that led the [agency] Board to question his capacity to serve." *Walpin v. Corporation for National & Community Service*, 630 F.3d 184, 186 (D.C. Cir. 2011). Although the President provided the 30-day notice to Congress, Walpin was immediately placed on paid administrative leave the day before the notice was sent. *Id.* at 185. Walpin brought a mandamus action challenging the notice as defective since he was removed from office prior to the completion of the 30-day period. Both the district court and the D.C. Circuit held that (1) his placement on administrative leave was not a removal from office so he did not have a right to relief for a violation of Section 3(b) of the IG Act; and (2) the IG Act does not require the President to provide any "greater detail" on the reasons for the removal, and, indeed, the President did provide additional information about Walpin's behavior during that 30-day notice period. *Id.* at 187-88. Thus, the five IGs who were fired or replaced by President Trump similarly would not have a statutory remedy under the IG Act because in each instance, the administration provided the requisite 30-day notice to Congress.

Moreover, nearly a century ago, the Supreme Court held that the Appointments Clause of the U.S. Constitution (Art. II, § 2, cl. 2) which reserves to the President the right to appoint certain officers with the advice and consent of the Senate, necessarily requires that the President also have the power to remove those officers. *Myers v. United States*, 272 U.S. 52, 117 (1926) ("in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those"); *id.* at 164 ("the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate . . . and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."). Therefore, an IG does not have the right to challenge his or her removal on First Amendment grounds.

In 2010, the Supreme Court applied *Myers* in holding that limitations on the removal of board members and inferior officers in the Public Company Accounting Oversight Board (PCAOB) similarly violated the Appointments Clause. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 492, 496-97 (2010).

Most recently, the Supreme Court held that similar restrictions on the removal of the Director of the Consumer Financial Protection Bureau (CFPB) also violated the President's broad constitutional authority. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ___, 140 S. Ct. 2183, 2203-04 (2020). Thus, even if Congress were to create a statutory remedy so that IGs could challenge their removal, the courts would likely hold that such a remedy violates the Appointments Clause, and thus was unconstitutional.

IV. The First Amendment and Whistleblowers with Classified Information.

Several recent prosecutions of whistleblowers have confirmed that the First Amendment cannot be used as a defense when the information disclosed is classified, national security information. These cases rely upon long-standing precedent that secrecy agreements requiring pre-publication review are enforceable as a bar to publication of classified information. *Snepp v. United States*, 444 U.S. 507, 513 (1980) (secrecy agreements "ensure, in advance, and by proper procedures, that information detrimental to national interest is not published"); *id.* at 510 (CIA can "act to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment"); *McGehee v. Casey*, 718 F.2d 1137, 1142-43 (D.C. Cir. 1983) (First Amendment rights are preserved where the restrictions "protect a substantial government interest unrelated to the suppression of free speech," and the restrictions are "narrowly drawn to restrict speech no more than is necessary to protect the substantial government interest").

Edward Snowden, a government contractor who disclosures confirmed the existence of massive internal electronic surveillance by the National Security Agency (NSA), published a book, *Permanent Record*, and give speeches. Although Snowden remains in Russia, the Department of Justice sued him and his publisher (MacMillan), alleging that his failure to obtain pre-publication review breached his contractual obligations under several "Secrecy Agreements" with both the NSA and the CIA. *United States v. Snowden*, __ F. Supp. 3d __, 2019 WL 8333546, at *1-*2 (E.D. Va. Dec. 17, 2019). Despite these agreements, Snowden published his book and gave speeches. *Id.* at *3. The United States sought to recover the proceeds from his book and speeches, and moved for summary judgment without any discovery. *Id.* Snowden requested discovery in order to show that the Secrecy Agreements were unenforceable. *Id.*

U.S. District Judge Liam O'Grady denied Snowden's request for discovery, given that he bypassed the procedures for pre-publication review. If he had sought that review, and the NSA or CIA had denied approval, then he could have initiated an action for judicial review of the agency's decision. *Id.* at *5. Instead, Snowden published without any pre-publication review. Judge O'Grady cited *Snepp* as justification for both pre-publication review and for denying Snowden's defenses: "Yet, his failure to participate in the prepublication review process eliminated the judiciary's ability to review any hypothetical denials which may have resulted if he had made any submissions." *Id.* Judge O'Grady recently entered a judgment in the amount of $4.2 million for the book revenues, and $1,027,800 for the speeches. *United States v. Snowden*, No. 1:19-cv-1997, 2020 WL 5884754, at *2-*3 (E.D. Va. Sept. 29, 2020); *see also* Ellen Nakashima, "Judge Orders Snowden to Forfeit Proceeds from Book, Speeches," *Wash. Post*, Oct. 2, 2020, at A-4. However, the real threat in the Snowden and other prosecutions is that the government will proceed against the whistleblowers under the espionage statutes as it has done against both Snowden and Julian Assange.

Similarly, John Bolton, the former National Security Advisor from April 2018 to September 2019, wrote a book about his time in the Trump Administration, *The Room Where It Happened*. Initially, Bolton participated in the pre-publication review process, as required under his signed agreements governing his access to classified information. However, mid-way through that review, Bolton alleged that the government was improperly redacting information that was not classified, and was otherwise delaying the publication review for political purposes, so Bolton went ahead and published his book without waiting for completion of that review.

The Department of Justice filed a complaint against Bolton, alleging violations of his secrecy agreements. Initially, the government sought a temporary restraining order and a preliminary injunction against publication and distribution of the book, due to be released on June 23, 2020. *United States v. Bolton*, 2020 WL 3401940, at *1 (D.D.C. June 20, 2020). U.S. District Judge Royce Lamberth denied the government's motion for injunctive relief. Judge Lamberth did agree that publication of the classified materials meant that the government "is likely to succeed on the merits," given that *Snepp* and *McGehee* make clear that pre-publication review does not violate the First Amendment. *Id.* at *4. However, he concluded that the government would not succeed in showing that there would be irreparable injury inf the injunction is not granted, given the widespread pre-release publicity about the contents of the books, with reporters already in possession of the book: "By the looks of it, the horse is not just out of the barn – it is out of the country." *Id.* Hence, "there is no restoring the status quo." *Id.*

Judge Lamberth recognized that Bolton, by not challenging the prepublication review prior to publishing, took a risk which he lost:

> Bolton disputes that his book contains any such classified information and emphasizes his months-long compliance with the prepublication review process. He bristles at the mixed messages sent by prepublication review personnel and questions the motives of intelligence officers. **Bolton could have sued the government and sought relief in court. Instead, he opted out of the review process before its conclusion. Unilateral fast-tracking carried the benefit of publicity and sales, and the cost of substantial risk exposure.** This was Bolton's bet: If he is right and the book does not contain classified information, he keeps the upside mentioned above; but if he is wrong, he stands to lose his profits from the book deal, exposes himself to criminal liability, and imperils national security. Bolton was wrong.

Id. at *3 (emphasis added).

Bolton then moved to dismiss the government's complaint, and Judge Lamberth recently denied his motion. *United States v. Bolton*, No. 1:20-cv-1580-RCL, 2020 WL 5866623 (D.D.C.

Oct. 1, 2020). Judge Lamberth found that Bolton was required under the secrecy agreements to complete pre-publication review or else forego disclosing information that the government asserts is classified. Judge Lamberth specifically rejected the arguments that the pre-publication review, including the alleged delays or improper classifications, violated the First Amendment, given that the Supreme Court, in *Snepp*, had upheld an even "stricter prepublication review requirement" over a First Amendment challenge. *Id.* at *7. "While the government may not prevent Bolton from publishing unclassified materials, it may require him to undergo a reasonable prepublication review process." *Id.* at *8. Judge Lamberth concluded that "Nor does the First Amendment prohibit punishing those who unlawfully disclose classified information. Thus, even if the remedy the government sought did punish Bolton, the First Amendment would offer him no refuge." *Id.* at *13; *see also* Spencer S. Hsu, "Bolton Bid to Dismiss Book Suit Is Blocked," *Wash. Post*, Oct. 2, 2020 at A-4; Charlie Savage, "Judge Rules that Lawsuit Over Bolton Book can Proceed," *New York Times*, Oct. 4, 2020, at 21.

Another issue is that the overriding problem is that the U.S. government over-classifies information, so that information about how the government is functioning is routinely classified, which harms transparency of government operations. The Trump Administration is attempting to impose "gag orders" on information that is <u>not</u> classified, typically through requiring government employees to sign non-disclosure agreements. These "gag orders" violate the WPA, since the Whistleblower Protection Enhancement Act of 2012 expressly prohibits the federal government from imposing a non-disclosure agreement that does not contain an exception for communications to Congress, an Inspector General, or any other communication allowed under the WPA:

> [An employee shall not] implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

5 U.S.C. § 2302(b)(13); *see generally* Irvin McCullough & Addison Rodriguez, "The Trump Administration Loves Gag Orders. But They're Illegal," *Washington Post* (Oct. 13, 2020).

V. NDAA Protection for Government Contractors.

There are several statutes that cover government contractors, but they have significant exclusions that, as for the federal WPA, render them useless for most national security whistleblowers, including people like Mr. Snowden.

A. Employees of Government Contractors: National Defense Authorization Act.

Title 41, which governs public contracts, has two statutory provisions that provide similar coverage to contractor employees. Originally, 41 U.S.C. § 4705 (formerly codified at 41 U.S.C. § 265), provided limited protections to employees of contractors who made disclosures "to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for, or negotiation of, a contract)." 41 U.S.C. § 4705(b). Section 4705 created an administrative process involving an investigation by the agency IG, who is to issue a report to the head of the agency. 41 U.SC. § 4705(c). If the agency head determines that there was a prohibited reprisal, the agency head can order the contractor to abate the reprisal, to reinstate the employee with back pay, and/or to pay the costs and expenses, including attorneys' fees and expert witnesses' fees. 41 U.S.C. § 4705(d)(1). If the contractor fails to implement the relief ordered by the agency head, the agency head "shall file an action for enforcement of the order in the United States district court," which court "may grant appropriate relief, including injunctive relief and compensatory and exemplary [punitive] damages." 41 U.S.C. § 4705(d)(2). Critically, Section 4705 does <u>not</u> contain a statutory exclusion for employees of contractors who work for the intelligence agencies, or who disclose information relating to activities of the intelligence agencies.

However, in January 2013, as part of the National Defense Authorization Act (NDAA), Congress established a new statutory section in Title 41, and temporarily suspended Section 4705 for four years, *i.e.*, from January 2, 2013 through January 1, 2017. 41 U.S.C. § 4705(f). The new Section 4712 of the NDAA, titled "Enhancement of contractor protection from reprisal for disclosure of certain information," is more modeled on the DoD/NASA contractor reprisal statute. *See* 41 U.S.C. § 4712. Thus – like the DoD/NASA statute, but unlike Section 4705 – Section 4712 specifically carves out "intelligence community" disclosures:

> (f) Exceptions.—
>
> > (1) This section shall not apply to any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 [50 U.S.C. § 3003(4)].
> >
> > (2) This section shall not apply to any disclosure made by an employee of a contractor, subcontractor, or grantee of an element of the intelligence community

if such disclosure—

(A) relates to an activity of an element of the intelligence community; or
(B) was discovered during contract, subcontract, or grantee services provided to an element of the intelligence community.

41 U.S.C. § 4712(f). "Nothing in this section, or the amendments made by this section, shall be construed to provide any rights to disclose classified information not otherwise provided by law." *See* 41 U.S.C. § 4712(h).

Thus, the 2013 amendments under the NDAA actually *reduced* the whistleblower protection available to employees of contractors, by specifically excluding disclosures relating to "any element of the intelligence community" and "classified information."

Mr. Snowden and other national security whistleblowers who work for contractors were not protected by either 10 U.S.C. § 2409 or 41 U.S.C. § 4712 (NDAA), which exclude classified information, and information from or relating to elements of the intelligence community.

The NDAA's Section 4712 does provide for more robust protections for other contractor employees who do not have intelligence-related claims.

B. Armed Forces and NASA Contractor Employees.

Title 10, covering the Armed Forces, has a section that protects contractor employees of the Department of Defense and the National Aeronautics and Space Administration (NASA) from reprisal for disclosing information "that the employee reasonably believes is evidence of … gross mismanagement of [an Agency] contract or grant, a gross waste of [Agency] funds, an abuse of authority relating to an [Agency] contract or grant, or a violation of law, rule, or regulation related to an [Agency] contract (including the competition for or negotiation of a contract) or grant." 10 U.S.C. § 2409(a)(1).

Disclosures are protected only if they are made to any of the following:

(A) A Member of Congress or a representative of a committee of Congress;
(B) An Inspector General;
(C) The Government Accountability Office;
(D) An [Agency] employee … responsible for contract oversight or management;
(E) An authorized official of the Department of Justice or other law enforcement agency;
(F) A court or grand jury;
(G) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

10 U.S.C. § 2409(a)(2). The statute provides that complaints may be filed with the Inspector General of DoD or NASA, as appropriate, and the IG will investigate the complaint. If the IG determines that there was a reprisal, he shall submit a report to the head of the agency, who will determine whether to "order the contractor to take affirmative action to abate the reprisal" against the complainant, and/or "order the contractor to reinstate the person … together with compensatory damages (including back pay)" and/or "pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant." 10 U.S.C. § 2409(c)(1).

If the agency head issues an order denying relief, or has not issued an order within 210 days of filing of the complaint, then the complainant "may bring a *de novo* action at law or equity against the contractor to seek compensatory damages and other relief available under this section in the appropriate district court," with right to a jury trial. 10 U.S.C. § 2409(c)(2). The burden of proof under the WPA, 5 U.S.C. § 1221(e), applies. 10 U.S.C. § 2409(c)(6).

However, the DoD/NASA contractor reprisal statute specifically excludes disclosures relating to the "intelligence community," which for purposes of DoD and NASA contractors, includes the Office of the Director of National Intelligence, CIA, NSA, Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, "Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs," "the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;" the Bureau of Intelligence and Research of the Department of State;" the "Office of Intelligence and Analysis" in both Treasury and the Department of Homeland Security; and "such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community." *See* 50 U.S.C. § 3003(4).