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Castaway: Navigating Uncharted Waters

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CASTAWAY: NAVIGATING UNCHARTED WATERS

> "*[W]histle-blowing is a generous, positive act—someone putting his or her career on the line in order to stop a serious problem from causing preventable harm to others. Whistleblowers are not traitors, but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent.*"[1]

INTRODUCTION

On May 20, 2013, former National Security Agency ("NSA") contractor Edward Snowden boarded a flight from Hawaii to Hong Kong with a massive trove of classified documents.[2] During 2012 and 2013, Snowden secretly compiled and purloined the cache of documents from the NSA over the course of a fifteen-month stint as an NSA contractor in Ha-

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1. Report of the Comm. on Legal Affairs and Human Rights on The Protection of "Whistleblowers," U.N. Doc. 12006, at 6 (2009) [hereinafter Whistleblower Protection Report], https://whistlenetwork.files.wordpress.com/2014/12/omtizgt-report-wb-doc12006-14sept2009.pdf.

2. Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN, June 9, 2013, http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance. The NSA originally estimated that Snowden stole 1.7 million documents, but Snowden claims that he took far less and intentionally left a trail of digital clues to enable the NSA to determine which documents he merely viewed and which ones he actually took; however, the NSA has still not successfully decrypted this digital trail, which renders their estimate inaccurate at best and pure speculation at worst. *See* Andy Greenberg, *Snowden: I Left the NSA Clues, but They Couldn't Find Them*, WIRED (Aug. 13, 2014, 7:00 AM), http://www.wired.com/2014/08/snowden-breadcrumbs/; s*ee also* James Bamford, *The Most Wanted Man in the World*, WIRED at 2, http://www.wired.com/2014/08/edward-snowden/ (last updated Aug. 22, 2014). Investigators now at least distinguish between the number of documents Snowden was able to access—the estimated 1.7 million—and documents they believe he distributed to journalists—a more modest fifty to two hundred thousand documents. Bryan Burrough, Sarah Ellison & Suzanna Andrews, *The Snowden Saga: A Shadowland of Secrets and Light*, VANITY FAIR (May 2014), http://www.vanityfair.com/news/politics/2014/05/edward-snowden-politics-interview.

waii.[3] During a prearranged meeting with *Guardian* journalist Glenn Greenwald and American documentary filmmaker Laura Poitras, Snowden made "arguably the most significant national security leak in American history"[4] by disclosing details about the—at that time—largely unknown mass surveillance programs operated by the NSA, which entailed dragnet data collection of American citizens.[5] Snowden, with good reason, had concerns about the constitutionality of these programs, which prompted him to take action.[6] His concerns allegedly remained unaddressed and largely unacknowledged, despite repeated attempts to voice them to his superiors who may have been able to effect change by further escalating them within the ranks of the NSA.[7]

Only days after leaking the documents to various media outlets, Snowden identified himself as the source of the leaked classified information.[8] The U.S. government promptly re-

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3. For the first twelve months of his stint in Hawaii, Snowden was employed by Dell as lead technologist of the NSA's regional information-sharing office, Bamford, *supra* note 2, at 4, and, for the last three, he was employed by defense consulting firm Booz Allen Hamilton as an infrastructure analyst, Burrough, Ellison & Andrews, *supra* note 2.

4. Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 281 (2014).

5. *See* Greenwald, MacAskill & Poitras, *supra* note 2.

6. *See, e.g.*, Matt Sledge, *NSA Releases Edward Snowden Email to Push Back at Whistleblower Claim*, HUFFINGTON POST (May 29, 2014, 8:59 PM), http://www.huffingtonpost.com/2014/05/29/nsa-edward-snowden-email_n_5412579.html (describing NSA's surveillance programs as "improper and at times unconstitutional").

7. Whether Snowden actually raised his concerns within the NSA or not is a source of heated debates. *See, e.g.*, Ken Dilanian, *Read the Only Email of Snowden Raising Concerns the NSA Has Found*, PBS (May 29, 2014), http://www.pbs.org/newshour/rundown/see-email-nsa-found-snowden-raising-concerns/. The answer to this question is irrelevant to this Note, however, because even intra-organization reports of suspected wrongdoing by intelligence community contractors like Edward Snowden do not qualify for statutory protection. *See infra* Part II.C. Moreover, even if contractors were protected under the framework of current laws in the United States, the protections afforded to covered intelligence community workers are, according to some commentators, illusory: the law merely masquerades as a whistleblower protection statute because, in reality, it only protects disclosures of classified information to Congress rather than providing recourse for employer-retaliation. *See infra* note 135 and accompanying text.

8. Despite journalist Ewen MacAskill's attempts to convince Snowden to "remain anonymous," Snowden outed himself as the source of the stolen doc-

sponded by filing a criminal complaint against him in federal court,[9] in which prosecutors charged Snowden with three felonies—"theft, unauthorized communication of national defense information, and willful communication of classified communications intelligence information to an unauthorized person"[10]—the last two of which were brought under the auspices of the 1917 Espionage Act.[11] Interestingly, a number of countries with strained U.S.-foreign relations[12] demonstrated a willingness to

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uments in part because "he knew there would be inquiries at the N.S.A., and he didn't want to put his colleagues through all that." Burrough, Ellison & Andrews, *supra* note 2.

9. Complaint at 1, United States v. Snowden, No. 1:13 CR 265 (CMH) (E.D. Va. June 14, 2013), *available at* http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/. The United States also "asked Hong Kong to detain [Snowden] on a provisional arrest warrant." Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST, June 21, 2013, http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html.

10. Complaint, *supra* note 9.

11. Finn & Horwitz, *supra* note 9.

12. The government of Hong Kong declined to execute a U.S. order to detain Snowden for technical reasons, including the U.S. government's failure to list Snowden's middle name correctly on the application and the application's request for only his detention, rather than surrender and detention. Patsy Moy, *US Failure to Clarify Snowden Papers Tied HK's Hands, Says Justice Chief*, SOUTH CHINA MORNING POST, June 26, 2013, http://www.scmp.com/news/hong-kong/article/1268958/us-failure-clarify-snowden-papers-tied-hks-hands-says-justice-chief?page=all. Some authors have suggested that Hong Kong's refusal may have been, in part, politically motivated, as evidenced by Hong Kong's request for more information about "alleged hacking of computer systems in Hong Kong by U.S. government agencies which Snowden had revealed." *See, e.g.*, *Hong Kong: Extradition Request Failed to Comply with Law*, NEWSMAX (June 23, 2013, 9:13 AM), http://www.newsmax.com/Newsfront/hong-kong-extradition-request/2013/06/23/id/511371/. *But see* Mark D. Kielsgard & Ken Gee-Kin Ip, *Hong Kong's Failure to Extradite Edward Snowden: More than Just a Technical Defect*, 13 RICH. J. GLOBAL L. & BUS. 48 (2014) (suggesting that Hong Kong's grounds for extradition refusal had sufficient legal support). Additionally, "Ecuador initially provided [Snowden] with a *laissez-passer* (from the French for 'let pass'), or temporary letter of passage, requesting a country to allow a person without other identity documents to cross international borders." Owen Bowcott, *Is Edward Snowden Stateless and Where Can He Go?*, GUARDIAN, July 2, 2013, http://www.theguardian.com/world/2013/jul/02/edward-snowden-where-can-he-go. Ecuadorian President Rafael Correa also noted in an open letter that

help Snowden avoid extradition to the United States.[13] The United States then revoked Snowden's passport, as he awaited a flight in Moscow's Shermetyevo Airport during, his attempted journey from Hong Kong to Cuba.[14] As a result, Snowden remained in the airport for thirty-nine days[15] while his asylum applications to twenty-one nation-states around the world were processed.[16] Eventually, Russia granted Snowden temporary asylum for one year,[17] and in August 2014, Snowden was granted a residential permit that would allow him to stay in

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the Ecuadorian government would give full consideration to Snowden's request for asylum without considering the mounting political pressure the United States was exerting at the time. Peter Hart, *Washington Post: Let's Punish Ecuador (Again)*, FAIR BLOG (June 25, 2013), http://fair.org/blog/2013/06/25/washington-post-lets-punish-ecuador-again/. Given that Correa is "a brash populist leader who loves tussling with the United States," Juan Forero, *Through Snowden, Ecuador Seeks Fight with U.S.*, WASH. POST, June 24, 2013, http://www.washingtonpost.com/world/the_americas/through-snowden-ecuador-seeks-fight-with-us/2013/06/24/2229ad52-dd07-11e2-a484-7b7f79cd66a1_story.html, few would find it hard to believe that political motivations were partly responsible for these actions.

13. One author has argued that Russia's decision to grant Snowden temporary asylum was a revenge tactic, carefully calculated by Vladimir Putin in response sanctions the United States imposed on Russian officials who were suspects in the death of a Russian whistleblower who was violently beaten by prison guards. Zackary Keck, *Why Did Putin Grant Edward Snowden Asylum? Revenge.*, DIPLOMAT (Aug. 6, 2013), http://thediplomat.com/2013/08/why-did-putin-grant-edward-snowden-asylum-revenge/. Another scholar posited that "[r]ising anti-Americanism will strain already tense relationships with countries such as Russia and China," Mark D. Young, *National Insecurity: The Impacts of Illegal Disclosures of Classified Information*, J.L. & POL'Y FOR INFO. SOC'Y, Summer 2014, at 367, 386, which may explain Hong Kong's failure to detain and extradite Snowden as well as Russia's willingness to grant him temporary residency.

14. *Snowden Remains at Shermetyevo Transit Area as His Passport is Revoked*, SPUTNIK NEWS (June 26, 2013, 9:51 AM), http://sputniknews.com/voiceofrussia/2013_06_26/Snowden-stays-transit-area-of-Sheremetyevo-because-his-passport-was-revoked-source-2715/.

15. Joshua Eaton, *Looking Back in Anger: One Year of Snowden's Leaks*, AL JAZEERA (July 31, 2014, 5:00 AM), http://america.aljazeera.com/articles/2014/7/31/snowden-awaits-leakscontinue.html.

16. Bowcott, *supra* note 12.

17. Steven Lee Meyer & Andrew E. Kramer, *Defiant Russia Grants Snowden Year's Asylum*, N.Y. TIMES, Aug. 2, 2013, at A1, http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html?pagewanted=all&_r=0.

the country for another three years.[18] Despite permission from the Russian government to travel abroad for up to three months at a time, venturing beyond the current safety of the Russian border would put him at risk of detention and extradition to the United States by an American ally.[19] The risk of capture and extradition therefore has given Snowden little choice but to remain in Russia for the duration of his three-year residential permit.

Once news of the intrusive surveillance programs broke, it seemed that legislators and the public alike were concerned with little else.[20] President Barack Obama was concerned by how far these programs reached and the public's perception of

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18. Alec Luhn & Mark Tran, *Edward Snowden Given Permission to Stay in Russia for Three More Years*, GUARDIAN, Aug. 7, 2014, http://www.theguardian.com/world/2014/aug/07/edward-snowden-permission-stay-in-russia-three-years. If Snowden "extend[s] his stay for one year beyond" the expiration of his three-year residential permit, he will become eligible to apply for Russian citizenship. Michael Birnbaum, *Russia Grants Snowden Residency for Three More Years*, WASH. POST, Aug. 7, 2014, http://www.washingtonpost.com/world/europe/russia-grants-edward-snowden-residency-for-3-more-years/2014/08/07/8b257293-1c30-45fd-8464-8ed278d5341f_story.html.

19. In a conversation with Washington Post reporter Greg Miller, a government official speaking on condition of anonymity said that White House homeland security adviser Lisa Monaco stated, "The best play for us is him landing in a third country." Greg Miller, *U.S. Officials Scrambled to Nab Snowden, Hoping He Wouldn't Take a Wrong Step. He Didn't.*, WASH. POST, June 14, 2014, https://www.washingtonpost.com/world/national-security/us-officials-scrambling-to-nab-snowden-hoped-he-would-take-a-wrong-step-he-didnt/2014/06/14/057a1ed2-f1ae-11e3-bf76-447a5df6411f_story.html. The anonymous source added "We were hoping he was going to be stupid enough to get on some kind of airplane, and then have an ally say: 'You're in our airspace. Land.'" *Id.*

20. Benkler, *supra* note 4, at 281. As a result of Snowden's actions,

> Within six months, nineteen bills had been introduced in Congress to substantially reform the [NSA's] . . . bulk collection program and its oversight process; a federal judge had held that one of the major disclosed programs violated the Fourth Amendment; a special President's Review Group, . . . appointed by the President, had issued a report that called for extensive reforms of NSA bulk collection and abandonment of some of the disclosed practices; and the Privacy and Civil Liberties Oversight Board . . . found that one of the disclosed programs significantly implicated constitutional rights and was likely unconstitutional.

Id. (internal citations omitted).

them—so much so that Obama addressed these concerns directly in a speech to the Department of Justice about the results of his administration's "broad-ranging and unprecedented review of U.S. intelligence operations."[21] The President recommended substantial changes to the scope of the NSA's authority[22] and advocated for changing the rules and procedures that govern the handling of information once it is collected by the NSA.[23] The judiciary was quick to follow suit and only a few months later, handed down a decision declaring one of the most controversial NSA programs unconstitutional. [24] Together,

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21. Megan Slack, *President Obama Discusses U.S. Intelligence Programs at the Department of Justice*, THE WHITE HOUSE (Jan. 17, 2014, 6:44 PM), http://www.whitehouse.gov/blog/2014/01/17/president-obama-discusses-us-intelligence-programs-department-justice. In his speech, the President expressed concerns about the reach of the NSA's operations into the private lives of Americans not suspected of any wrongdoing. *See* White House Office of the Press Secretary, *Remarks by the President on Review of Signals Intelligence*, THE WHITE HOUSE (Jan. 17, 2014, 11:15 AM), http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence [hereinafter *Presidential Remarks on Intelligence*] ("[T]he same technological advances that allow U.S. intelligence agencies to pin-point an al Qaeda cell in Yemen or an email between two terrorists in the Sahel, also mean that many routine communications around the world are within our reach[, and] . . . that prospect is disquieting for all of us.").

22. *Id.*

23. *See* Ellen Nakashima & Greg Miller, *Obama Calls for Significant Changes in Collection of Phone Records of U.S. Citizens*, WASH. POST, Jan. 17, 2014, http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7f6e-11e3-95c6-0a7aa80874bc_story.html. President Obama also described the history of U.S. surveillance and noted that several events throughout U.S. history have reminded Americans that substantial liberties should not be sacrificed for national security. *Presidential Remarks on Intelligence*, *supra* note 21. For example, he stated, "In the long, twilight struggle against Communism, we had been reminded that the very liberties that we sought to preserve could not be sacrificed at the altar of national security." *Id.*

24. In December 2013, a judge for the Federal District court for the District of Columbia

> ruled . . . that the [NSA] program that is systematically keeping records of all Americans' phone calls most likely violates the Constitution, describing its technology as 'almost Orwellian' and suggesting that James Madison would be 'aghast' to learn that the government was encroaching on liberty in such a way.

Charlie Savage, *Judge Questions Legality of N.S.A. Phone Records*, N.Y. TIMES, Dec. 17, 2013, at A1 (citing Klayman v. Obama, 957 F. Supp. 2d 1

these events signify an implicit ratification of Snowden's disclosures by all branches of the government and the public alike. Despite widespread acknowledgement of the value in Snowden's revelations,[25] the Executive branch ("Executive"), through various agents, has adamantly repeated that it will not consider granting Snowden clemency for his actions,[26] but instead will prosecute him to the full extent of the law.[27]

As one of the most significant leaks of classified government information in recent history,[28] the NSA revelations illustrate

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(D.C. Cir. 2013). *Contra* American Civil Liberties Union v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (holding that NSA's phone meta-data collection did not violate fourth amendment).

25. *See, e.g.*, Zeke J. Miller, *Time Poll: Support for Snowden—And His Prosecution*, TIME (June 13, 2013), http://swampland.time.com/2013/06/13/new-time-poll-support-for-the-leaker-and-his-prosecution/ ("54% of respondents said the leaker, Edward Snowden, did a 'good thing' in releasing information about the government programs.").

26. *See, e.g.*, Sharon D. Nelson & John W. Simek, *Edward Snowden's Impact*, 74-JUL. OR. ST. B. BULL. 19, 19 (2014). Even the head of the task force charged with evaluating the leaks' effects raised the possibility of granting Snowden amnesty in exchange for the return of the remaining undisclosed documents in his possession. *See NSA Task Force Leader Backs Talks on Amnesty for Snowden*, FOX NEWS (Dec. 16, 2013), http://www.foxnews.com/politics/2013/12/16/nsa-task-force-leader-snowden-took-keys-to-kingdom/. The White House, however, restated its position that Snowden will be severely punished for his crimes to the extent permitted by law. *Id.*

27. John Mueller & Mark G. Stewart, *Secret Without Reason and Costly Without Accomplishment: Questioning the National Security Agency's Metadata Program*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 407, 407 (2014). (noting that the Obama administration "set in motion a program to pursue [Snowden] to the ends of the earth in order to have him prosecuted to the full extent of the law for illegally exposing state secrets"). Conviction for the three felonies that Snowden has been charged with, *see* Finn & Horwitz, *supra* note 9, could land him in prison for up to thirty years. Scott Shane, *Ex-Contractor is Charged in Leaks on N.S.A. Surveillance*, N.Y. TIMES, June 21, 2013, http://www.nytimes.com/2013/06/22/us/snowden-espionage-act.html?pagewanted=all&_r=0.

28. Benkler, *supra* note 4, at 281. President Obama acknowledged the monumental importance of these disclosures during his speech to the Department of Justice on the results of his administration's review of U.S. intelligence programs. *Presidential Remarks on Intelligence*, *supra* note 21, at 5 ("[A]n avalanche of unauthorized disclosures [sparked] controversies at home and abroad that have continued to this day."). Ironically, Snowden's revelations came only a few short weeks after Obama publicly registered his concern about the need for "a more robust public discussion about the balance between security and liberty" during a speech to the National Defense Uni-

the push-pull tension between secrecy and democracy[29] that underlies any discussion about the legality of intelligence operations. The importance of Snowden's disclosures is demonstrated by the fact that Snowden instigated the most wide-scale re-evaluation of American surveillance operations since the mid-1970s.[30] Yet, attitudes about how Snowden went about making these disclosures are split,[31] and they continue to change as more information about the NSA's surveillance programs is leaked.[32] One thing remains clear: had the proper disclosure channels and statutory protections existed to allow Snowden to disclose his concerns and have them addressed by the government, Edward Snowden would not be a household name.

Every whistleblower[33] protection[34] statute enacted in the United States has treated intelligence community ("IC") work-

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versity. *Id*. For more information about the context in which the President acknowledged the need for more discussion on this sensitive matter of public concern, see White House Office of the Press Secretary, *Remarks by the President at the National Defense University*, THE WHITE HOUSE (May 23, 2013, 2:01 PM), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

29. *See generally* Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUINNIPIAC L. REV. 1 (2009).

30. Benkler, *supra* note 4, at 281.

31. *See, e.g.*, *Presidential Remarks on Intelligence*, *supra* note 21 (stating that "more robust public discussion about the balance between security and liberty" was needed, but noting that the "sensational" manner disclosures were made in has "shed more heat than light" and negatively impacted intelligence operations); Roy Greenslade, *Edward Snowden's Leaks Cause Editorial Split at the Washington Post*, GUARDIAN, July 5, 2013, http://www.theguardian.com/media/greenslade/2013/jul/05/edward-snowden-washington-post.

32. *See Public Split Over Impact of NSA Leak, but Most Want Snowden Prosecuted*, PEW RESEARCH CENTER (June 17, 2013), http://www.people-press.org/2013/06/17/public-split-over-impact-of-nsa-leak-but-most-want-snowden-prosecuted/; RT.com, *Most Americans Applaud Snowden's Exposure of NSA Mass Surveillance*, FINAL CALL, http://www.finalcall.com/artman/publish/National_News_2/nsa_snowden_101503.shtml (last updated June 9, 2014, 9:32 AM).

33. Whistleblowing "refers to the disclosure of wrongdoing that threatens others, rather than a personal grievance." Richard Calland & Guy Dehn, *Introduction* to WHISTLEBLOWING AROUND THE WORLD (Richard Calland & Guy Dehn eds., 2004).

34. This Note will focus on whistleblower protections for federal public sector workers in the United States. While there is substantial legislation that protects private sector whistleblowers, such statutes are beyond the scope of this Note.

ers[35] differently than any other federal government employee. A number of considerations and unique characteristics make IC workers warrant special statutory treatment, which has resulted in total exclusion from the vast majority of whistleblower statutes in the United States.[36] Worse yet, an arbitrary statutory distinction between employees and contractors left Snowden with no whistleblower protection whatsoever; he had no recourse against employer retaliation for exposing what he perceived as wrongdoing.[37] Because the current statutory framework does not include IC *contract workers*, individuals like Snowden do not enjoy even the modest protections from retaliation that *employees* of IC agencies do.[38] Accordingly, internally disclosing information he reasonably believed evidenced an abuse of power very likely could have been a career-ending move for Snowden,[39] while the perceived abuses would have continued unchecked.[40]

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35. As used in this Note, the term "workers" will refer to both *employees* and *contractors*.

36. The relevant statutes are the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, the Intelligence Community Whistleblower Protection Act of 1988, and the Whistleblower Protection Enhancement Act of 2012. For a detailed discussion of the provisions in each, see *infra* Part II.

37. *See, e.g.*, Jon Greenberg, *Greenwald: NSA Leaker Snowden has no Whistleblower Protection*, POLITIFACT (Jan. 7, 2014, 11:42 AM), http://www.politifact.com/punditfact/statements/2014/jan/07/glenn-greenwald/greenwald-nsa-leaker-snowden-has-no-whistleblower-/.

38. *See* Glenn Kessler, *Edward Snowden's Claim That He Had "No Proper Channels" for Protection as a Whistleblower*, WASH. POST (Mar. 12, 2014), http://www.washingtonpost.com/blogs/fact-checker/wp/2014/03/12/edward-snowdens-claim-that-as-a-contractor-he-had-no-proper-channels-for-protection-as-a-whistleblower/ (stating that "the [Intelligence Community Whistleblower Protection Act of 1998] is generally regarded as fairly weak" and noting that Presidential Policy Directive 19, *see infra* Part II.E., does not protect IC whistleblowers from retaliation); *see also infra* Part II.C., for a discussion of the Intelligence Community Whistleblower Protection Act of 1998.

39. For example, in July 2003, federal air marshal John MacLean disclosed to the media the Transportation Security Administration's plan to suspend all missions requiring a federal air marshal to stay in a hotel overnight for over ten days. Jon Knight, *Patrolling the Unfriendly Skies: Protecting Whistleblowers Through Expanded Jurisdiction*, 20 FED. CIRCUIT B.J. 281, 281–83 (2010). The TSA was announced this plan to air marshals only a day before "intelligence memos [that] showed the greatest threat to airline safety since the 9/11 attacks on the World Trade Center and Pentagon" were pub-

As a result, IC whistleblowers[41] are forced to choose between several unappealing courses of action: ignoring illegality, agency misconduct, wrongdoing, government abuse, or policies in the IC that warrant blowing the whistle;[42] reporting any of these internally through prescribed channels only to be retaliated against; or publicly disclosing wrongdoing at risk of criminal prosecution.[43] Faced with these choices and "[w]ithout protected channels for exposing wrongdoing, some national security and [IC] members who were unwilling to remain silent have taken huge personal risks to expose wrongdoing."[44]

Unfortunately for an IC contractor in this position, disclosing information about perceived misconduct will most likely result in prosecution under the Espionage Act of 1917, at least under the Obama administration.[45] The lack of adequate protections

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lished on the front page of the *Washington Post*. *Id.* (citing Sarah Kehaulani, *Memo Warns of New Plots to Hijack Jets*, WASH. POST, July 30, 2003, at A1). MacLean was later fired on several grounds, despite voicing his concerns to his supervisor and the Office of the Inspector General, both of whom failed to investigate the well-founded concerns, before turning to the media. MacLean had no recourse for his termination—normally, a prohibited personnel practice that whistleblowers are protected from—because he was an intelligence community employee. *Id.* Similarly, in 2010, when NSA employee Thomas Drake attempted to blow the whistle by "follow[ing] the Intelligence Community Whistleblower law to a 'T'," Greenberg, *supra* note 37, he became the suspect of a four year federal investigation and was charged with multiple felonies that ultimately failed to stick, *see* Kessler, *supra* note 38.

40. *See, e.g.*, Jenny Mendelsohn, Note, *Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing*, 8 WASH. U. GLOBAL STUD. L. REV. 723, 723 (2009) ("A potential whistleblower faces a difficult choice: she can either stick her neck out and report misconduct, risking potential retaliation from her employer, or she can keep quiet, keep her job and keep her employer's misconduct hidden.").

41. In this Note, "IC whistleblowers" will refer to any employee of or worker contracted by an Executive agency which has, as its principal function, the conduct of foreign intelligence or counter-intelligence operations.

42. This note will use "misconduct," "wrongdoing," "government abuse," and similar words interchangeably to refer to misconduct that warrants disclosure to an employer, a third party, or a public outlet such as the media.

43. Arden Arnold, *Does New Policy Protect Intelligence Whistleblowers?*, POGO BLOG (July 10, 2013), http://www.pogo.org/blog/2013/07/20130710-does-new-policy-protect-intelligence-whistleblowers.html.

44. *Id.*

45. Under the Obama administration, eight individuals have been charged for leaks under the Espionage Act of 1917, while only three Americans in history previously suffered the same fate. *See* Cora Currier, *Charting*

for IC whistleblowers and the government's unwavering dedication to prosecuting disclosers of questionably classified information both undermines the stated purpose of current whistleblower statutes and criminalizes individuals who disclose perceived wrongdoing with a good faith belief that doing so will end the abuses. Additionally, it creates perverse incentives for countries with soured U.S.-foreign relations to harbor and grant asylum to individuals who possess sensitive national security information that could pose a grave risk of imminent harm to American national security.[46]

While the United States is among the countries with the most robust whistleblower protections in the world,[47] these protections could be improved by expanding them to cover all IC workers. Providing proper, protected channels for IC workers to disclose wrongdoing would reduce the number of public disclosures of classified national security information; increase disclosures to designees best situated to remedy well-founded

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Obama's Crackdown on National Security Leaks, PRO PUBLICA (July 30, 2013, 3:40 PM), http://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks, archived at http://perma.cc/L2CZ-CRCW. For background information on the three individuals prosecuted for leaks prior to President Obama's initial election, see Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 455 n.17 (2014). Papandrea hypothesizes that "[t]he primary causes of the dramatic increase in prosecutions are likely changes in technology and the media, exploding growth of and access to classified information, and a belief that it is especially important in a war against terrorists to protect our secrets vigilantly." *Id.*

46. This concern was echoed by the NSA, which was so concerned about the documents Snowden stole falling into the hands of the Russians and Chinese that they considered granting Snowden amnesty at one time. *See* Spencer Ackerman, *NSA Officials Consider Edward Snowden Amnesty in Return for Documents*, GUARDIAN, Dec. 15, 2013, http://www.theguardian.com/world/2013/dec/15/nsa-edward-snowden-amnesty-documents.

47. *See, e.g.*, THAD M. GUYER & NIKOLAS F PETERSON, THE CURRENT STATE OF WHISTLEBLOWER LAW IN EUROPE: A REPORT BY THE GOVERNMENT ACCOUNTABILITY PROJECT 7 (2013), http://whistleblower.org/sites/default/files/TheCurrentStateofWhistleblowerLawinEurope.pdf (describing the U.S. whistleblower protection regime as "comprehensive" in comparison to the EU's largely ineffective "patchwork" protections) (citing PAUL STEVENSON & MICHAEL LEVI, COUNCIL OF EUROPE, THE PROTECTION OF WHISTLEBLOWERS: A STUDY ON THE FEASIBILITY OF A LEGAL INSTRUMENT ON THE PROTECTION OF EMPLOYEES WHO MAKE DISCLOSURES IN THE PUBLIC INTEREST 12 (2012))

reports of wrongdoing; and bolster national security by preventing sensitive from falling into political enemies' possession. Ultimately, expanding whistleblower protections to protect all IC workers would reserve use of the 1917 Espionage Act for its intended purpose[48] and make a significant stride toward accomplishing Congress's stated purposes in enacting whistleblower statutes.[49] This Note explores ways in which the U.S. whistleblower statutes could be enhanced by expansion to cover IC workers and proposes a suggestion for such expansion by taking cues from the United Kingdom's whistleblower protection statute.

Part I of this Note discusses the relevant background of IC whistleblowing under U.S. law, noting the important function that whistleblowing serves. This discussion also describes the inherent difficulties in designing a statute that provides adequate protections without risking excessive disclosure and inadvertent harm to national security. Part II explores the history of whistleblower statutes in the United States and provides a detailed description of the current statutory framework. Additionally, it criticizes the current state of the U.S. whistleblower protection laws and enumerates their widely-recognized shortcomings. Part III first discusses the United Kingdom's whistleblower protection statute. Part III further proposes comprehensive statutory reforms in the United States based on the United Kingdom's whistleblower protection statute and acknowledges that the U.K model would be more effective in the comparatively small cohort of IC workers than it has been with the entire U.K. population. Finally, Part III expounds upon how these recommendations would improve the protections currently afforded IC workers by U.S. whistleblower protection laws.

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48. The 1917 Espionage Act is "[a]n Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the Unites States, to punish espionage, and better to enforce the criminal laws of the United States." Espionage Act of 1917, Pub. L. 65-24, pmbl., 40 Stat. 217, 217 (codified as amended at 18 U.S.C. § 793).

49. *E.g.*, Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.) ("The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, *to prevent reprisals*, and *to help eliminate wrongdoing within the Government*." (emphasis added)). For more examples of Congress's stated purposes in enacting whistleblower protection statutes, see *infra* Part II.

I. BACKGROUND

> "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[50]

Drafting a law that adequately deals with the issue of whistleblowing in the intelligence community is difficult, first, because there is widespread disagreement about how such individuals should be treated. While there has been a general trend toward enhancing the federal government's treatment of whistleblowers in recent years, IC whistleblowers are "[t]he [g]reat [e]xception" to that rule.[51] This is partially due to the polarizing nature of cases involving IC whistleblowing:[52] strong opinions arise out of concerns over the hot-button issue of national security.[53] Perhaps unsurprisingly, public reactions to actions like Snowden's cannot even be predicted along party lines.[54] A sin-

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50. Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor*, *in* VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES 19–21 (1756), *available at* http://franklinpapers.org/franklin/framedVolumes.jsp?vol=6&page=238a.

51. Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 72–89 (2012).

52. Recently, a number of high-profile cases have demonstrated the divisiveness that IC whistleblowing engenders. For example, the story of Chelsea—formerly Bradley—is probably still fresh in the mind of most Americans. As a result of his attempt to "show the true cost of war," Amy Goodman & Juan Gonzalez, *WikiLeaks Whistleblower Bradley Manning Says He Wanted to Show the Public the "True Cost of War,"* DEMOCRACY NOW! (Mar. 1, 2013), http://www.democracynow.org/2013/3/1/wikileaks_whistleblower_bradley_manning_says_he, Manning was sentenced to thirty-five years in prison after being convicted for seventeen of twenty-two charges for leaking hundreds of thousands of diplomatic cables to WikiLeaks, Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST, Aug. 21, 2013, http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html. While many called for his imprisonment, others rallied and protested in support of Manning's cause, labelling him a hero and a martyr.

53. *See* Adam Edelman, *Edward Snowden, Hero or Traitor? NSA Leaker Divides Political World in Sometimes Unpredictable Ways*, N.Y. DAILY NEWS (June 11, 2013), http://www.nydailynews.com/news/politics/edward-snowden-hero-traitor-nsa-leaker-divides-political-world-sometimes-unpredictable-ways-article-1.1369586.

54. *See, e.g.*, Rodney A. Smolla, *Liability for Massive Online Leaks of National Defense Information*, 48 GA. L. REV. 873, 894 (2014) ("For those who leak government secrets for altruistic motives, the public perception of their justification is likely to be divided and controversial.").

gle whistle blower may be called a hero by some and a traitor by others.[55] Not only has the media engaged in this political "name game," in which the accused is referred to by various names that each carry their own "connotations of righteousness and wrongdoing,"[56] but President Obama has similarly adopted a wide range of rhetoric to refer to different disclosures depending on his judgment of each.[57] Given this lack of consensus about how such individuals should be treated, it is no surprise that current whistleblower protection statutes do not adequately protect IC workers and that comprehensive reforms are still needed.

Drafting legislation on this issue is further complicated by the fact that a whistleblower protection statute must mount the difficult task of striking an appropriate balance between the equally important but competing interests of security and democracy, which "coexist with one another in a precarious, ever-shifting state of balance that security concerns threaten constantly to upset." [58] Striking the appropriate balance be-

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55. *Id.* ("There are those who regard Daniel Ellsberg or Edward Snowden as cultural heroes, and those who regard them as pariahs."). *See generally* Papandrea, *supra* note 45 (questioning whether individuals like Chelsea—formerly Bradley—Manning and Edward Snowden are traitors, spies, or whistleblowers).

56. *See, e.g.,* Katy Steinmetz, *The Edward Snowden Name Game: Whistle-Blower, Traitor, Leaker,* TIME (July 10, 2013), http://newsfeed.time.com/2013/07/10/the-edward-snowden-name-game-whistle-blower-traitor-leaker, archived at http://perma.cc/9S98-EZV3.

57. Obama has referred to what he deems to be valuable disclosures as instances of "whistleblowing," while he has described disclosures of national security information as "leaks." Moberly, *supra* note 51, at 73–75. Perhaps unsurprisingly, when confidential information is leaked to the benefit of the government, it is a routine matter for the leaker to go unpunished. For more information on the contradictory practice of permitting strategic government leaks, see generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). Pozen notes that "[c]lassified information disclosures to the media are thought to occur so regularly in Washington as to constitute a routine method of communication about government." *Id.* at 528 (internal quotation marks omitted) (footnotes omitted).

58. Benjamin Wittes, *Against a Crude Balance: Platform Security and the Hostile Symbiosis Between Liberty and Security*, BROOKINGS AND HARVARD LAW SCHOOL PROJECT ON LAW AND SECURITY (Sept. 21, 2001), http://www.brookings.edu/research/papers/2011/09/21-platform-security-wittes. *See also Presidential Remarks on Intelligence*, *supra* note 21 ("Those who are troubled by our existing programs are not interested in a repeat of

tween "defend[ing] our nation and uphold[ing] our civil liberties," however, is complicated by the imperative that intelligence agencies operate under a veil of secrecy: by definition, the result is that any such agency is less accountable to the people.[59] Therefore, while the Executive must be granted adequate authority—including the right to keep certain information secret[60] and conduct certain operations in secret—to ensure national security,[61] that grant must not be so expansive as to make the Executive's decision making unaccountable to the people.[62]

The Constitution manifestly grants the Executive the sole power to ensure and maintain national security,[63] and an integral component of the Executive's duty to protect the Nation's security is the discretion to classify documents and infor-

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9/11, and those who defend these programs are not dismissive of civil liberties. The challenge is getting the details right, and that's not simple.").

59. *See Presidential Remarks on Intelligence*, *supra* note 21.

60. *See, e.g.*, *id.* ("[I]ntelligence agencies cannot function without secrecy.").

61. In a 2001 memorandum to the President, the Department of Justice Office of Legal Counsel stated

> [T]he President's constitutional power to defend the United States and the lives of its people must be understood in light of the Founders' express intention to create a federal government "cloathed with all the powers requisite to [the] complete execution of its trust." Foremost among the objectives committed to that trust by the Constitution is the security of the Nation. As Hamilton explained in arguing for the Constitutional's adoption, because "the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency."

Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to the Deputy Counsel to the President on the President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them 2 (Sept. 25, 2001) (citing THE FEDERALIST NO. 23, at 122 (Alexander Hamilton)) (on file with author).

62. A noted scholar described this power as the "vast and largely unchecked control the executive branch enjoys over national security information." Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 237 (2008).

63. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.").

mation. As a result, national security decision making, including decisions regarding classification, is generally not subject to judicial review[64]—one of the many important and effective power checks that exist in the American political machine. Accordingly, commentators have argued that Executive has essentially unbridled discretion to classify national security information as it sees fit.[65] However, a critical component to the core of democratic society is allowing the public to access government information; but access is limited when the Executive classifies information.[66] Concededly, procedures must exist to keep certain information confidential and to maintain an adequate level of Executive secrecy.[67] And while this should not be misconstrued as a metaphorical blank check for the Executive, it is generally treated as such: the government systematically over-classifies information.[68]

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64. *See, e.g.*, Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."); United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972) ("If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is party of the executive function beyond the scope of judicial review."); Ctr. for Nat. Sec. Studies v. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) ("We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues."). Furthermore, "[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Id.* at 932.

65. Papandrea, *supra* note 62, at 236. Papandrea further states that "[a]lthough the Freedom of Information Act and whistleblower protection laws serve as checks on the executive's power over information, these checks are largely ineffectual in the context of national security information." *Id.*

66. Pamela Takefman, Note, *Curbing Overzealous Prosecution of the Espionage Act*: *Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897, 901 (2013). Takefman indicates that "[e]xperts have recognized that government agencies withhold too much information from the public by classifying documents when there is no real threat to national security therein." For a brief synopsis of support for Takefman's assertion, see the accompanying explanatory text in footnote 17 of her article.

67. *See, e.g.*, Exec. Order No. 13526, 75 Fed. Reg. 707 (2010).

68. According to Rodney Smolla, "the government engages in massive overclassification of materials, undermining fundamental values of transparency

This further complicates the issue of how to treat IC whistleblowers because publicly disclosing classified information is prohibited by law, and under the current statutory framework, a disclosure is not protected if it is "prohibited by law."[69] Therefore, even if IC workers were adequately protected by the current U.S. whistleblower protection statutes, many disclosures––including the ones Edward Snowden made—would be unprotected given the amount of information that is wrongfully classified. [70] In such cases, by not protecting and often prosecuting IC whistleblowers, [71] the government effectively muzzles the "public dialogue" sparked by whistleblowing that is necessary to "hold the government accountable for its actions."[72] Absent

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and accountability essential to a healthy well-functioning democracy." Rodney A. Smolla, *supra* note 54, at 875 (citing Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 403 (2009) ("When asked how much defense information in government is overclassified or unnecessarily classified, former Under Secretary of Defense for Intelligence Carol A. Haave told a House subcommittee in 2004 that it could be as much as fifty percent, an astonishingly high figure.")). *See also III. Information Security: Classification of Government Documents*, 85 HARV. L. REV. 1189, 1201 (1972) ("I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified . . . ; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time."). Often, such information has little to with national security, and instead it merely protects illegal or embarrassing government actions from public scrutiny. For a detailed discussion about "illegal secrets," i.e., maintaining the secrecy of illegal government action through classification, see Jenny-Brooke Condon, *Illegal Secrets*, 91 WASH. U. L. REV. 1099 (2014).

69. If an IC employee makes a qualifying disclosure (i.e., the right type of information was made to one of a number of legally appropriate parties), he or she is entitled to whistleblower protection *unless* "such disclosure is . . . specifically prohibited by law" or the disclosed information "is 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. § 1213(a)(1). Because disclosure of the lion's share of information or conduct that IC workers have access to and observe is "prohibited by law," this requirement effectively renders almost all potential IC whistleblowers unprotected.

70. Papandrea, *supra* note 45, at 490 ("[N]ational security whistleblowers have little shelter from retaliation, and the judicial branch has no authority to review any retaliation claims they might have. As a result, the executive branch has virtually unchecked authority to declare what information is secret and to punish leakers as it sees fit." (footnotes omitted)).

71. Currier, *supra* note 45.

72. Takefman, *supra* note 66.

IC whistleblowers like Snowden who disclose wrongdoing to the media, the public would otherwise have no access to information that may have been improperly classified.[73]

When democratic accountability is lacking, "the danger of government overreach becomes more acute."[74] Accordingly, unbridled Executive national security decision-making power inevitably does lead to government overreaching—and the NSA scandal is a visceral illustration of that startling, yet unsurprising, reality. As one scholar noted,

> [u]nless one believes that the national security establishment has a magical exemption from the dynamics that lead all other large scale organizations to error, then whistleblowing must be available as a critical arrow in the quiver of any democracy that seeks to contain the tragic consequences that follow when national security organizations make significant errors or engage in illegality or systemic abuse.[75]

However, given the vital importance of national security, wrongdoing and misconduct must be promptly identified and adequately redressed,[76] which is precisely one of the functions whistleblowing serves.

Not only has the ability of intelligence agencies like the NSA to conduct operations shrouded in secrecy enabled Executive power abuses, but rapid technological innovation has also enabled intelligence agencies to conduct operations on a scale pre-

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73. *Id.*

74. *Id.*

75. Benkler, *supra* note 4, at 285.

76. *Id.* at 290 (citing JOHN HAMPDEN JACKSON, CLEMENCEAU AND THE THIRD REPUBLIC 228 (1946)). At length, Benkler explained,

> [F]or national security, current law protects secrecy at the expense of external review, even at the cost of securing bureaucratic independence from democratic accountability. The facially obvious reason is that revealing information that the national security establishment deems secret can have negative consequences such that the benefits of disclosure, generally thought worthwhile in less life-critical contexts than national security, do not in this context outweigh the costs of error, incompetence, and malfeasance within the system. Once stated in this form, the obvious counterargument emerges. To paraphrase Clemenceau, national security is too important to be left to national security insiders.

Id. at 289.

viously not thought possible.[77] However, as a world leader in technological innovation, the United States is held to a higher standard by the rest of the world, which not only expects, but demands, that the digital information age usher in an era of "individual empowerment" rather than one of "governmental control."[78] It is therefore imperative to implement power-checking mechanisms—other than public transparency, which would eliminate the secrecy that is necessary for the conduct of intelligence operations—to enhance government accountability with respect to national security decision making.[79]

Whistleblowing is one such mechanism that could effectively check the Executive's broad power to make national security

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77. *See, e.g.*, *Presidential Remarks on Intelligence*, *supra* note 21. President Obama explained,

> When you cut through the noise, what's really at stake is how we remain true to who we are [as a nation] in a world that is remaking itself at dizzying speed. Whether it's the ability of individuals to communicate ideas; to access information that would have once filled every great library in every country in the world; or to forge bonds with people on other sides of the globe, technology is remaking what is possible for individuals, for institutions, and for the international order.

Id.

78. *Id.*

79. NSA General Counsel Rajesh De asserted the following:

> There is no doubt that in a democracy like ours, an important form of accountability is public transparency. However, it is absolutely essential not to assume that the legitimacy afforded by public transparency is the only way to achieve accountability, which may—in fact, must with respect to NSA—primarily be achieved through alternate means. *There is no perfect substitute for public transparency in a democracy*; but when there is also no way to provide information to those whom you seek to protect without also providing it to those from whom you seek to protect them, we must largely rely on such alternate means of accountability.

Rajesh De, General Counsel, National Security Agency, *The NSA and Accountability in an Era of Big Data*, 7 J. NAT'L SECURITY L. & POL'Y 301, 308 (2014) (emphasis added). Others, however, have noted the difficulty that is part and parcel of ensuring accountability in this context. Walter F. Mondale et al., *National Security and the Constitution: A Conversation Between Walter F. Mondale and Robert Stein*, 98 MINN. L. REV. 2011, 2013 (2014) ("The great challenge in the conduct of our classified intelligence operations is that it is very difficult, and sometimes almost impossible, to ensure the accountability envisioned in our Constitution.").

decisions in its sole discretion.[80] Absent judicial review, the accountability-enhancing function that whistleblowing serves in the realm of national security and the IC are integral to maintaining governmental integrity.[81] Given the current limitations of IC whistleblower protection, broadening the coverage of these statutes is a necessity. Whether any individuals brought within the coverage of a statute that has broader protections "blow the whistle" or not, that protection for would-be whistleblowers itself is a robust mechanism for preventing abuses. If a constant threat exists that wrongdoing may be legally disclosed, greater caution will inform governmental decision making.[82]

By the same token, an over-broad expansion of IC whistleblower protections creates a serious risk that classified information will be inadvertently revealed to the material detriment of U.S. national security.[83] The clarity with which mid- and low-level intelligence analysts understand the potentially far-reaching implications of a given disclosure of classified information is limited by the breadth of information that their security clearances allow them to access.[84] Accordingly, a statute

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80. Papandrea, *supra* note 62, at 244 ("[F]ederal whistleblower statutes are [one] mean[] by which Congress has attempted to provide a check on the executive branch's natural tendency to be excessively secretive.").

81. *See generally* ORG. FOR ECON. CO-OPERATION & DEV., G20 ANTI-CORRUPTION ACTION PLAN PROTECTION OF WHISTLEBLOWERS para. 1 (2011) [hereinafter 2011 G20 ANTI-CORRUPTION ACTION PLAN], http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf.

82. Candice M. Kines, Note, *Aiding the Enemy or Promoting Democracy: Defining the Rights of Journalists and Whistleblowers*, 116 W. VA. L. REV. 739, 779 (2013) ("[A]s long as the executive branch understands that any information may be disclosed to the public at any time, it is likely that it will engage in national security decision making more carefully. . . [T]he government will be forced to balance what is best for the public good."). *But see* Elletta Sangrey Callahan et al., *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879, 908 (2004) (asserting that empirical research undercuts the seemingly intuitive proposition that protecting whistleblowers from retaliation will induce individuals to disclose observed wrongdoing and that providing affirmative incentives, e.g., financial rewards for substantiated claims, is a superior alternative means to enhance accountability and transparency through whistleblowing).

83. *See*, *e.g.*, Kines, *supra* note 82, at 770 ("Overall, prevention of harmful disclosure is necessary to protect national security.").

84. *See, e.g.*, *Presidential Remarks on Intelligence*, *supra* note 21 ("[T]he sensational way in which these disclosures have come out has often shed

that defers to the judgment of all IC workers and protects them from retaliation for making any public, external disclosures of perceived wrongdoing is too broad and may harm national security.[85]

This is not to say that such disclosures are never appropriate. To the contrary, when lower-level employees are guilty of misconduct, internal reporting will most likely be preferred; but if managerial or high-level-official misconduct is pervasive, it is far more likely that the whistleblower, out of necessity, will turn to external reporting channels.[86] In light of the need for both secrecy and accountability, statutory protections for IC whistleblowing should be tempered by a recognition of the potential for concurrent harm to national security, and drafters should therefore deliberately attempt to strike the correct, deli-

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more heat than light, while revealing methods to our adversaries that could impact our operations in ways that we may not fully understand for years to come."); United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) ("What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context."). Some courts even give near absolute deference to the Executive branch on issues relating to national security and intelligence operations under the theory that "only experienced individuals steeped in national security can know if seemingly harmless tidbits of information can be disclosed without causing harm." David Rudenstine, *The Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37, 64 (2014) (citing Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1700–01 (2009)).

85. *See, e.g.*, *Presidential Remarks on Intelligence*, *supra* note 21 ("If any individual who objects to government policy can take it in their own hands to publicly disclose classified information, then we will never be able to keep our people safe or conduct foreign policy."). Moreover, such a statute may reduce the quality of government decision making. *See* Papandrea, *supra* note 45, at 482.

86. Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems*, 54 S. TEX. L. REV. 37, 43 (2012) (citing Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 180 (2008) ("[W]hen the subject matter of the unlawfulness . . . implicated the entire organization . . . external enforcement was the chosen path.")). The need for public, external disclosures in certain circumstances has even been recognized in the international community. Whistleblower Protection Report, *supra* note 1, at 4 para. 6.2.3. ("Where internal channels . . . have not functioned properly, or could reasonably not be expected to function properly given the nature of the problem raised by the 'whistle-blower', external 'whistleblowing', including through the media, should likewise be protected.").

cate balance between the equally important and competing interests of secrecy and democracy.

II. HISTORY OF WHISTLEBLOWER PROTECTIONS IN THE UNITED STATES

> "Given the unique power of the state, it is not enough for leaders to say: trust us, we won't abuse the data we collect. For history has too many examples when that trust has been breached. Our system of government is built on the premise that our liberty cannot depend on the good intentions of those in power; it depends upon the law to constrain those in power."[87]

The concept of whistleblowing[88] in the United States has existed since the Nation's founding, and the vital function it serves has long been recognized.[89] Whistleblowing both enhances governmental accountability and transparency as well as prevents wrongdoing.[90] However, Congress did not officially recognize until 1978, when the Civil Service Reform Act was passed, that a duty to disclose wrongdoing must be accompanied by statutory protections from retaliation in order to be

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87. *Presidential Remarks on Intelligence*, *supra* note 21.

88. Notably, the *term* whistleblowing, by contrast, is of comparatively recent vintage, being coined by Ralph Nader in the 1970's to avoid the negative connotations of other words used to refer to the same people, such as "snitch" or "informer." *Whistleblowing*: *Origin of Term*, WIKIPEDIA, http://en.wikipedia.org/wiki/Whistleblower#Origin_of_term (last modified Jan. 24, 2014, 1:09 AM) (citing NADER, ET AL., WHISTLEBLOWING (1972)).

89. Indeed, the first whistleblower protection statute was passed by the Continental Congress in 1778. S. RES. 202, 113th Cong. (2013) (enacted). The Continental Congress unanimously resolved to enact the first whistleblower statute, which stated that "it is the duty of all persons in the service of the United States . . . to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge." *Id.*

90. 2011 G20 ANTI-CORRUPTION ACTION PLAN, *supra* note 81 ("Whistleblower protection is essential to encourage the reporting of misconduct, fraud and corruption . . . . The protection of . . . whistleblowers from retaliation . . . is . . . integral . . . to combat corruption, promote public sector integrity and accountability, and support a clean business environment."). *See also* Calland & Dehn, *supra* note 33 ("Whistleblowing is a key way to deliver accountability (by which we mean that people are expected to explain their conduct).").

meaningful.[91] For this reason, most government workers kept their heads down and ignored corruption, abuse, and misconduct for the majority of U.S. history, keeping silent for fear of retaliation.[92] Moreover, IC workers were entirely unprotected for an additional twenty years.[93]

A. The Civil Service Reform Act of 1978 ("CSRA")

Important whistleblower protection reforms in the United States commenced with the passage of the CSRA,[94] which was enacted in the wake of the Watergate Scandal.[95] As "the first major overhaul of the federal civil service" in nearly a century,[96] the CSRA created the Merit Systems Protection Board ("MSPB") and the Office of the Special Counsel ("OSC").[97] Under the CSRA, the Special Counsel's role was to receive reports from federal workers of waste, fraud, and abuse and to investigate such reports as warranted.[98] Secondly, the MSPB's role then was to "process hearings and appeals affecting Federal employees" [99] and administer corrective action to agencies whose officials engaged in prohibited practices.[100] Accordingly, the OSC was to receive complaints from federal workers that their employer had engaged in a "prohibited personnel prac-

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91. Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111. For more on this Act, see *infra* Part II.A.

92. Fear of reprisal was one of the most common reasons for refusing to blow the whistle as late as 2012. *See infra* note 147 and accompanying text.

93. IC workers finally obtained some relief—albeit, extremely limited relief—for their lack of whistleblower protections with the passing of the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), Pub. L. 105-272, 112 Stat. 2413. For a detailed discussion of this legislation's provisions, effectiveness, and shortcomings, see *infra* Part II.C.

94. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

95. *See generally*, ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 72–88 (2012) (arguing that Congress probably would not have enacted the CSRA absent the occurrence of the Watergate scandal). The author noted that "[w]histleblowers played important roles in the Watergate scandal and one of them, Daniel Ellsberg, figured prominently in the motivation for the presidential cover-up of the Watergate break-in." *Id*. at 72.

96. Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 369 (1991).

97. *Id.*

98. Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, § 1206(a), 92 Stat. 1111, 1125; *see also* Fisher, *supra* note 96, at 371–72.

99. Sec. 3(1), 92 Stat. at 1112.

100. § 1206(h), 92 Stat. at 1129; Fisher, *supra* note 96, at 372.

tice," determine if such reports were well founded,[101] investigate well-founded reports, and "prosecute federal employees committing prohibited personnel practices against their subordinates for whistleblower and other activities."[102] However, the CSRA explicitly excluded IC workers from its protections,[103] and a worker whose report of a prohibited personnel action was determined to be unfounded by the Special Counsel had no further recourse.[104] The MSPB's "poor" performance in the ensuing years,[105] perhaps unsurprisingly, is a patent illustration of the Act's near utter failure to protect government whistleblowers. This subsequently created the need for additional legislation to guarantee that federal employees received the protections that the CSRA purported to provide.

B. Whistleblower Protection Act of 1989 ("WPA")

After over a decade of experience under the CSRA, Congress found that "Federal employees who make disclosures . . . serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures"[106] and that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service."[107] In light of the CSRA's failure to adequately protect whistleblowers, the WPA was enacted in 1989

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101. § 1206(b), 92 Stat. at 1125.

102. Fisher, *supra* note 96, at 371.

103. "Agenc[ies]" protected by the CSRA "do[] not include . . . the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." § 2302(a)(2)(C), 92 Stat. at 1115.

104. Fisher, *supra* note 96, at 370, 399 ("[I]f the Special Counsel investigated the prohibited personnel practice case and decided not to pursue the matter before the MSPB, that ended the matter for career employees. The CSRA did not confer on the victim an express or implied cause of action for reprisal for whistleblowing.") (citing Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982); Walker v. Gibson, 604 F. Supp. 916, 926 (N.D. Ill. 1985)).

105. *Id.* at 386 ("Given the OSC's crucial role in whistleblower protection under the CSRA it would be an understatement to say that the OSC's performance was poor. It was marked largely by inaction, frequent hostility to whistleblower claims, and arguable distortion of the OSC's role vis-à-vis whistleblowers.").

106. Whistleblower Protection Act of 1989 (WPA), Pub. L. 101-12, sec. 2(a)(1), 103 Stat. 16, 16.

107. Sec. 2(a)(2), 103 Stat. at 16.

"to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government."[108] The Act gave effect to this purpose by, *inter alia*, "mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices,"[109] establishing that the OSC's "primary role . . . is to protect employees, especially whistleblowers, from prohibited personnel practices,"[110] and imposing a duty on the OSC to "act in the interests of employees who seek assistance from the [OSC]."[111] In addition to protecting federal employees from retaliation for reporting with a reasonable belief[112] the same types of government misconduct enumerated in the CSRA,[113] the WPA also granted complainants a right to federal appeal of adjudications by the MSPB that were formerly considered to be

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108. Sec. 2(b), 103 Stat. at 16

109. Sec. 2(b)(1), 103 Stat. at 16.

110. Sec. 2(b)(2)(A), 103 Stat. at 16. Notably, the definition of "prohibited personnel practices" was expanded to include even a threat to take or fail to take a personnel action as retaliation for a protected disclosure. § 2302(b)(9), 103 Stat. at 32.

111. The OSC was established to investigate and bring enforcement actions when appropriate upon receiving allegations of retaliation against whistleblowers. §1212(a), 103 Stat. at 19.

112. The reasonableness of a whistleblower's belief is judged by "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government' evidence wrongdoing as defined by the statute." 2011 G20 ANTI-CORRUPTION ACTION PLAN, *supra* note 81, para. 16 (internal quotation marks omitted) (citing Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert denied*, 528 U.S. 1153 (2000)). This definition was later codified in the Whistleblower Protection Enhancement Act of 2012 (WPEA), sec. 103, § 2302(b), Pub. L. 112-199, 126 Stat. 1465, 1466–1467. The Act provides as follows:

> [A] determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste abuse, or danger.

Id.

113. *See supra* note 98 and accompanying text.

strictly final.[114] However, while the WPA explicitly set forth the powers and functions of the OSC[115] and enumerated detailed procedures for the OSC's handling of reports of misconduct by whistleblowers,[116] it failed to expand such statutory protections to include IC workers.[117]

In addition to the shortcomings of the WPA's coverage, the WPA "bec[ame] an unexpected minefield for the intrepid Federal employee who unknowingly risk[ed] his or her career by taking the law's promise of protection at face value."[118] Notwithstanding enactment of the WPA, "it remain[ed] difficult" for those who suffered retaliation to prove their case.[119] Moreover, failure of the OSC and MSPB to accomplish their objectives meant that most individuals who chose to blow the whistle were ostensibly hung out to dry with no recourse. Substantial personal damages were the norm for even those who effectively invoked the statutory protections, and few whistleblowers' careers escaped unscathed.[120] As Congress's second attempt to protect federal whistleblowers, the WPA gave little hope to would-be whistleblowers because the Act's provisions

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114. Whistleblower Protection Act of 1989, Pub. L. 101-12, sec. 3, § 1221(h)(1), 103 Stat. 16, 30–31.

115. §§ 1212–19, 103 Stat. at 19–29.

116. §§ 1213–15, 103 Stat. at 21–28.

117. Under the WPA, like the CSRA, disclosures are only protected insofar as they are "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. . . ." § 1213, 103 Stat. at 21. The effect of this was to almost entirely preclude protection for disclosures by IC workers given that much of the information they have access to that may evidence wrongful, reportable conduct is classified. *See supra* note 69 and accompanying text. Furthermore, the WPA specifically failed to amend 5 U.S.C. § 2302(a)(2)(C)(ii), as established by the CSRA, *see supra* note 103, which expressly excluded employees of most IC agencies from all whistleblower protections.

118. Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 187 (2012) (describing the WPA as a "false promise of protection" for whistleblowers).

119. *Id*. at 187 n.13 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-93-3, WHISTLEBLOWER PROTECTION: DETERMINING WHETHER REPRISAL OCCURRED REMAINS DIFFICULT 1 (1992), *available at* http://www.gao.gov/assets/220/217067.pdf).

120. McCarthy, *supra* note 118, at 187. For a detailed description of common ways that employers and agency heads have historically punished whistleblowers that are remarkably effective yet avoid the statutory prohibitions, see Fisher, *supra* note 96, at 363–69.

were confusing and the government actors tasked with protecting whistleblowers failed to deliver.

C. Intelligence Community Whistleblower Protection Act of 1998 ("ICWPA")

Congress passed the ICWPA[121] in part based on its findings that the reporting of Executive misconduct by IC workers may have been chilled by fear of retaliation.[122] Therefore, Congress felt that a procedure should be implemented to encourage the flow of information between the Executive and the Legislative branches of government.[123] Importantly, Congress recognized the significance of its constitutionally granted authority to check the Executive's power, and, moreover, recognized that being informed of alleged wrongdoing within the IC is critical to that power-check's effectiveness and continued vitality.[124]

Under the ICWPA, both *employees* and *contractors* of various IC agencies[125]—including the NSA—who intend to blow the whistle with respect to an "urgent concern"[126] may disclose the

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121. Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), Pub. L. No. 105-272, tit. VII, 112 Stat. 2396 (1999) (codified as amended in scattered sections of 5 & 50 U.S.C.).

122. Sec. 701(b)(5), 112 Stat. at 2414.

123. Sec. 701(b)(6), 112 Stat. at 2414.

124. Sec. 701(b)(3), 112 Stat. at 2413. This acknowledgement, however, was tempered by the recognition that while "national security is a shared responsibility, [it requires] mutual respect by Congress and the President," and "the principles of comity between the branches of Government apply to the handling of national security information." Sec. 701(b)(1)–(2), 112 Stat. at 2413. The statute is therefore deceptive because it purports to implement a power-checking mechanism while simultaneously reciting policy-based rationalizations that are substantial impediments to fulfilling this power-checking function, such as the maintenance of secrecy.

125. The CIA, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, the National Security Agency, the FBI, and any agency that the President determines has "the conduct of foreign intelligence or counterintelligence activities" as "its principal function." Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2415.

126. *Urgent concern* is defined as any of the following: "[a] serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters;" "[a] false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence opportunity;" or "[a]n action including a personnel action described in [the WPA] constituting re-

pertinent information to the Inspector General ("IG") of the department to which the employee's agency belongs.[127] Upon receiving a report of wrongdoing, the IG must assess the credibility of the report or complaint.[128] Depending on which agency the employee works for, the IG must forward the report to either the Director or the head of the establishment if the report is deemed credible.[129] In turn, the Director or establishment head must append any comments deemed necessary and forward the report and comments to either of the Congressional Intelligence Committees.[130] Alternatively, if the IG determines that the allegations lack credibility, no further action is required, rendering the whistleblower's attempt to rectify agency wrongdoing "dead in the water."[131] To make matters worse for an IC whistleblower, decisions about how reports of misconduct

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prisal or threat of reprisal prohibited under [the WPA]." Sec. 702(a)(1), 112 Stat. at 2415; sec. 702 (b)(1), 112 Stat. at 2416.

127. Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2415. Notably, while the ICWPA states that both employees and contractors may report urgent concerns to the IG of the relevant agency, the remaining provisions of the act only apply to employees. Accordingly, the provision requiring the agency to notify an employee who reports misconduct of any actions taken or decisions made with respect to such report, sec. 702(a)(1), 112 Stat. at 2415; 702(b)(1), 112 Stat. at 2416, does not apply to a contractor who discloses the same information to the same party. Furthermore, unlike employees, the Act does not grant contractors the right to report directly to the intelligence committees of Congress if the IG, director, or establishment head fails to handle a report of misconduct appropriately. Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2416. Thus, the ICWPA's appearance of espousing a "no loophole" approach to whistleblower protection by its inclusion of contractors in certain provisions, this appearance is merely illusory, and contractors are not protected from reprisals.

128. Sec. 702(a)(1), 112 Stat. at 2414; 702(b)(1), 112 Stat. at 2416.

129. The Director, if the agency is the CIA, or the "head of the establishment," in the case of an alternative agency falling under the coverage of the ICWPA. *Id.*

130. The ICWPA defines *intelligence committees* as "the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate." Sec. 702(a)(1), 112 Stat. at 2415; sec. 702(b)(1), 112 Stat. at 2417.

131. The phrase *dead in the water* describes "an idea or scheme [that] has no momentum and no chance of success." It is a nautical analogy that "dat[es] back to the days of sailing ships," which derives its meaning from the fact that "[o]n a windless day, with nothing to propel the vessel, a boat sitting motionless in the sea was known as 'dead in the water', *going nowhere*." ALBERT JACK, RED HERRINGS & WHITE ELEPHANTS—THE ORIGINS OF THE PHRASES WE USE EVERY DAY 4 (2004) (emphasis added).

are handled rendered by the Director, establishment head, or IG are not subject to judicial review.[132] Finally, if the IG does not transmit the complaint or information to the appropriate party, an employee may report directly to Congress.[133] However, the employee may report directly to Congress only after the employee follows the procedures set forth above and subsequently attains and complies with the Director's or department head's directions for contacting Congress in compliance with the applicable security procedures.[134]

In light of these procedures, the Acting IG for the Department of Defense described the ICWPA's statutory name as a "misnomer" and stated that it is more aptly characterized as "a statute protecting communications of classified information to . . . Congress."[135] While Congressional oversight can be an effective check on Executive agencies' powers,[136] any power-check purportedly created by the ICWPA, and any alleged resulting protection for IC whistleblowers, is merely illusory because the IG has the discretion to determine that any report or complaint made by an IC whistleblower is not credible.[137] Because credibility determinations are final (i.e., not subject to judicial review),[138] a complaint alleging wrongdoing that is deemed to

132. Sec. 702(a)(1), 112 Stat. at 2415; sec. 702(b)(1), 112 Stat. at 2416.

133. Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2416.

134. Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2416.

135. *National Security Whistleblowers in the Post-September 11th Era—Lost in a Labyrinth and Facing Subtle Retaliation: Hearing Before the Subcomm. on Nat'l Sec. Emerging Threats, and Int'l Relations of the H.R. Comm. on Gov't Reform*, 109th Cong. 391–92 (2006) (Statement of Thomas F. Gimble, Acting Inspector General, Dep't of Defense). *See also* McCarthy, *supra* note 118, at 196 n.79 ("The misnamed Intelligence Community Whistleblower Protection Act . . . does not actually protect whistleblowers against reprisal.").

136. *See generally, e.g.*, Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch Themselves)?*, 54-AUT LAW & CONTEMP. PROBS. 205 (1991) (recognizing that congressional oversight is a powerful in the context of the Environmental Protection Agency ("EPA")). *But cf.* Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54-AUT LAW & CONTEMP. PROBS. 241 (1991) (recognizing the disadvantages and limitations of congressional oversight in the context of the EPA).

137. Sec. 702(a)(1), 112 Stat. at 2414; sec. 702(b)(1), 112 Stat. at 2416.

138. Sec. 702(a)(1), 112 Stat. at 2415; sec. 702 (b)(1), 112 Stat. at 2416.

lack credibility may never be addressed,[139] and the reported conduct may continue unabated.[140] In essence, requiring IC employees to contact and follow the orders of high-ranking officials in the agency whose conduct is complained of "amount[s] to asking a fox to watch the henhouse."[141]

Finally, and most importantly, while the Act establishes a procedure to facilitate a flow of allegations of IC wrongdoing between the two branches of government and is designed to encourage reporting,[142] it grants IC whistleblowers no affirmative protections from retaliation.[143] Where previous whistleblower legislation expressly prohibited a plethora of personnel practices in retaliation for making a lawful disclosure,[144] the ICWPA remains silent. As a result, the Act is little more than an empty promise. Duped by the Act's misleading title, more than one naïve IC worker's false hopes of protection were promptly extinguished when they reported perceived misconduct and strictly complied with the prescribed procedures.[145] Accordingly, IC workers are well-advised to deliberate at length and proceed with caution before reporting IC wrongdoing, at least under the current statutory framework.

D. Whistleblower Protection Enhancement Act of 2012 ("WPEA")

Before Congress passed the WPEA,[146] federal employee surveys conducted by the MSPB demonstrated that the most oft-cited reasons for not blowing the whistle, even when wrongdoing was perceived, is that federal employees felt their reports would not be addressed and feared retaliation.[147] Accordingly,

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139. The Act lacks any mandates once a determination—which is not subject to judicial review—is made that a complaint lacks credibility and there are no provisions for protection from retaliation.

140. Mendelsohn, *supra* note 40.

141. Knight, *supra* note 39, at 292 (citations omitted).

142. *Supra* notes 122 and 123 and accompanying text.

143. McCarthy, *supra* note 118, at 196 n.79.

144. *See supra* Part II.B.

145. *See, e.g.*, Knight, *supra* note 39.

146. Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465 (codified as amended in scattered sections of 5 U.S.C.).

147. Whistleblower Protection Report, *supra* note 1, at 7 para. 8 (citing Tom Devine, *Whistleblowing in the United States: the Gap Between Vision and*

Congress passed the WPEA in response to diminishing protections that federal whistleblowers experienced in recent years stemming, in large part, from the judiciary's narrow construction of exactly what kind of disclosures are statutorily protected.[148] To enhance federal whistleblower protections, the WPEA sought to clarify which disclosures qualified federal employees for protection from reprisal,[149] mandated that non-disclosure-type agreements or policies explicitly state that federal employees' right to blow are not affected, and granted "certain authority" to the Special Counsel.[150] The Act also imposed a duty on agency heads to inform employees of their right to report "classified information relating to national security" to certain designated parties. [151]

While the WPEA implemented myriad new policies designed to enhance the protections of federal whistleblowers, like each of the Act's predecessors, it included an express exception that prevented IC workers from receiving the benefits of protection provided thereby.[152] Initially, the bill included specific protections for IC workers. However, they were stripped from the Act in response to House Republican's objections, much to President Obama's chagrin.[153]

E. Presidential Policy Directive 19

Because President Barack Obama perceived the exclusion of IC workers from whistleblower protections as a shortcoming that warranted addressing, he signed Presidential Policy Di-

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Lessons Learned, *in* WHISTLEBLOWING AROUND THE WORLD 81 (Richard Callan & Guy Dehn, eds., 2005)).

148. S. REP. NO. 112–155, at 1–2 (2012).

149. Sec. 101, 126 Stat. at 1465–66.

150. Pmbl., 126 Stat. at 1465. For example, the WPEA authorized the Special Counsel to appear as amicus curiae in any case relating to whistleblowing to express an opinion about what effect a decision in that case would have on the enforcement of certain provisions of the statute. Sec. 112, § 2302(c), 126 Stat. 1472.

151. Sec. 113, § 1212(h)(1), 126 Stat. at 1472.

152. The WPEA does not protect employees of the FBI, the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the NDA, the Office of the Director of National Intelligence, the National Reconnaissance Office, or any Executive agency or unit that the President determines has the principal function of intelligence activities. Sec. 105, § 2302(a)(2)(C)(ii)(I)–(II), 126 Stat. at 1468.

153. Arnold, *supra* note 43.

rective 19 ("PPD-19") in 2012,[154] which "embraces those agencies not covered by the WPEA."[155] While PPD-19 extends the coverage of whistleblower protections to IC employees who were previously excluded altogether, many commentators have criticized PPD-19 as failing to create any real reform or grant effective protections that were previously lacking.[156] Significantly, whether contractors are protected by PPD-19 is doubtful in view of the Obama Administration's response that "the Executive Branch is evaluating the scope [of PPD-19]" when asked specifically about its coverage of contractors.[157]

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154. PRESIDENTIAL POLICY DIRECTIVE 19, BARACK OBAMA (2012), http://www.va.gov/ABOUT_VA/docs/President-Policy-Directive-PPD-19.pdf [hereinafter PPD-19].

155. R. Scott Oswald, *A Closer Look at Presidential Policy Directive 19*, LAW 360 (Aug. 12, 2013), http://www. law360.com/articles/460838/a-closer-look-at-presidential-policy-directive-19. For a list of agencies not covered by the WPEA, see *supra* note 152.

156. One commentator has argued that while PPD-19

> provides national security employees with some additional whistleblowing protections they have not enjoyed until now, . . . these protections still fall short of what other government employees have, and they do not cover government contractors. In addition, national security whistleblowers have little shelter from retaliation, and the judicial branch has no authority to review any retaliation claims they might have. As a result, the executive branch has virtually unchecked authority to declare what information is secret and to punish leakers as it sees fit.

Papandrea, *supra* note 45, at 490. Another author noted that PPD-19 is "not as robust as needed." Arnold, *supra* note 43. Finally, a notable institution criticized PPD-19 by stating that "[t]he directive could facilitate transparency in instances where one employee is aware of another employee's rogue misconduct, but is unlikely to have much effect in cases where the agency itself is complicit in the wrongdoing and the intelligence committees are not willing to interfere." BRENNAN CTR. FOR JUSTICE AT NYU SCH. L., NATIONAL SECURITY WHISTLEBLOWING: A GAP IN THE LAW 2 (2013), http://www.brennancenter.org/sites/default/files/analysis/Factsheet%20-%20National%20Security%20Whistleblowing.pdf.

157. Arnold, *supra* note 43.

III. APPLICATION OF U.K. LAW TO THE U.S. INTELLIGENCE COMMMUNITY

> "[L]ike anybody preparing for a potentially precarious journey a good map and a compass are useful commodities if you are going to arrive safely at your destination."[158]

In the United Kingdom, the Public Interest Disclosure Act ("PIDA") was enacted by Parliament in response to "a series of avoidable disasters"[159] "to protect individuals who make certain disclosures of information in the public interest [and] to allow such individuals to bring action in respect of victimisation."[160] For non-IC workers in the United Kingdom, however, the criteria that must be satisfied for a disclosure to qualify for protection are significantly more stringent than under the WPEA. For example, the PIDA first requires a whistleblower to have a "reasonable belief" that the disclosure "tends to show" at least one of the following has occurred in the past, is currently occurring, or is likely to occur: a criminal offense, failure of a person to comply with a legal duty, a miscarriage of justice, endangerment to an individual's health or safety, damage to the environment, or deliberate concealment of information evidencing any of the previous items in this list.[161]

Furthermore, the PIDA enumerates specific channels through which a whistleblower may disclose information in order to qualify for protections from employer retaliation, which include the worker's "employer or other responsible person," a "legal adviser," a "Minister of the Crown," or another party that the Secretary of State, by order, prescribes (a "Prescribed Re-

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158. Richard Calland & Guy Dehn, *Whistleblowing Around the World: Giving People a Voice*, *in* WHISTLEBLOWING AROUND THE WORLD 199, 203 (Richard Calland & Guy Dehn, eds. 2004). The authors continue, "Thus, in addition to the protection the law provides and its signposting for a new culture, the guidance that legislation provides is crucial for whistleblowing. At the very least, as we know from the organisations we run, the guidance the law offers encourages potential whistleblowers to identify their destination or what it is they are trying to achieve." *Id*.

159. Whistleblower Protection Report, *supra* note 1, at 7 para. 7. Such tragedies include "the sinking of the ferry *Herald of Free Enterprise* and the destruction of an oil platform in the North Sea." *Id*.

160. Public Interest Disclosure Act of 1998, c. 23, pmbl. (UK) [hereinafter PIDA].

161. *Id*. sec. 43B.

cipient").[162] The PIDA even permits disclosures of such information through nonenumerated channels, but in so permitting, the statute mandates that five conditions must be satisfied: the disclosure was made in good faith; the whistleblower "reasonably believe[d]" the information and any allegations therein are "substantially true"; the whistleblower did not disclose information "for purposes of personal gain"; any of the conditions in subsection (2) is met; and in view of the totality of the circumstances, the disclosure was reasonable.[163] The conditions in subsection 2, of which one must be satisfied for a disclosure made through a non-enumerated channel to qualify for disclosure are as follows: the whistleblower reasonably believed he would be "subjected to a detriment by his employer" if the disclosure were made to the employer or a party prescribed by the Secretary of State; the whistleblower reasonably believed evidence relating to the subject of the report would be destroyed if made to his employer and no Prescribed Recipient exists to receive such disclosure; or "substantially the same information" was already disclosed to the worker's employer or a Prescribed Recipient.[164]

One important distinction is that the PIDA "did not set out to *encourage* whistleblowing—it merely aims to *protect* those who raise a particular type of concern . . . in a specified way."[165] Additionally, the PIDA applies to nearly all employees,[166] whereas the WPEA protects only government workers. Accordingly, the PIDA has been "described as one of the most far-reaching whis-

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162. *Id.* secs. 43C–F.

163. *Id.* sec. 43G(1). Relevant factors to the determination of whether it was reasonable for a worker to make the disclosure in view of the totality of the circumstances include, but are not limited to, the recipient's identity, the "seriousness" of the conduct that is the subject of a disclosure, whether the conduct is likely to continue or recur, and whether a "duty of confidentiality" was breached by making the disclosure. *Id.* sec. 43G(3).

164. *Id.* sec. 43G(2).

165. David Lewis, *Ten Years of Public Interest Disclosure Act 1998 Claims: What Can We Learn from the Statistics and Recent Research?*, 39 INDUS. L. J. 325, 328 (2010).

166. Evelyn Oakley & Anna Myers, *The UK: Public Concern at Work*, *in* WHISTLEBLOWING AROUND THE WORLD 169, 173 n.12 (Richard Calland & Guy Dehn eds., 2004).

tleblower protection laws in the world."[167] Moreover, the PIDA "fiercely protects internal reports."[168]

The PIDA, however, is not without its own shortcomings. First, despite the PIDA's coverage of more workers than U.S. whistleblower protection laws and strong protection of internal reports,[169] it is far more difficult for a whistleblower to qualify for protection under the PIDA when making an external disclosure.[170] Second, despite the existence of statutory protections, the PIDA's strong favoritism of internal reporting has been heavily criticized because employers often ignore internal reports.[171] Indeed, in cases where workers have gone so far as to actually report wrongdoing, it is no surprise that many decline to further report suspected wrongdoing once the initial report is ignored by their employers. Third, the PIDA's model of whistleblower protection is imperfect in its application to nearly all U.K. workers. Whistleblower protection statutes should not be a "one size fits all" solution to all corruption and abusive conduct.[172] Therefore, because a single statute governs all whistleblowing activity in the United Kingdom,[173] Parliament failed to distinguish certain unique classes of whistleblowers from others and recognize that they warrant special treatment. Finally, the PIDA has been heavily criticized as being difficult for aver-

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167. *Id.* at 173.

168. Mendelsohn, *supra* note 40, at 723. By contrast, "despite the incomprehensibility of much of American whistleblower law, it still clearly favors external reporting." *Id.*

169. Oakley & Myers, *supra* note 166, at 173.

170. *Compare* PIDA, *supra* note 160, secs. 43G & 43H *with* 5 U.S.C. § 1211 (requiring only that [1] the whistleblower have a reasonable belief that information disclosed evidences one of enumerated violations or courses of conduct, and [2] that the disclosure was not prohibited by law or the information required to be kept secret by executive order).

171. One study demonstrated that managers ignored three out of four reports of whistleblowers who disclosed wrongdoing internally within their organizations. Rajeev Syal, *Whistleblowers Claims of Wrongdoing Being Ignored*, GUARDIAN (May 14, 2013, 1:00 AM), http://www.theguardian.com/business/2013/may/14/whistleblowers-claims-ignored. However, this may not be a problem with the statute's drafting as much as it is with implementation, as with the MSPB's poor performance following enactment of the CSRA in the United States.

172. *Contra* Mendelsohn, *supra* note 40, at 743 ("A model law should have a single source of protection so that an employee can know where to look to see if his speech is protected.").

173. *Id.*

age civilian workers to navigate in light of the complexity of the procedural requirements that must be satisfied for a disclosure to qualify for protection.[174]

Despite these criticisms, the PIDA is a good model to model for IC whistleblower protection statute because of its preference for internal reporting. The fact that the U.K. model has been commended as "skillfully achieving the essential but delicate balance between the public interest and the interests of employers"[175] illustrates how befitting this model is: this delicate balance is quite analogous to the balance of secrecy and democracy that an IC whistleblower protection statute must strike.[176] Finally, the criticisms of the PIDA for its stringent criteria for an external disclosure to qualify for protection and complex procedural requirements will not carry the same weight if this model is applied to IC workers. In fact, in the intelligence community—wherein the ability to maintain a certain level of secrecy is indispensable[177]—application of the PIDA's strong preference for internal reporting, near universal protection of good faith disclosures made to designated internal recipients,[178] and complex procedural requirements are highly desirable because such attributes will encourage would-be whistleblowers to deliberate at length before disclosing sensitive information externally or departing from clearly defined procedures. Encouraging such processes is important for an IC whistleblower protection statute because they serve to protect the secrecy of properly classified information that has the potential to harm national security.

Because the factors that enter consideration when fashioning a remedy for the current lack of IC whistleblower protections are unique to the IC,[179] merely expanding the class of individuals protected by current U.S. whistleblower protection statutes to include IC workers, as some commentators have advocat-

174. *Id.* at 737 n.82 (citing LUCY VICKERS, FREEDOM OF SPEECH AND EMPLOYMENT 116 (2002)).

175. Oakley & Myers, *supra* note 166, at 173 (citing Lord Nolan, former Chair of the Committee on Standards in Public Life).

176. *See supra* Part I.

177. *See, e.g.*, Chinen, *supra* note 29, at 14–15.

178. *See generally* Mendelsohn, *supra* note 40.

179. *Id*. *See generally* Chinen, *supra* note 29.

ed,[180] will not solve a problem as multifaceted as IC whistleblowing. Most importantly, a simple expansion of the statutes' protected class would fail to strike an optimal balance between the competing interests of secrecy and democratic accountability.[181] Instead, the United States should supplement the current statutory framework by passing legislation that amends current whistleblower protection statutes[182] to emulate many of the PIDA's provisions, underlying purposes, and guiding principles. Such legislation should enumerate clear procedures that would make understanding how to make a legal disclosure that qualifies for protection easy.

IV. PROPOSAL

The following proposal first enumerates the principle that should guide Congress in drafting legislation that would amend current whistleblower protection statutes. Second, the proposal states that current protections should be expanded to protect IC contractors and enumerates the reasons for their inclusion. Third, it recommends adding a catch-all provision to the current statutory framework where prohibited personnel practices are enumerated. Finally, it advocates adopting a disclosure regime based on the U.K.'s model and provides the standards for protection of disclosures made through the prescribed channels. Finally, the parties the proposed legislation would protect are briefly described, along with an additional requirement for the information disclosed to qualify for protection.

A. Comprehensive Statutory Reforms

In devising the proposed legislation, Congress should focus on both providing "a clear definition of the scope of protected disclosures and of the persons afforded protection"[183] and establishing clear "procedures and prescribed channels for facilitating" whistleblowing.[184] Following this principle would prevent

180. *U.S.: Statement on Protection of Whistleblowers in Security Sector*, HUM. RIGHTS WATCH (June 18, 2013), http://www.hrw.org/news/2013/06/18/us-statement-protection-whistleblowers-security-sector.

181. *See supra* Part I.

182. *See supra* Part II.

183. 2011 G20 ANTI-CORRUPTION ACTION PLAN, *supra* note 81, at 30.

184. *Id.* at 32. *See also*, Miriam A. Cherry, *Virtual Whistleblowing*, 54 S. TEX. L. REV. 9, 34 (Fall 2012) ("Whistleblowing employees—and society—will

the resulting legislation from becoming an "unexpected minefield" like the WPA,[185] from deceiving IC members into believing their disclosures are protected like the ICWPA,[186] and denying individuals protection for small, inadvertent deviation from complex statutorily prescribed procedures like the PIDA.

With this principle in mind, first, the United States should adopt a "no loophole" approach, in which contractors are not excluded from protection.[187] Any distinction between an employee and a contractor is arbitrary: whistleblowing by both serves the same important function, and the mere fact that protected individuals include contractors does not increase the risk of excessive, harmful disclosures. Moreover, distinguishing between the two classifications and excluding the latter from the statutory protection only serves to increase the likelihood that a contract worker who blows the whistle will go directly to the media rather than attempt to make the disclosure through appropriate internal channels first.[188] Additionally, it is arguable that an individual who is currently a contractor is more deserving of protections than a future potential employee or past applicant, both of which are protected by current U.S. whistleblower protection statutes.[189] For these reasons, protection should not depend on classification of a person as an *employee* or a *contractor*.

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be better served by a set of uniform laws that are easily understood by employees. In this way, we will be able to reach a more optimal level of whistleblowing and deterrence for wrongdoing that is discovered within organizations."). Of note, this guiding principle may not be as substantial a limit on Congress as it would were the proposed legislation to apply to all federal employees. Arguably, understanding the legislation's coverage and procedures may be less difficult for members of the IC than a lay-person who works for the federal government in light of the stringent qualifications required of IC workers. This does not undercut the importance of clarity to the proposed legislation, but it does, however, recognize that Congress need not go to great lengths to simplify the legislation and sacrifice specificity in the process.

185. *See* McCarthy, *supra* note 118.

186. *See supra* Part II.C.

187. 2011 G20 ANTI-CORRUPTION ACTION PLAN, *supra* note 81, para. 19. Other world-leading whistleblower protection statutes use this approach. *See* PIDA, *supra* note 160, sec. 43K(1); *Public Service Act 1999* (Cth) s 16 (Austl.) (protecting all individuals who "perform[] functions in or for an Agency").

188. *See, e.g.*, Knight, *supra* note 39, at 281–283.

189. 5 U.S.C. § 1213(a) (2002) (including disclosures of specified types of information by "an employee, former employee, or applicant for employment" in the coverage of whistleblower protections).

Second, the United States should add a catch-all provision to the enumerated list of prohibited personnel practices that prohibits any action for which the IC agency's primary motivation is retaliation for a legal disclosure. By adding this provision, Congress would make illegal all of the practices that employers have historically used to retaliate against legal whistleblowers while still skirting the prohibitions of whistleblower protection statutes.[190] Moreover, this is consistent with the burden shifting mechanism currently utilized by courts that interpret the WPEA wherein the burden shifts to the employer to prove that they would have taken the prohibited personnel action even if the IC worker had not blown the whistle.[191]

Finally, the United States should adopt a tiered disclosure regime similar to that employed by the U.K.'s PIDA. The legislation should first require that any IC whistleblower report allegations of wrongdoing to either his employer, the agency IG, or the head of the department to which the agency belongs. As under the PIDA, any report to these individuals made with a "good faith" belief[192] that "a violation of any law, rule or regula-

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190. For example, after an employee discloses suspected wrongdoing, his or her employer may point out deficiencies in the employee's present or past performance that would have previously been overlooked or ignored; subject the employee to public humiliation by exposing the employee's performance deficiencies in front of co-workers; condemn a type of conduct that the employer knows the employee has already engaged in and "ask staff members to report any violations of the condemned conduct"; socially isolate the employee by excluding him or her from office social activities or by moving the employee's office to "a remote, undesirable location"; intentionally "adding to the duties of the whistleblower to the point that he becomes mentally or physically unable to perform his work," resulting in poor performance that may ultimately result in termination; continually giving the employee new tasks for which little or no training is provided, which results in poor performance that warrants punishment; etc. For a detailed description of how these various tactics work to punish whistleblowers, see Fisher, *supra* note 96, at 363–69.

191. 5 U.S.C. § 1221(e)(2) (2012) ("Corrective action . . . may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure."); Watson v. Dep't of Justice, 64 F.3d 1524, 1528 (1995) ("The statute requires only that the agency demonstrate by clear and convincing evidence that it would take the same personnel action in the absence of the protected disclosure; it does not require . . . that the adverse personnel action be based on facts 'completely separate and distinct from protected whistleblowing disclosures.'").

192. This language is borrowed from the PIDA, *supra* note 160, sec. 43F(1)(a).

tion . . . or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"[193] (each a "Reportable Violation") is occurring or will recur would be almost universally protected. If reporting through one of these internal channels proved futile,[194] an IC worker should be permitted to disclose the information to a designated second-tier recipient—either of the congressional intelligence committees.[195] For a disclosure through this channel to qualify for protection, the IC worker must hold a reasonable belief "that the information disclosed, and any allegation contained in it, are substantially true."[196] As a last resort, should the report to Congress also prove futile, the proposed legislation would permit disclosure of Reportable Violations to the media, a public outlet, or any other recipient that could be reasonably trusted to responsibly handle the information.

To minimize the third type of disclosures, however, protection from retaliation would be predicated upon satisfaction of exceptionally strict criteria. Such protection for external whistleblowers would be warranted only if, at the time of disclosure, [1] the IC worker disclosed substantially the same information to a designated first- *and* second-tier recipient (the "Exhaustion Provision");[197] [2] the report was not made for personal gain;[198] [3] the IC worker "reasonably believes that the information disclosed, and any allegation contained therein, is substantially true";[199] [4] the Reportable Violation is ongoing *un-*

193. This language is borrowed from 5 U.S.C. § 1213(a)(2)(A) and (B).

194. Ideally, futility of disclosure could be proven by showing that the recipient of the complaint failed to act thereupon within a specified time limit. Disclosure to the first two tiers should also be considered futile if the recipient disagrees with the IC worker about whether the disclosed information constitutes a Reportable Violation requiring corrective action. The futility element would, in effect, create a chain of appeals.

195. This provision is borrowed in part from the ICWPA. *See supra* notes 133 and 134 and accompanying text.

196. This language is borrowed from the PIDA, *supra* note 160, sec. 43F(1)(b)(ii). The proposed Act, however, would eliminate the PIDA's requirement that the whistleblower reasonably believe "that the relevant failure falls within any description of matters in respect of which that person is so prescribed." PIDA, *supra* note 160, sec. 43F(1)(b)(i). Such a condition requires too much of a would-be whistleblower and might hinder disclosures of wrongdoing.

197. This principle is based upon the PIDA, *supra* note 160, sec. 43G(2)(c).

198. *Id.* sec. 43G(1)(c).

199. *Id.* sec. 43G(1)(b).

less the whistleblower did not know or have reason to know the conduct constituting a Reportable Violation has desisted; and [5] no *properly* classified information or documents was disclosed to a party not authorized to view them.[200] Such stringent preconditions for public disclosures to qualify for protections would attenuate the risk of a well-intentioned IC worker inadvertently disclosing seemingly innocuous national security information that, in reality, has the potential to cause irreparable harm.[201]

This tiered disclosure regime, as well as its Exhaustion Provision, will serve a vital function in the intelligence community, where secrecy is of utmost importance.[202] Mandating internal disclosure first, before going public, will ensure that the agency best positioned to rectify any wrongdoing is the first to know that a potential problem exists. Furthermore, it gives that agency an adequate opportunity to correct the reported problem without compromising confidentiality. Finally, should any agency receive notice of a Reportable Violation, knowledge that such information may become public knowledge if the agency fails to correct the problem within a specified period of time will promptly spurn an investigation and force the agency to evaluate whether corrective action is required.

Similarly, requiring that a Reportable Violation be ongoing at the time of disclosure to qualify for protection furthers the purpose of keeping sensitive information confidential. This requirement discourages reporting in cases where the agency in question has acted appropriately upon receiving notice of a Reportable Violation by discontinuing or properly addressing the conduct in question. At the same time, it disincentivizes permitting the acts complained of to continue unabated until right before the IC worker makes an external disclosure. The requirement's incorporation of a discovery rule would render external disclosures made in such cases protected, provided that

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200. The fifth requirement does not prohibit disclosure of all classified information. Instead, it prohibits only disclosure of information or documents that were properly classified. In other words, the proposed Act would permit an IC worker to disclose legally "classified" information that does not contain sensitive national security information but instead was given its legal status to keep embarrassing information about illegal government actions or operations out of the public domain.

201. Rudenstine, *supra* note 84, at 64.

202. Chinen, *supra* note 29, at 14–15.

all other elements of the standard are satisfied. Some commentators will argue that the public has a right to know of past misconduct committed by the IC. The proposed legislation, however, is not the appropriate channel through which to address this concern.[203] The goal of the proposed Act is not to expose every case of wrongdoing in the IC, but rather to protect those who do so in the interest of maintaining government accountability in appropriate circumstances. Given the vitality of secrecy to the IC, by incorporating the Exhaustion Provision and protecting only disclosures related ongoing wrongdoing, this model is a superior alternative to the current framework. For example, an IC whistleblower's only viable choice under the current framework is often a public disclosure that could cause media fallout that forces hastily-devised solutions to appease the knowing public.

Further, what may be viewed as another limitation of this proposed model is actually one of its most significant boons: any individual who discloses classified information through a third tier channel—whether the disclosure was first made to a designee from each of the first two tiers or under the exception—will almost certainly be prosecuted under the 1917 Espionage Act.[204] Therefore, the likelihood of a whistleblower being dragged into court, as well as the stringent criteria that must be satisfied for this type of whistleblower to qualify for protections, provide a strong disincentive for any IC worker attempting to blow the whistle in this manner. IC workers who choose this path do so at their own risk; and the gravity of this risk will effectively deter such disclosures in all but the most clear-cut cases where an IC whistleblower is nearly certain that their actions will be vindicated during their day in court. This risk will also encourage would-be IC whistleblowers to engage in prolonged deliberation before making a disclosure to parties outside the agency he or she aims to improve.

While the goal of the proposed legislation is to minimize time consuming and costly litigation, any litigation that thereby re-

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203. A viable alternative may be to pursue such inquiries under the Freedom of information Act, which authorizes judicial review of Executive decisions to classify documents. It should be noted that in this context the judiciary does, perhaps, defer to the Executive more than is necessary, but this issue, while indeed related, is beyond the scope of this Note and should accordingly be addressed separately.

204. *See generally* Takefman, *supra* note 66.

sults would be valuable in itself. For example, it would allow the judiciary to check the Executive's national security power. Because this amounts to judicial review of decisions made by designated recipients of Reportable Violations, any risk of widespread corruption or inter-branch governmental collusion would be minimized, the national security power would be effectively checked, and government accountability would be achieved. In cases where an IC whistleblower has proceeded according to procedures mandated by the above proposed legislation, the decision to make a public, external disclosure should not, and most likely will not, be made lightly; a decision by two branches of the federal government that the alleged misconduct is, in fact, permissible should be interpreted by most IC workers as probative evidence that the judiciary may well decide similarly. By permitting all three branches of government to have input in decisions about the treatment of a Reportable violation, this model maximizes both governmental transparency and accountability while still upholding principles of governmental inter-branch comity.

CONCLUSION

Without statutory reform, IC workers will continue to disclose classified information directly to the media and threaten national security. While complete elimination of this practice will likely never be achieved, statutory reform may be the answer that government officials are looking for to curtail this ever-increasing trend, enabled by the recent technological revolution. Accordingly, new legislation should be enacted to amend relevant sections of 5 U.S.C. where the majority of whistleblower protection statutes are codified.

If the solution proposed above were adopted, the constant threat of exposure would provide a strong, if not forceful, disincentive to illegal action and misconduct by the Executive. Indeed, in the climate created by this statutory framework, it would be wise, if not necessary, for any national security decision to be made only after careful consideration and a diligent effort to ensure that the resulting decision is authorized by the Constitution. As a result, if the proposed Act curtails abusive government practices as predicted, the natural result will be a corresponding reduction in whistleblowing and risk of inadvertent harm to national security from well-intentioned disclosures. Individuals like Edward Snowden should no longer have

to be "martyrs to their cause"[205] and outcasts from the very organizations they set out to improve by blowing the whistle.[206]

Burton W. King[*]

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205. Richard Calland & Guy Dehn, *Conclusion* to, WHISTLEBLOWING AROUND THE WORLD 199 (Richard Calland & Guy Dehn eds., 2004).

> In the old days, miners would take a canary underground with them. Gas is highly dangerous underground, but very hard to detect. Canaries apparently have more sensitive capacities and could operate as an early warning system. Whistleblowers have long served a similar sort of role. Unfortunately, like the canary who [sic] died in the process, whistleblowers used to be martyrs to their cause. The position has now thankfully changed. Seeing whistleblowers as exercising a 'right to warn', they are valued as people who can help organisations and societies to avoid disaster.

206. *See, e.g.*, Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says His Mission's Accomplished*, WASH. POST (Dec. 23, 2013), http://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-missions-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html. During the author's interview with him, Snowden stated, "I am not trying to bring down the NSA, I am working to improve the NSA . . . I am still working for the NSA right now. They are the only ones who don't realize it." When asked what entitled him "to take on that responsibility," Snowden responded, "That whole question — who elected you? — inverts the model," he said. "They elected me. The overseers." After noting that those individuals responsible for the NSA's systematic abuses "elected" him, Snowden qualified this by explaining "It wasn't that they put it on me as an individual — that I'm uniquely qualified, an angel descending from the heavens — as that they put it on someone, somewhere . . . You have the capability, and you realize every other [person] sitting around the table has the same capability but they don't do it. So somebody has to be the first." *Id.*

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