CHAPTER 1
INTRODUCTION AND SCOPE

I. INTRODUCTION

This is the second edition of *A Guide to the Whistleblower Protection Act and Whistleblower Protection Enhancement Act*, which was published in 2013. There was a previous edition titled *A Guide to the Whistleblower Protection Act & Related Litigation*, by Fowler and L'Heureux (2001). Our first edition was written against the background of the then newly-enacted Whistleblower Protection Enhancement Act of 2012 (WPEA). That law expressed Congress' dissatisfaction with the MSPB's and Federal Circuit's narrow interpretations of the Whistleblower Protection Act of 1989. For example, Senator Chuck Grassley, R-Iowa, stated: "Even if they're 100% right, they still kind of ruin themselves professionally.…There are a lot of whistle-blower protection laws out there.…But the spirit of the law isn't always carried out." Peter Eisler, "Whistleblowers' Rights Get Second Look," *USA TODAY*, 15 April 2010. *See also* Memorandum from Tom Devine, Government Accountability Project, August 16, 2013. A prevalent view among whistleblower protection advocacy groups is that whistleblower reprisal claims almost always lose. While reprisal claims are not easy to prove, that exaggerates any difficulty; there are significant successful whistleblower reprisal claims.

In any event, we now have the ability to make preliminary judgments on whether the changes demanded by Congress in the 2012 legislation has had much of an effect on whistleblower reprisal cases in the federal sector. While some changes were in motion even before the WPEA of 2012 (e.g., *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012)), our review of the case law for the past several years reveals many fewer whistleblower reprisal cases dismissed or determined on the basis that a disclosure was not protected. Stated another way, the MSPB is less likely to resolve cases based on this threshold determination and more willing to allow cases to turn on the merits, to include putting agencies to the test of proving that they would have taken the same action anyway, under a clear and convincing burden of proof. Cases that illustrate that include the following: *Aquino v. DHS*, 121 MSPR 35, 2014 MSPB 21 (2014) (clear and convincing standard not met); *Agoranos v. Dept. of Justice*, 119 MSPR 498, 2013 MSPB 41 (2013), *aff'd* No. 2014-3209 (Fed. Cir. 2015) (remand to comply with *Whitmore*); *Chavez v. VA*, 120 MSPR 285, 2013 MSPB 83 (2013); *Durr v. VA*, 119 MSPR 195, 2013 MSPB 12 (2013) (remand to comply with *Whitmore*); *Mithen v. VA*, 122 MSPR 489, 2015 MSPB 38 (2013) (remand to comply with *Whitmore*); *Herman v. Dept. of Justice*, 119 MSPR 642, 2013 MSPB 60 (2013) (remand to comply with *Whitmore*); *Hugenberg v. Dept. of Commerce*, 120 MSPR 381, 2013 MSPB 92 (2013) (remand to comply with *Whitmore*); *Lu v. DHS*, 122 MSPR 335, 2015 MSPB 28 (2015) (remand to comply with *Whitmore*).

In addition, the MSPB and Federal Circuit have been busy determining which provisions of the WPEA should be given retroactive effect. In short, to the extent that the MSPB and circuit have determined that the WPEA is simply a clarification and not a change in law, retroactive effect has been provided. *Compare Day v. DHS*, 119 MSPR 589, 2013 MSPB 49 (2013) (retroactive: disclosures made in the course of regular duties protected); *Rumsey v. Dept. of Justice*, 120 MSPR 259, 2013 MSPB 82 (2013) (retroactive: information already publicly known), *with King v. Dept. of Air Force*, 119 MSPR 663, 2013 MSPB 62 (2013) (whether compensatory damages are allowable as a remedy) and *Hicks v. MSPB*, No. 2016-1091 (Fed. Cir. 2016) (circuit affirms Board decision that 2302 (b)(9) IRA right not retroactive). Here, it should be noted that the MSPB in *Day*, *supra*, declined to follow Federal Circuit precedent in *Huffman v. OPM*, 263 F.3d 1341 (Fed. Cir. 2001), observing both that due to the WPEA's all-circuit review change that Federal Circuit decisions are not binding on the MSPB and that it "on numerous occasions distinguished its jurisprudence from the Federal Circuit's constricted reading of the WPA." *Day* at 600–01. The MSPB has also sought to address and interpret the new provisions of the WPEA. For example, it is delineating the new Individual Right of Action under 5 USC 2302 (b)(9) and applicable burdens of proof (see *Alarid v. Dept. of Army*, 122 MSPR 600, 2015 MSPB 50 (2015)); and, the heightened burden of proof as to disclosures made in the course of normal duties (*Benton-Flores v. Dept. of Defense*, DC-1221-13-0522-B-1 (2016), *on remand by* 121 MSPR 428, 2014 MSPB 60 (2014). *See also Acha v. Dept. of Agric.*, No. 15-9581 (10th Cir. 2015) (consideration of heightened burden).

The MSPB has further been less strict in applying the knowledge-timing test to establish that the whistleblowing was a contributing factor in the taking of the covered personnel action and less willing to find that an employee has elected an alternative process to make a whistleblower reprisal claim, now applying a standard of an informed election of remedies (E.g., *Agoranos*, *supra*. The circuit too has weighed in and recently expanded the coverage of the Whistleblower reprisal provisions to include the Federal Bureau of Investigation. Previously, the case law provided that the FBI was excluded from coverage. E.g., *Van Lancker v. Dept. of Justice*, 119 MSPR 514, 2013 MSPB 42 (2013)). However, as provided in *Parkinson v. Dept. of Justice*, 815 F.3d 757 (Fed. Cir. 2016), the Federal Circuit ruled that an FBI appellant may raise a whistleblower reprisal claim as an affirmative defense. The Board has also clarified the limits in using the WPA to attempt to challenge security clearance or related determinations. E.g., *Grimes v. Dept. of Justice*, 122 MSPR 36, 47, 2014 MSPB 87 (2014) (appeal of removal of employee from critical-sensitive position; "Finally, we agree with the administrative judge's decision not to adjudicate the appellant's affirmative defense of whistleblower reprisal because such a claim would go to the merits of the agency's underlying basis for determining that the appellant is not eligible to hold a critical-sensitive position and obtain access to NSI. *See Doe v. Department of Justice*, 121 M.S.P.R. 596, ¶ 10 n.5 (2014) (finding that an appellant cannot maintain a whistleblower reprisal claim challenging a security clearance determination under the Whistleblower Protection Enhancement Act of 2012);….").

Additionally, we are beginning to see the effect of all-circuit review, which was allowed for a two-year test period by the WPEA. 5 USC § 7703(b)(1)(B) (2012). The WPEA, reflecting Congress' view that the Federal Circuit had too narrowly interpreted the WPA, extended jurisdiction of whistleblower reprisal appeals to any of the federal appeals courts. *Ibid*. Previously, appeals could only be taken to the Federal Circuit Court of Appeals. That test period was extended for an additional three years on September 22, 2014. *See* All Circuit Review Extension Act, Pub.L. No. 113-170, 128 Stat. 1894 (extending the sunset of all-circuit review to five years instead of two years after enactment). The Fifth Circuit has weighed in with *Aviles v. MSPB*, 799 F. 3d 457 (5th Cir. 2015), the first non-Federal Circuit decision under the all-circuit review provision. This case involved whether disclosures of purely private wrongdoing are protected as well as the nonfrivolous and specific nature of another disclosure. *Ibid*. While the court found that disclosures of private misconduct are not protected (i.e., does not evidence "government misconduct") and

the second disclosure was too general and not a nonfrivolous allegation, the circuit used an approach for analyzing a nonfrivolous allegation that is different from the Federal Circuit. *Id*. at n 4. *See also Acha v. Dept. of Agric.*, No. 15-9581 (10th Cir. 2015) (decision pending). We may be in for a bumpy ride of inconsistent decisions between the circuits, apparently just as Congress intended.

Recently, the Supreme Court has weighed in as well. In an important decision that was very favorable to whistleblower reprisal claimants, the Supreme Court ruled that a disclosure was protected, despite that the agency argued that it concerned information so sensitive that it was "specifically prohibited by law." *DHS v. MacLean*, 135 S. Ct. 913 (2015). This important case is discussed in more detail later. But, it should be noted that this is another instance of a change of judicial environment for employees claiming whistleblower reprisal.

And, just as we observed in our previous edition, even before the WPEA statutory changes, there appeared to be a loosening of some of the standards, so that it was becoming incrementally easier to prove whistleblower reprisal cases at the MSPB and in the circuit. We cited to one case in particular, *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). The importance of this case has become even more apparent in the last couple years, with the Board applying it with vengeance, and, more often than not, reversing the agency action or remanding for additional evidence. See cases cited above. Because of its importance, we describe below the facts and holding in *Whitmore*.

Whitmore v. Dept. of Labor, *supra*, was a 2012 circuit court decision concerning a whistleblower reprisal affirmative defense to a removal in which the Federal Circuit determined that a Board administrative judge erroneously limited proof and remanded the matter for reconsideration. Whitmore, the Head of the Recordkeeping Requirements Group, was removed based on charges of disruptive and intimidating behavior, conduct unbecoming a supervisor, and inappropriate conduct in the workplace. He contended that the removal was in retaliation for his whistleblowing disclosures (public disclosures alleging that OSHA was failing to enforce its recordkeeping requirements and acquiescing in industry reports of impossibly low numbers of injuries and illnesses, to include in connection with a newspaper article in the Oakland Tribune and in support of other employees' claims). The Board AJ sustained the charges and determined that, while Whitmore made protected disclosures and proved a *prima facie* case, the agency proved that he would have been removed regardless of his whistleblowing disclosures. On review, the Federal Circuit focused on evidence (and lack of) in relation to the agency's burden, concluding that witnesses were improperly excluded, and evidence was inappropriately limited.

The court's language in *Whitmore* is extremely broad and favorable to whistleblower claims generally (i.e., "The Whistleblower Protection Act makes clear that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation.…Congress understood that whistleblowers are at an evidentiary disadvantage in proving their cases. In many instances, our review of whistleblower appeals turns on whether substantial evidence exists to support the judgment of the MSPB.…[W]e are unable to make such determinations if the MSPB fails to provide an in depth review and full discussion of the facts to explain its reasoning." *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012)).

Citing to *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), the *Whitmore* court noted that to determine whether an agency has carried its burden to establish by clear and convincing evidence that it would have taken the same personnel action regardless of the employee's whistleblowing, the following factors must be considered: "[1] the strength of the agency's evidence in support of its personnel action; [2] the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and [3] any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." As to witnesses excluded in relation to this part of the case, these included an employee, who conducted an investigation (on which the agency partly relied), *and* those he interviewed (who were relevant to *Carr* factors 1 and 2 in terms of the strength of agency's case and motive); and, another OSHA whistleblower (relevant under *Carr* factor 3), who the agency also removed.

As to evidence improperly not considered by the AJ, the circuit court focused on the alleged "several years' worth of evidence showing a pattern of Whitmore's whistleblowing disclosures followed by adverse personnel actions taken against Whitmore by his direct supervisors." The AJ "failed to consider the evidence suggesting the existence of a retaliatory motive on the part of OSHA officials" except from the proposing and deciding officials and whether those officials "might have been influenced by such other OSHA officials." (Evidence relevant to *Carr* factor 2).

The court in *Whitmore* further found that the AJ's analysis (based on Board precedent) of *Carr* factor 3 was "highly restrictive" in relation to those who are "similarly situated":

> We cannot endorse the highly restrictive view of *Carr* factor three adopted by the AJ in this case. One can always identify characteristics that differ between two persons to show that their positions are not 'nearly identical,' or to distinguish their conduct in some fashion. *Carr,* however, requires the comparison employees to be "similarly situated"—not identically situated—to the whistleblower. To read *Carr* factor three so narrowly as to require virtual identity before the issue of similarly situated non-whistleblowers is ever implicated effectively reads this factor out of our precedent.

As to this "similarly situated" aspect—an extremely significant part of this case—the court noted that "[t]o the extent such evidence exists, however, the agency is required to come forward with all reasonably pertinent evidence relating to *Carr* factor three. Failure to do so may be at the agency's peril." The court also observed many other "omissions from the AJ's decision." "Perhaps most glaringly absent from the AJ's decision is any serious discussion of the facts and circumstances surrounding how Whitmore's whistleblowing in 2005 marked the beginning of his increasingly strained relationships with OSHA officials, and how his disclosures paralleled his increasingly poor performance reviews and adverse personnel actions after decades of exceptional service." The court set aside the MSPB decision and remanded.

Again, as suggested above, *Whitmore* indicates a favorable trend for whistleblowing claims and provides substantial ammunition for employees who claim whistleblowing reprisal (and a wake up call for agencies defending such claims). This is reflected by the court's more general language as to the valuable role played by whistleblowers—language that will undoubtedly find its way into employee briefs and arguments—and more importantly, by the focus on the evidence necessary for the agency to prove that it would have taken the same action anyway, despite whistleblowing.

II. OTHER STATUTES PROVIDING WHISTLEBLOWER PROTECTION

The predominant laws providing for whistleblower protection are the Whistleblower Protection Act of 1989, as amended in 1994, and the

WPEA of 2012. It is those laws—to include the background leading up to the laws—and the substantial MSPB and Federal Circuit case law that provides the basis for this book.

We recognize, too, that there are numerous other statutes that provide whistleblower reprisal protection. Among those are:

- 31 USC 3730(H) (False Claims Act retaliation provision);
- The American Recovery and Reinvestment Act, PL 111-5, 1553, 123 Stat. 115, 297–302 (2009) (prohibiting any private employer or state or local government that receives stimulus funds from retaliating against an employee who discloses information that the employee reasonably believes constitutes evidence of an improper use of stimulus funds, including gross mismanagement of an agency contract or grant);
- 10 USC 2409; 41 USC 265 (both prohibiting retaliation against employees of government contractors);
- Federal Acquisitions Streamlining Act, 41 USC 265 (protects employees of contractors of agencies other than the DoD who suffer reprisal for "disclosing 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).";
- The Sarbanes-Oxley Act, 18 USC 1514(A) (protects an employee who provides information, causes information to be provided, or otherwise assists in an investigation regarding any conduct which the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, or securities fraud, or a violation of any rule or regulation of the Securities and Exchange Commission ("SEC") or any provision of Federal law relating to fraud against shareholders);
- The Consumer Product Safety Improvement Act, 15 USC 2087 (protects an employee whose employer discharges or discriminates against her because the employee: (1) provides information relating to a violation of the CPSIA or any act enforced by the Consumer Product Safety Commission ("Commission") to their employer, the federal government, or state attorneys general; (2) testifies or assists in a proceeding concerning a violation of the CPSIA or any act enforced by the Commission; or (3) refuses to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSIA or any act enforced by the Commission. 2087(a)(1)-(4)); and
- The Dodd-Frank Act, Section 1057 (protects those who provide to the Bureau of Consumer Financial Protection ("Bureau") or any other government or law enforcement agency information that the employee reasonably believes relates to any violation of the consumer financial protection provision of the Dodd-Frank Act (Title X), or any rule, order, standard, or prohibition prescribed or enforced by the Bureau).

III. USEFUL MSPB AND OSC REPORTS ON WHISTLEBLOWER PROTECTION

The subjects of whistleblowing and whistleblowing reprisal are addressed in two useful, recent MSPB reports. One provides a good analysis, mostly from a legal perspective, of the case law and statutory history of the Whistleblower Protection Act. MSPB, *Whistleblower Protections for Federal Employees*—A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board (September 2010). Another report, more in the nature of a survey, assesses barriers to reporting waste, fraud and abuse in the federal sector. MSPB, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*—A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board (November 2011).

OSC has issued a valuable and useful outline, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*. It is timely and provides a good summary of both case law and OSC processing.

IV. HOW THIS BOOK IS ORGANIZED

A couple additional comments before we describe the rest of this book. First, we noted above some of the dissatisfaction—particularly by Congress—with the way in which the whistleblower reprisal law has been implemented. Those like Senator Grassley and whistleblower reprisal advocacy groups believe that employees get short shrift when they make whistleblower reprisal claims. Just as frequently, though, the view is expressed that employees use the whistleblower reprisal laws to shift responsibility for their own misconduct. We do not intend to weigh in on this dispute—a dispute that is more political than legal. Our intention is to provide a clear, logical and complete explanation of whistleblower reprisal law.

In organizing this book, the chapters describe the history of and the whistleblower reprisal laws, the agencies that were established by these laws, the operations of those agencies, the elements of proving and defending against whistleblower reprisal cases, the avenues of redress and appeal, remedies, and other related matters. Below, we describe the general scope of these chapters:

- Chapter 2: Overview— Here we write about the passage of the Civil Service Reform Act, which included, as a prohibited personnel practice, retaliation against whistleblowers, the first such federal statutory prohibition. This law created the Merit Systems Protection Board and the Office of Special Counsel as the principal federal agencies to enforce the whistleblower protections. We further describe the next stage in the history of whistleblower protections—the Whistleblower Protection Act of 1989, which strengthened the authority of the Office of Special Counsel, made it a separate agency and, for the most part, provides current penalties and protections. This 1969 law was expanded somewhat by the 1994 amendments. The final step is the recent WPEA of 2012. Lastly, we discuss the NO FEAR Act, passed by Congress, in 2003. While this law did not add any additional whistleblower reprisal enforcement provisions, it added certain whistleblower reprisal reporting, training, and disclosure requirements.
- Chapter 3: OSC Operations— The Office of Special Counsel, under the WPA of 1989 and now under the WPEA of 2012, has important investigative and enforcement authority to receive whistleblower claims, investigate reprisal claims, to seek to penalize those who commit reprisal, and to protect those who have been disciplined for whistleblowing, among other

responsibilities. We describe in this chapter the OSC procedures for investigations, and the process for seeking to resolve matters with agencies. The OSC is also a prerequisite step in an employee pursuing certain whistleblower reprisal actions at the MSPB (e.g., Individual Right of Actions). We discuss that process as well.

- Chapter 4: OSC and the MSPB—Corrective and Disciplinary Actions— The MSPB and OSC are the principal federal agencies involved in whistleblower reprisal matters. They are joined at the hip. This chapter describes that interrelationship—the process by which OSC pursues disciplinary, corrective action, intervener actions and stays at the MSPB and the elements for each.
- Chapter 5: MSPB Processing of Individuals' Reprisal and Other Protected Activity Claims—OAAs and IRAs— There are two principal ways in which employees can bring whistleblower reprisal and related claims to the MSPB, as an Individual Right of Action (after filing a complaint with OSC) or as an affirmative defense in a direct appeal of an Otherwise Appealable Action (OAA). We discuss those two types of claims, including the way in which MSPB jurisdiction is established (e.g., in an IRA through a nonfrivolous claim).
- Chapter 6: Whistleblower Reprisal Claims and the Negotiated Grievance Process— Under the law, employees covered by a negotiated agreement, which permits raising whistleblower reprisal claims, can elect to pursue those claims either in arbitration or before the MSPB, but not both. We discuss those requirements in this chapter.
- Chapter 7: Stays— While we touch on this in an earlier chapter, we detail the process by which either the OSC or the employee can request that the MSPB stay (i.e., enjoin) an action. We also discuss the little known and little used authority to stay actions by arbitrators. Because it is somewhat related, we detail the authority of MSPB administrative judge's to grant interim relief (i.e., relief pending an appeal). This discussion includes the Board's stay regulations.
- Chapter 8: Elements of a Reprisal Claim Made By Employees or Applicants—A Primer— In this short, foundational chapter, we detail the individual elements and burdens of proof for IRA and whistleblower reprisal affirmative defenses.
- Chapter 9: A Closer Look at the Elements: Protected Disclosures and Protected Activity— This is the first of the chapters in which we begin to explore and analyze the individual elements of a whistleblower reprisal case, discussing the important and often disputed element of making a protected disclosure (i.e., blowing the whistle). This involves a detailed discussion of the various categories of wrongdoing (e.g., violation of law rule or regulation, abuse of authority), how those categories have been defined and limited by case law; the objective test for determining a protected disclosure (i.e., disinterested observer); the proof necessary to establish this element; and the exceptions (e.g., within normal duties). We also discuss the circumstance of "perceived" whistleblowers and other kinds of reprisal.
- Chapter 10: When a Disclosure Is Not a Disclosure— This chapter describes the various circumstances that do not constitute disclosures because of the way in which (or the person to whom) they are made. The WPEA of 2012 has substantially narrowed these exclusions, but they still include some limitations on disclosures made in the course of normal duties and those "prohibited by law or executive order" (which are not covered unless made in a particular way).
- Chapter 11: The Other Aspects of a *Prima Facie* Case: A Personnel Action and a Contributing Factor— Along with the disclosure element, discussed in the previous chapter, an employee must prove two other elements to establish a *prima facie* case and thereby shift the burden of proof to the agency. Those are that the agency took a "personnel action" and that reprisal was a "contributing factor" in taking that personnel action. We discuss those two elements and relevant case law in this chapter.
- Chapter 12: The Agency's Burden: It Would Have Taken the Action in the Absence of Whistleblowing or Protected Activity— Once an employee satisfies a *prima facie* showing, the burden then shifts to the agency to prove by clear and convincing evidence that it would have taken the same action anyway. This crucial element and its constituent sub elements (i.e., the *Carr* factors) are discussed, along with an analysis of the "clear and convincing" burden and the substantial case law surrounding this element.
- Chapter 13: Remedies, Damages, and Relief— The remedies available to employees of whistleblower reprisal include consequential damages, compensatory damages (after the WPEA of 2012), back pay and other make whole relief, a transfer preference, referral to OSC, and interim relief. The WPEA of 2012 also now provides remedies for retaliatory investigations of whistleblowers. In addition, there are certain remedies obtainable in corrective and disciplinary actions filed with the MSPB by OSC. Each of those remedies—individual or OSC—are described in this chapter along with applicable standards and case law.
- Chapter 14: Administrative and Judicial Review— The "administrative decisions" on whistleblower reprisal claims will mostly be made by the MSPB. Those decisions can be reviewed by the U.S. Court of Appeals for the Federal Circuit and other circuits during a five year trial period provided in the WPEA of 2012 and the All-Circuit Extension Act. There will be some whistleblower reprisal decisions made by arbitrators with review at the Federal Circuit or even other circuits as a result of the WPEA of 2012 (and sometimes after FLRA review for matters not within the MSPB's jurisdiction). Those appeal routes, the process before the circuits and any prerequisites to an appeal are discussed in this chapter.
- Chapter 15: National Security Employees: The Presidential Policy Directive Protecting Employees With Access to Classified Information— Here, we describe President Obama's new Presidential Policy, signed on October 10, 2012, which provides certain whistleblower-related protections and remedies for employees in covered agencies or who are eligible for access to classified information and who are not covered by the WPA. [Reproduced at Appendix 7.] It seeks to ensure that such employees can report "waste, fraud and abuse while protecting classified national security information" and "prohibits retaliation against employees for reporting waste, fraud, and abuse." PPD at 1. We also describe available procedures for DOD intelligence community employees that are excluded from statutory whistleblower reprisal coverage (5 USC 2302(a)(2)(C) and 5 USC 7511(b)(8)) as well as excluded from coverage under PPD-19.

Happy Reading!

CHAPTER 2
OVERVIEW

We've come a long way. The first US law adopted specifically to protect whistleblowers was the 1863 False Claims Act, now codified as 31 USC 3730(H), which was intended to combat fraud by suppliers of the United States government during the Civil War. The act encouraged whistleblowers by promising them a percentage of the money recovered or damages won by the government and protected them from wrongful dismissal. This "qui tam" provision allowed those not affiliated with the government to file actions on behalf of the government and receive a portion (usually about 15–25%) of any damages.

I. INITIAL EFFORTS TO PROTECT FEDERAL EMPLOYEES

Whistleblower protections for federal employees were even longer in coming and have been much rockier. United States Presidents Theodore Roosevelt and William Howard Taft issued orders in 1902 and in 1909, respectively, prohibiting federal employee direct contact with Congress. For example, President Roosevelt ordered that:

> All officers and employees of the United States of every description, serving in or under any of the executive departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service.

48 Cong. Rec. 4513 (1912).

This overreach was reversed in the Lloyd-LaFollette Act, providing safeguards to employees from arbitrary dismissal for attempting to contact Congress, but it was not until 1958 that Congress adopted a Code of Ethics that directed federal government employees to "expose corruption wherever covered." 72 Stat. B12 (1958) (H.Con.Res. 175).

Problems began bubbling to the surface. In the 1970s, there were numerous instances of employees who exposed wasteful government programs such as defense cost overruns and nuclear power plant deficiencies but still few protections. This culminated in a 1978 Report to Congress that specified these numerous instances in which federal employees exposed corruption, yet concluded that the fear of reprisal "renders intra-agency communications a sham, and compromises not only the employee, management, and the Code of Ethics, but also the constitutional function of congressional oversight itself." The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption, prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2nd sess. 1 (Comm. Print, Feb. 1978).

II. THE CSRA

This congressional concern led to certain provisions in the Civil Service Reform Act of 1978. This landmark law completely restructured and reformed the federal civil service. It became effective on January 9, 1979, abolished the Civil Service Commission and established three new agencies: the FLRA (Federal Labor Relations Authority); the OPM (Office of Personnel Management); and the MSPB (Merit Systems Protection Board). At about the same time, Reorganization Plan Number 2 was adopted, which transferred certain functions and responsibilities relating to equal employment opportunity in the federal civil service from other agencies to the EEOC (Equal Employment Opportunity Commission).

More to our point here, the CSRA was the first law to establish procedural protections for federal employee whistleblowers. The viewpoint of Congress is expressed in the Senate Committee on Governmental Affairs, which, in reporting the legislation, provided that "[o]ften, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss." That report further provided that protecting employees "who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. …What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 95-969, 95th Cong., 2nd sess. 8 (1978); *see also* HR. Rep. No. 95-1403, 95th Cong., 2nd sess. 4 (1978).

The CSRA identified nine merit principles, to include that "[e]mployees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 92 Stat. 1114, 2301(b)(8) (1978). It made whistleblower reprisal one of then 11 prohibited personnel practices, specifying at 5 USC 2302:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> …
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) a 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; or

(B) a disclosure to the 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) a 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;….

In order to carry out the "mandate" to protect whistleblowers from improper reprisals, the CSRA also established the Office of Special Counsel (OSC). S. Rep. No. 95-969, 95th Cong., 2nd sess. 8 (1978). OSC was made part of the MSPB. While there is some dispute as to OSC's then actual purpose, it viewed itself as more of a prosecutorial arm of the MSPB. E.g., *Frazier v. U.S. Marshals Service*, 1 MSPR 163 (1979), and *Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982). OSC was responsible for investigating claims of prohibited personnel practices made to it by federal employees or applicants (or on its own); seeking stays from the MSPB of any personnel action where OSC had determined there were reasonable grounds to believe that the action was based on a prohibited personnel action; petitioning the MSPB if it believed that corrective action was necessary for an employee adversely affected by a PPP (and the MSPB could then order whatever corrective action was appropriate); intervening as a matter of right in MSPB proceedings; and petitioning the MSPB for disciplinary action against an employee who committed a PPP. The OSC also had authority to investigate Hatch Act or Freedom of Information Act violations as well as other activities prohibited by civil service law, rule or regulation. Importantly, the OSC had no separate litigating authority and could not appeal MSPB decisions to court. (Although employees or applicants could appeal, so that OSC was sometimes a party in federal court). Finally, OSC was a safe channel for employees to make disclosures of information believed to evidence "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." As to these disclosures, OSC had no authority to investigate but could review them and refer them to the appropriate agency head for investigation. If OSC determined that there was a substantial likelihood that the information constituted covered wrongdoing (e.g., abuse of authority), it could require an agency report on the disclosure, signed by the agency head, within 60 days.

III. THE WPA OF 1989

At least from the perspective of Congress, things did not work out as expected in the protection of whistleblowers. An MSPB Report in 1984, "Blowing the Whistle in the Federal Government," based on a survey of federal employees, determined that employees with knowledge of government wrongdoing chose not to report it. The Board pointed out in the report that "no measurable progress has been made in overcoming federal employee resistance to the idea that they should report instances of fraud, waste and abuse." MSPB, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*—A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board (November 2011) at 5.

The OSC itself did not help matters. As provided in the Senate Report of the Committee on Governmental Affairs, S. Rep. 100-413 (Whistleblower Protection Act of 1988), the Special Counsel for the period 1982-1986, stated in a Washington Post article that if he were an attorney representing whistleblowers, "I'd say that unless you're in a position to retire or are independently wealthy, don't do it. Don't put your head up, because it will get blown off."

Congress was also concerned about the way in which this Special Counsel perceived his role. He stated in testimony before Congress that his office "has only one client; it is the enforcement of the merit systems and the laws that carry it into effect"; federal employees who bring claims of agency wrongdoing "are not the clients of this office; the system is." *See Frazier v. MSPB*, 672 F.2d at 162 (Board disagreed that OSC's role was that of an employee advocate and determined that OSC was more of "a prosecutor charged with vindicating the Act's goal of achieving a fair, efficient, and lawfully conducted Civil Service."). The Special Counsel expressed his "firm belief" that most federal managers follow the law but that "most whistleblowers are malcontents." "Whistleblower Protection," hearings before the House Committee on Post Office and Civil Service, 99th Cong., 1st sess. 237 (1985). There was also congressional concern that the OSC only pursued cases that were absolutely "winnable." *Id.* (relying on and referring to a GAO Report, "Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection," GAO/GGD-85-53, May 10, 1985).

There were also congressional concerns about the disclosure of information by OSC and OSC intervention; the narrow MSPB and court interpretation of "a disclosure"; the absence of any employee appeal rights as to matters that were not within the MSPB's direct jurisdiction (e.g., transfers, nonselection); the difficulty in proving a nexus between a protected disclosure and a personnel action; and the relative ease in which agencies could prove the affirmative defense; as well as others.

Congress' dissatisfaction led to the Whistleblower Protection Act of 1989 (an earlier nearly identical version had passed Congress in 1988 but had been pocket vetoed by President Reagan). This law made numerous important changes to the Civil Service Reform Act. It provided that OSC's primary role is to "protect employees, especially whistleblowers, from prohibited personnel practices," and that OSC "shall act in the interests of employees who seek assistance" from that office. Congress also established OSC as an independent agency, separate from the MSPB (although it did not allow OSC to seek judicial review of MSPB decisions).

By far, the most important specific change was the establishment of the new Individual Right of Action appeal. Under the previous law, if a matter was not within the jurisdiction of the MSPB (such as a transfer, nonselection, 5 day suspension), an employee was limited to filing a claim of whistleblower reprisal with OSC. Whether the matter was pursued was entirely up to OSC. Under this new IRA right, an employee would be required to first file with OSC. After 120 days, if OSC did nothing or if OSC made a determination, the employee could appeal to the MSPB within 60 days and receive (if there was a nonfrivolous claim of jurisdiction) a hearing. In effect, this expanded MSPB jurisdiction.