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National Security Whistleblowing vs. Dodd-Frank Whistleblowing

FINDING A BALANCE AND A MECHANISM TO ENCOURAGE NATIONAL SECURITY WHISTLEBLOWERS

INTRODUCTION

On June 14, 2013, five days after Edward Snowden revealed himself as the person who leaked classified documents to Glenn Greenwald, the United States filed a criminal complaint in the Eastern District of Virginia, charging Snowden with “theft, ‘unauthorized communication of national defense information,’ and ‘willful communication of classified communications intelligence information to an unauthorized person.’”¹ The recent release of scores of information regarding the surveillance programs of the National Security Agency (NSA) was first reported by Greenwald, a reporter at the British national newspaper, *The Guardian*.² Charging Snowden is reflective of an aggressive policy of the U.S. government to discourage whistleblowing about national security issues. Snowden began his whistleblowing in January 2013, when he reached out to a documentary filmmaker to discuss the extent of the NSA’s surveillance program.³ In February 2013, Snowden contacted Greenwald to reveal what he knew.⁴ Snowden then began sending secured documents that he had obtained through his work with Booz Allen Hamilton, a defense

¹ 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.

² Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps In To User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

³ Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out: The Full Story Behind the Scoop and Why the Whistleblower Approached the Guardian*, GUARDIAN (June 12, 2013), <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

⁴ *Id.*

contractor that was working for the NSA.⁵ Some of the documents included information about the “Prism” program, which collects “information from the world’s leading technology companies”⁶ about Internet communications, and a U.S. court order compelling Verizon to turn over phone records of American citizens.⁷ Public reaction has been divided, with some touting Snowden as a hero and others calling him a traitor.⁸ The government responded by filing the aforementioned charges against him for violations of the 1917 Espionage Act, as well as theft.⁹ Currently, Snowden has been granted asylum for one year in Russia and has supposedly started a job helping to maintain a website there.¹⁰

The Obama Administration has brought charges for violations of the 1917 Espionage Act against national security whistleblowers with some frequency.¹¹ At least one of those

⁵ Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 11, 2013), <http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance?uni=Network%20front:network-front%20aux-1%20mini-bento:Bento%20box%208%20col:Position1:sublinks>.

⁶ Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out: The Full Story Behind the Scoop and Why the Whistleblower Approached the Guardian*, GUARDIAN (June 12, 2013), <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

⁷ *Id.*

⁸ See Ariel Edwards-Levy & Sunny Freeman, *Americans Still Can't Decide Whether Edward Snowden is a 'Traitor' or 'A Hero,' Poll Finds*, HUFFINGTON POST (Oct. 30, 2013, 7:00 AM), http://www.huffingtonpost.com/2013/10/30/edward-snowden-poll_n_4175089.html (reporting a poll that found 51% of Americans thought Snowden was “something of a hero” while 49% thought Snowden was “more of a traitor”); Robert Kuttner, *Time to Thank Edward Snowden*, HUFFINGTON POST (Nov. 10, 2013, 9:57 PM), http://www.huffingtonpost.com/robert-kuttner/time-to-thank-snowden_b_4252208.html (arguing, as the title suggests, that we should and someday may be grateful for Snowden’s leaks despite their illegality because they sparked the conversation regarding the extent of America’s surveillance programs). Interestingly, Daniel Ellsberg, the whistleblower who released the Pentagon Papers, has joined the national dialogue regarding whether Snowden is a traitor or a hero. See *infra* Part I.A. In addition to praising Snowden for making these disclosures in a Washington Post editorial, most recently, Ellsberg took to the popular social news website Reddit.com to answer any questions users wanted to ask him. The title of the post and the beginning of the “thread” reads “I am Pentagon Papers leaker Daniel Ellsberg. Edward Snowden is my Hero. [Ask me Anything].” See Daniel Ellsberg, *Daniel Ellsberg: NSA Leaker Snowden Made the Right Call*, WASH. POST (July 7, 2013), http://www.washingtonpost.com/opinions/daniel-ellsberg-nsa-leaker-snowden-made-the-right-call/2013/07/07/0b46d96c-e5b7-11e2-af3-339619eab080_story.html; Daniel Ellsberg, *I am Pentagon Papers Leaker Daniel Ellsberg. Edward Snowden is My Hero*, AMA, REDDIT (Jan. 15, 2014), http://www.reddit.com/r/IAmA/comments/1vahsi/i_am_pentagon_papers_leaker_daniel_ellsberg/.

⁹ 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 Alla Eshchenko, *Edward Snowden Gets Website Job in Russia, Lawyer Says*, CNN (Oct. 31, 2013), <http://www.cnn.com/2013/10/31/world/europe/russia-snowden-job/>.

¹¹ Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 75-76 (2012).

cases involved prosecuting a whistleblower who disclosed information regarding wasted funds at the NSA—information which the Inspector General Report substantiated.¹² Notwithstanding the substantiated claims of the whistleblower, after a five year investigation, the whistleblower “pled guilty to a misdemeanor charge of ‘exceeding authorized use of a computer.’”¹³ More recently, Private First Class Chelsea Manning (born Bradley Manning) was sentenced to 35 years in prison for charges under the Espionage Act for being the source of the WikiLeaks documents.¹⁴ In total, President Obama has charged eight individuals with violations of the Espionage Act for leaking classified information, which is more than all other presidents combined.¹⁵ It is for this reason that “[h]aving watched the Obama Administration prosecute whistleblowers at a historically unprecedented rate, [Snowden] fully expects the US government to attempt to use all its weight to punish him.”¹⁶

Now consider the recent Dodd-Frank legislation and the reward program for corporate whistleblowers who report corporate fraud and abuse to the Securities and Exchange Commission (SEC). On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) became law.¹⁷ The Act was passed and signed into law by President Obama in “response to the 2008 financial crisis that tipped the nation into the worst recession since the Great Depression.”¹⁸ One goal of Dodd-Frank is “to encourage whistleblower participation in the promotion of corporate governance.”¹⁹ To date, the SEC has issued three whistleblower

¹² *Id.*

¹³ *Id.*

¹⁴ Luis Martinez & Steven Portnoy, *Bradley Manning Guilty on Most Charges, But Not Aiding Enemy*, ABC NEWS (July 30, 2013), <http://abcnews.go.com/Blotter/bradley-manning-guilty-charges-aiding-enemy/story?id=19797378>. 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.

¹⁵ Daniel Politi, *Obama Has Charged More Under Espionage Act Than All Other Presidents Combined*, SLATE (June 22, 2013), http://www.slate.com/blogs/the_slatest/2013/06/22/edward_snowden_is_eighth_person_obama_has_pursued_under_espionage_act.html.

¹⁶ Greenwald et al., *supra* note 5.

¹⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁸ Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), www.nytimes.com/2010/07/22/business/22regulate.html?_r=0.

¹⁹ Umang Desai, Comment, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 LOY. U. CHI. L.J. 427, 429 (2010).

awards.²⁰ The first award occurred within a year of Dodd-Frank becoming law and was in the amount of \$50,000 (or 30% of the judgment), while the second award, 15% of the \$7.5 million judgment, occurred recently in June 2013.²¹ The most recent award was in the amount of \$14 million for information that resulted in an SEC enforcement action to recover investor funds.²² Although only three awards have been given out, the SEC received 3001 tips in the Fiscal Year 2012, which is an average of about eight tips per day.²³ These statistics suggest that the whistleblower provisions of Dodd-Frank are at least minimally effective. But, regardless of the provision's effects, the message is clear: the U.S. government encourages whistleblowing within public companies.²⁴

This note will examine the Dodd-Frank Act and related whistleblowing provisions that apply to the corporate world and the whistleblowing provisions in place within the government, especially as they pertain to the release of information related to national security. Upon examination, it will be clear that there is an inconsistency between the objectives of the different whistleblower provisions. It will also become evident that a different standard exists for public companies pursuant to Dodd-Frank that does not apply to the government itself. Under Dodd-Frank, the U.S. government policy objective is obvious: the federal government wants whistleblowers to report corporate wrongdoing that may result in financial losses to the SEC. Yet, when it comes to enabling government employees and contractors to blow the whistle on government perpetrated fraud or abuse, including possible violations of constitutional rights, the existing patchwork of federal legislation does little to provide a meaningful way for individuals to raise appropriate concerns without fear of retaliation or prosecution. This lack of a functional system within the government has arguably contributed to the leaking of confidential documents by Edward

²⁰ Press Release, U.S. Securities and Exchange Commission, SEC Awards More than \$14 Million to Whistleblower (Oct. 1, 2013), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UtlejHn0Bdg>; *see also* Erika Kelton, *SEC Whistleblower Rewards: Larger Ones Are Coming*, FORBES (June 26, 2013, 5:18 PM), <http://www.forbes.com/sites/erikakelton/2013/06/26/sec-officials-on-whistleblower-rewards-the-best-is-yet-to-come/>.

²¹ Kelton, *supra* note 20.

²² Press Release, *supra* note 20.

²³ U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2012, at 4-5, 11 (2012), *available at* <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf>.

²⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748, 124 Stat. 1376 (2010).

Snowden. The Dodd-Frank whistleblower provisions, a more functional whistleblower system, have arguably prevented or addressed frauds reported as well as contributed to the development of more effective internal reporting mechanisms within companies.²⁵

Drawing on the lessons from these inconsistencies, this note argues that the federal government should adopt a whistleblower scheme that is based on both the whistleblower provisions of the Dodd-Frank Act and the basic premise of checks and balances. Through Congress's power to create courts pursuant to Articles I and III of the Constitution,²⁶ a separate court should be created roughly based on the United States Foreign Intelligence Surveillance Court to respond to whistleblowers within the intelligence community. The new whistleblower court is certainly a starting point in an effort to balance both the interests of the United States citizen and the interests of an effective United States government and to provide an adequate solution to the age-old question of "who watches the watchers?"

Part I will discuss the relevant national security whistleblower laws as well as the relevant provisions of the Dodd-Frank Act. Part II will highlight the differences between the laws in both their structure and application. Finally, Part III will propose a new whistleblower court that is based on the Foreign Intelligence Surveillance Court to address the shortcomings of the national security whistleblower provisions. This new whistleblower court will adequately deal with the issues unique to national security, namely the need for secrecy, while still protecting individuals' rights.

I. THE WHISTLEBLOWER PROVISIONS

Whistleblowers in the national security industry of the United States government face a more complex, unclear, and inhospitable landscape than their counterparts in the corporate world. There is an inherent tension between national security and whistleblower laws because of the secrecy demanded by national security.²⁷ The tension has been described as the need for a "private space" where the President and his advisors can make the best decisions without the pressures of public

²⁵ See *infra* Part I.C.

²⁶ U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

²⁷ ROBERT G. VAUGHN, *THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS* 212 (2012).

scrutiny.²⁸ Despite this, “the Constitution promotes government transparency and Congressional oversight of the executive branch.”²⁹ The following discussion will summarize the whistleblower protections relevant to national security and the Dodd-Frank whistleblower provisions.

A. *National Security Whistleblower Provisions*

One commentator described generally whistleblower protections in national security:

The laws affecting national security whistleblowers differ dramatically from general [whistleblower] provisions . . . [E]mployees may report misconduct related to national security to a more limited group of people, excluding most of Congress and all of the public. Moreover, less protection from retaliation exists, and the judicial branch has no oversight of retaliation claims because the claims are adjudicated administratively within the executive branch and often within the whistleblower’s own agency, if at all.³⁰

The origins of whistleblower protection law reform can be traced to the Watergate scandal.³¹ Daniel Ellsberg played a major role in the Watergate scandal and, as a result, has been described as “one of the best-known whistleblowers in US history.”³² Daniel Ellsberg released what became known as the Pentagon Papers to two newspapers.³³ As a Rand Corporation employee, he contributed to a study conducted by Robert McNamara concerning United States involvement in Vietnam; the result was the highly critical Pentagon Papers.³⁴ Ellsberg released the Pentagon Papers first to the Senate Foreign Relations Committee in 1969 and then to the *New York Times* and the *Washington Post* in 1970.³⁵ After releasing the study to the newspapers, the federal government prosecuted him “for illegal possession of classified documents and a failure to return them to proper custody,” but the case was dismissed because, among other illegal activities, the executive branch was illegally spying on Ellsberg and his attorney, and executive branch employees broke into Ellsberg’s

²⁸ Moberly, *supra* note 11, at 91.

²⁹ *Id.*

³⁰ *Id.* at 95-96.

³¹ VAUGHN, *supra* note 27, at 72 (noting that “[w]ithout Watergate it is unlikely that Congress would have enacted the Civil Service Reform Act of 1978 (CSRA), and without that Act the whistleblower provision might have been delayed for years”).

³² *Id.* at 73, 215-17.

³³ *Id.* at 73.

³⁴ *Id.*

³⁵ *Id.*

psychologist's office.³⁶ President Nixon justified the illegal activity in the name of national security.³⁷ In response to the Watergate Scandal, Congress passed the Civil Service Reform Act of 1978 (CSRA)³⁸ and the Inspector General Act of 1978.³⁹ Both of these acts are considered "Watergate-reform legislation."⁴⁰

The Inspector General Act of 1978 is a statutory scheme that offers protection to federal employee whistleblowers. The Inspector General Act "authorizes the inspectors general to receive and investigate complaints or information received from agency employees concerning a violation of law, rules, or regulations; mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety."⁴¹ Unlike the other statutes discussed below, there is no exemption from protection for federal employees in the intelligence community.⁴² For example, whistleblowers from the NSA and DIA (two intelligence community agencies under the Department of Defense)⁴³ are protected.

The law provides that the inspector general's office of the Department of Defense investigate complaints concerning fraud or abuse or other information revealed to them by whistleblowers.⁴⁴ Among other possible violations, a revocation of security clearance is grounds for an investigation into whether retaliation occurred.⁴⁵ There have been some successful investigations into retaliation for whistleblowers under this scheme.⁴⁶

The CSRA created the Office of the Special Counsel (OSC), which is in charge of investigating allegations that a whistleblower was fired as retaliation.⁴⁷ The OSC has the power to remedy and

³⁶ *Id.* at 73-74.

³⁷ *Id.* at 74.

³⁸ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

³⁹ Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

⁴⁰ VAUGHN, *supra* note 27, at 217 (2012).

⁴¹ Lindsay Boyd & Brian Futagaki, *Intelligent Whistleblowing*, J. OF PUB. INQUIRY, Spring/Summer 2010, at 20, 21, available at <https://www.ignet.gov/sites/default/files/files/sp10jpi.pdf>.

⁴² *Id.*

⁴³ U.S., DEPT OF DEF., ORGANIZATION OF THE DEPARTMENT OF DEFENSE (DoD), available at http://odam.defense.gov/Portals/43/Documents/Functions/Organizational%20Portfolios/Organizations%20and%20Functions%20Guidebook/DoD_Organization_Mar_2012.pdf.

⁴⁴ Boyd & Futagaki, *supra* note 41, at 21-22.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.* at 22-23 (describing three instances of retaliation that were corroborated by the Department of Defense Office of Inspector General in the past three years).

⁴⁷ Lilyanne Ohanesian, *Protecting Uncle Sam's Whistleblowers: All-Circuit Review of WPA Appeals*, 22 FED. CIR. B.J. 615, 618 (2013).

punish accordingly any claims of retaliation.⁴⁸ Nevertheless, despite this big step for whistleblower protection from retaliation for government employees, the CSRA was largely ineffective.⁴⁹ Most importantly, the law was limited in scope; in particular, whistleblowers were not protected when it came to “information classified in the interests of national defense or foreign affairs.”⁵⁰ There was also no “legal protection [from retaliation] for many important disclosures by national security whistleblowers” because the CSRA excluded “the FBI, the CIA, the [DIA], the NSA, and other national security agencies.”⁵¹ Further, the definition of “agency” in the CSRA excludes any agency whose function the President determines is “the conduct of foreign intelligence or counterintelligence activities.”⁵² The practical effect of these exceptions is to carve out a large area where no protection exists—arguably where whistleblowing is needed most. The excluded agencies are granted broad authority, and the abuse of such power poses a threat to civil liberties. In practice, federal employees felt the law was hostile toward them; there were no cases brought on behalf of a whistleblower since the year of its passage, and contrary to the idea of whistleblower protections, the OSC revealed whistleblower identities after failing to investigate and prosecute claims.⁵³

As a result of these failures, Congress responded by passing the Whistleblower Protection Act of 1989.⁵⁴ The purpose of the Act, as stated by Congress, “is to protect employees, *especially whistleblowers*, from prohibited personnel practices.”⁵⁵ The CSRA originally made it “illegal to retaliate against whistleblowers for making a disclosure that evidenced illegality or specified misconduct.”⁵⁶ Congress amended the language in the Whistleblower Protection Act by changing “a disclosure” to “any disclosure.”⁵⁷ Previously, the Court interpreted “a disclosure” to

⁴⁸ *Id.*

⁴⁹ *Id.* (stating that “the CSRA’s whistleblower protections proved a disappointment in the decade that followed [its enactment]”).

⁵⁰ VAUGHN, *supra* note 27, at 217.

⁵¹ *Id.*

⁵² *Id.* at 217-18; 5 U.S.C. § 2302(a)(2)(C)(ii) (2014).

⁵³ Ohanesian, *supra* note 47, at 618.

⁵⁴ Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Ohanesian, *supra* note 47, at 619.

⁵⁵ Whistleblower Protection Act § 2(b)(2)(A) (emphasis added).

⁵⁶ Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 551 (1999) (internal quotation marks omitted).

⁵⁷ 5 U.S.C. § 2302(b)(8)(A)-(B) (2012); Whistleblower Protection Act of 1989 § 4(a)(3).

allow for loopholes in which a whistleblower would not be protected after they blew the whistle.⁵⁸ For example, in *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, the court held that the whistleblower's "primary motivation . . . must be the desire to inform the public on matters of public concern, and not personal vindictiveness"⁵⁹ and that the whistleblower's motives were related to personal vendettas and therefore not "a disclosure" protected by the act.⁶⁰ The amendment had the practical effect of "making protection mandatory whenever justified by the evidence in a disclosure."⁶¹ As a result, disclosures, even when made for personal reasons rather than the desire to inform the public on matters of public concern, would qualify as "any disclosure" as long as they stated a claim substantively. Despite these improvements, the problems previously noted with the CSRA as it pertained to national security whistleblowers were not addressed in Congress's amendments. It was not until the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA)⁶² that Congress addressed the issue of protecting national security whistleblowers. Congress's findings were that:

(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and

(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.⁶³

Under this law, intelligence community whistleblowers can now report to Congress but must report to the Office of the Inspector General (OIG) first, who then makes the determination whether it is credible enough to send to Congress.⁶⁴ However, according to Thomas Gimble, then-acting Inspector General of the Department of Defense in 2006, the ICWPA is a complete

⁵⁸ See, e.g., *Fiorillo v. U.S. Dep't of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986) (holding that the personal motives of the whistleblower disqualified him from protection under the CSRA).

⁵⁹ *Id.* at 1550

⁶⁰ *Id.*

⁶¹ Devine, *supra* note 56, at 551.

⁶² Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2413 (1998), available at <http://www.gpo.gov/fdsys/pkg/PLAW-105publ272/pdf/PLAW-105publ272.pdf>.

⁶³ *Id.*

⁶⁴ *Id.* § 702(a).

misnomer.⁶⁵ He contends that the Act more properly is a device that “protect[s] communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity.”⁶⁶ That is because there is no actual retaliation provision protecting a whistleblower who follows these procedures, but it does allow someone to communicate to Congress allegations of whistleblower retaliation.⁶⁷ At the time of Mr. Gimble’s comments, only three complaints had been made under the ICWPA.⁶⁸ Thus, the same recurring problem is faced by national security whistleblowers; that is, there is no protection from retaliation in the statutes for employees of the intelligence community.⁶⁹

Finally, on October 10, 2012, President Obama issued Presidential Policy Directive Nineteen (PPD-19), which purports to prohibit retaliation against employees who serve in the intelligence community or “who are eligible for access to classified information” who report waste, fraud, and abuse.⁷⁰ This is an attempt to fill in the shortcoming of the ICWPA; that is, the lack of protection for a whistleblower who tries to report to Congress.⁷¹ These protections, however, are practically nullified by the inclusion of the following text: “This directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”⁷² This means that there is no legal cause of action for a whistleblower who is fired, and the whistleblower has to depend on the previously discussed protections for redress.⁷³

⁶⁵ *National Security Whistleblower Protection: Hearing Before the Subcomm. on Nat’l Sec., Emerging Threats, and Int’l Relations of the H. Comm. on Gov’t Reform*, 109th Cong. 6-7 (2006) (statement of Thomas F. Gimble, Acting Inspector General of the U.S. Dep’t of Defense), available at http://www.fas.org/irp/congress/2006_hr/021406gimble.pdf.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 5 U.S.C. § 2302(a)(2)(C) (2012).

⁷⁰ Presidential Policy Directive-19, Protecting Whistleblowers with Access to Classified Information (Oct. 10, 2012), available at <https://www.fas.org/irp/offdocs/ppd/ppd-19.pdf>.

⁷¹ Daniel D’Isidoro, *Protecting Whistleblowers and Secrets in the Intelligence Community*, NAT’L SEC. J. (Sept. 29, 2014), <http://harvardnsj.org/2014/09/protecting-whistleblowers-and-secrets-in-the-intelligence-community/>.

⁷² Presidential Policy Directive-19, *supra* note 70.

⁷³ *National Security Whistleblowers Not Effectively Protected by New Whitehouse Directive: Directive Lacks Due Process and Real Legal Protections*, NAT’L WHISTLEBLOWERS CTR. (Oct. 11, 2012), http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1426&Item=229

Critics of PPD-19 argue that (1) “[t]he authority to protect the whistleblower is vested solely and absolutely with the [h]ead of the Agency that retaliated against the whistleblower;” (2) “[t]he Directive incorporates the ‘State’s Secrets’ privilege that permits agency heads to fire whistleblowers regardless of the Directive;” and, as previously discussed, (3) “[t]he Directive explicitly neglects to create any real legal protection.”⁷⁴ However, President Obama, regarding the Edward Snowden NSA leaks,⁷⁵ stated:

So the fact is, is that Mr. Snowden has been charged with three felonies If the concern was that somehow this was the only way to get this information out to the public, I signed an executive order well before Mr. Snowden leaked this information that provided whistleblower protection to the intelligence community—for the first time. So there were other avenues available for somebody whose conscience was stirred and thought that they needed to question government actions.⁷⁶

Based on these comments, it seems that PPD-19 is at least a signal that the Obama Administration has recognized a need to respond to intelligence community whistleblowers and to create a workable whistleblower environment in the national security arena. Nevertheless, the current patchwork of legislation and executive action falls short and does not provide a clear path for the national security whistleblower who may perceive his or her only option as going to the press.

B. The Classification System

National security whistleblowers are often left without any option but to go to the media.⁷⁷ Compounding this problem is the government’s use of the classification system. The classification system is used as both a shield and a sword for the

⁷⁴ Stephen Kohn, *Where We Stand on President Obama’s “Policy Directive” On National Security Whistleblowers*, WHISTLEBLOWERS PROTECTION BLOG (Sept. 27, 2013), <http://www.whistleblowersblog.org/2013/09/articles/whistleblowers-government-empl/terrorism/where-we-stand-on-president-obamas-policy-directive-on-national-security-whistleblowers/#more>.

⁷⁵ See *infra* Part III.

⁷⁶ Joe Davidson, *Obama’s ‘Misleading’ Comment on Whistleblower Protections*, WASH. POST (Aug. 12, 2013), http://articles.washingtonpost.com/2013-08-12/politics/41333716_1_edward-snowden-executive-order-policy-directive.

⁷⁷ Melissa Khemani, *The Protection of National Security Whistleblowers: Imperative but Impossible* 23 (Working Paper, May 30, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412112 (describing the options left for national security whistleblowers as a result of the legal framework within which they report).

government when it comes to national security whistleblowers. It has been argued that the power of the executive branch to classify documents “seem[s] to be invoked more as a shield to cover up government incompetence or misconduct rather than to protect classified information or national security interests.”⁷⁸ At the same time, the executive branch’s power to revoke security clearances can be a sword in the sense that it is a form of retaliation used to punish whistleblowers.⁷⁹ The Supreme Court has strengthened the power to revoke security clearances as a result of its decision in *Department of the Navy v. Egan*.⁸⁰ The Court held that the Merit Systems Protection Board could not review the Department of the Navy’s reasons for revoking an employee’s security clearance that led to an employee’s discharge.⁸¹ Accordingly, there is a “limitation placed on administrative and judicial review of the revocation of security clearances”⁸² making it easier for security clearance revocation to be used as retaliation. The effects of having a security clearance revoked prevent an employee from advancing or even retaining a position in the federal government where such a clearance is required.

To summarize, the whistleblower provisions discussed above, when they do protect a whistleblower, rely primarily on internal reporting and monitoring. The mechanisms for protection are all internal “external” review boards; that is, the boards consist of executive branch employees who review the complaints of whistleblowers who may or may not have been unfairly removed from their post or had their security clearance revoked.⁸³ Additionally, when there is Congressional oversight, it is limited because the OIG screens the information before it reaches Congress pursuant to the ICWPA. The inspectors general are also internal “external” review mechanisms. The President appoints them “by and with the advice and consent of the Senate” and has the power to remove them with notice to Congress of his or her reasons for doing so.⁸⁴ Although few question that the inspectors general are capable of doing a fair and impartial job, it is noteworthy that the Government considers itself more prepared to handle internal reports from whistleblowers than a private corporation is, even when it comes to protecting U.S.

⁷⁸ *Id.* at 20-21.

⁷⁹ VAUGHN, *supra* note 27, at 218-19.

⁸⁰ *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸¹ *Id.* at 525-33.

⁸² VAUGHN, *supra* note 27, at 218.

⁸³ *See* Inspector General Act of 1978, Pub. L. No. 112-239, § 3(a)-(b), 92 Stat.

1101 (1978).

⁸⁴ *Id.*

citizens' constitutional rights. Further, the classification system and its possible manipulation by the government places added burdens on a potential national security whistleblower.

C. *Dodd-Frank Whistleblower Provisions*

Two parts of the Dodd-Frank Act are relevant for purposes of this note. The first part is the bounty program. The Act reads, in pertinent part:

[T]he Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action⁸⁵

The second part is the protection afforded the whistleblower in the Dodd-Frank Act. The Act provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or ordered under the Sarbanes—Oxley Act of 2002⁸⁶

The term “whistleblower” for purposes of the Dodd-Frank Act is defined as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*.”⁸⁷ This distinction is important because Dodd-Frank has the effect of “limit[ing] its protections to those who report externally” to the government (not the press).⁸⁸ The implication of defining the whistleblower as someone who reports to the SEC is that anyone who only reports within their company, or internally, does not qualify for the bounties or the protections (although they may be protected under the Sarbanes-Oxley Act of 2002).⁸⁹

Despite this narrow definition of “whistleblower,” another provision of Dodd-Frank purports to offer protection for whistleblowers who “mak[e] disclosures that are required or

⁸⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(b)(1), 124 Stat. 1376 (2010).

⁸⁶ *Id.* § 922(h)(1)(A).

⁸⁷ *Id.* § 922(a)(6) (emphasis added).

⁸⁸ Harvard Law Review Association, *Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1832 (2011) [hereinafter HLRA, *Congress Expands Incentives*].

⁸⁹ *Id.*

protected under the Sarbanes-Oxley Act of 2002”⁹⁰ According to the Harvard Law Review Association, this provision might cover whistleblowers who only report internally because the Sarbanes-Oxley Act (SOX Act) includes a provision that protects whistleblowers who report internally.⁹¹ However, despite including this provision, the definition of “whistleblower” as someone who only reports to the SEC restricts the bounty awards and protections for whistleblowers in Dodd-Frank to those who report to the SEC.⁹² This has the practical effect of excluding whistleblowers who only report internally from the bounty program and protections, therefore discouraging internal reporting.

Recently, the Fifth Circuit Court of Appeals had the opportunity to determine whether the Dodd-Frank Act protected whistleblowers who only reported internally.⁹³ In this case, the plaintiff, Khaled Asadi, reported to his supervisors at G.E. Energy (G.E.) that Iraqi officials believed G.E. had hired a woman associated with a particular Iraqi official in order to “curry favor with that official in negotiating a lucrative joint venture agreement.”⁹⁴ In interpreting the statute, the court found that the definition of whistleblower “expressly and unambiguously requires that an individual provide information to the SEC”⁹⁵ The court further found that the SOX Act provision within Dodd-Frank does not add another definition of whistleblower; rather, a whistleblower still has to report to the SEC to fall within the SOX Act provision of the Dodd-Frank Act.⁹⁶ This ruling is in contrast with other district courts faced with the same issue.⁹⁷

More recently, the Southern District of New York found that because there is an ambiguity in the statute (created by the conflict between the definition of “whistleblower” as someone who reports to the SEC and the anti-retaliation provision not requiring the whistleblower to report to the SEC), it is appropriate to consider how the SEC interprets the

⁹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(h)(1)(A)(iii), 124 Stat. 1376 (2010).

⁹¹ HLRA, *Congress Expands Incentives*, *supra* note 88, at 1832 n.31.

⁹² *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

⁹³ *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

⁹⁴ *Id.* at 621.

⁹⁵ *Id.* at 623.

⁹⁶ *Id.* at 627.

⁹⁷ *See, e.g., Kramer v. Trans-Lux Corp.*, No. 3:11cv1424, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-94 (M.D. Tenn. 2012).

statute.⁹⁸ The court found that the SEC interpreted the statute to “not require a report to the SEC in order to obtain whistleblower protection.”⁹⁹ So, unless and until the Supreme Court decides to hear this issue or the law is amended to fix the inconsistency in the definition of “whistleblower,” the Dodd-Frank Act will continue to highly discourage any type of internal reporting because the Act’s anti-retaliation provisions¹⁰⁰ will not protect the employee if they have not also reported to the SEC, and they will be ineligible for the bounty awards.

In sum, Dodd-Frank is effective at generating tips from whistleblowers for the SEC¹⁰¹ in their pursuit of fixing what President Obama described as, “a crisis born of a failure of responsibility from certain corners of Wall Street to the halls of power in Washington.”¹⁰² Specifically, the Act contributes to the solution by providing “clear rules and basic safeguards that prevent abuse, that check excess, that ensure that it is more profitable to play by the rules than to game the system.”¹⁰³ Since the Act was signed into law, three awards have already been distributed,¹⁰⁴ demonstrating that the whistleblower provisions of Dodd-Frank are having an impact on detecting and preventing financial abuses.

The objectives of the program are clear: vigorously protect whistleblowers and motivate whistleblowing to the government through monetary reward. The head of the SEC’s whistleblower office, Sean McKessy, said, “[q]uality information is the lifeblood of the program. If people think if they report wrongdoing they get fired or risk other retaliation, that well will dry up quickly.”¹⁰⁵ Despite the recent ruling in *Asadi v. G.E. Energy (USA), L.L.C.*,¹⁰⁶ McKessy believes “companies are generally investing more in internal compliance as a result of [the] whistleblower program” and “[t]he vast majority of people who come to [the SEC] about their current or former company

⁹⁸ *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013).

⁹⁹ *Id.*

¹⁰⁰ 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii) (2010).

¹⁰¹ U.S. SEC. & EXCH. COMM’N, *supra* note 23, at 4-5, 11.

¹⁰² Press Release, White House, Statement by President Barack Obama Upon Signing H.R. 4173 (July 21, 2010).

¹⁰³ *Id.*

¹⁰⁴ Press Release, *supra* note 20; *see also* Kelton, *supra* note 20.

¹⁰⁵ Cheryl Soltis Martel, *SEC Whistleblower Office Preps for Additional Tips*, NACD DIRECTORSHIP (Aug. 24, 2012), <http://www.directorship.com/sec-whistleblower-office-preps-for-additional-tips/> (internal quotation marks omitted).

¹⁰⁶ *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

do say they tried to report internally.”¹⁰⁷ For example, the recent payout of \$168 million dollars to an unspecified number of whistleblowers related to the settlement of Johnson & Johnson with the United States over “charges that J&J marketed drugs for unapproved uses and gave kickbacks to doctors and nursing homes.”¹⁰⁸ A robust internal reporting system could have been an effective remedy for Johnson and Johnson before it ever reached the point of negotiating a \$2.2 billion settlement. This example suggests that other companies will do as McKessy suggests and invest more in their internal reporting systems to prevent exorbitant losses.

II. THE STRUCTURAL DIFFERENCES BETWEEN DODD-FRANK AND NATIONAL SECURITY WHISTLEBLOWING

The Dodd-Frank whistleblower structure encourages someone to go outside the company and report to the SEC (which, although independent, is a part of the executive branch) which then investigates the tip.¹⁰⁹ If the tip is credible enough, the SEC could bring an enforcement action against the company.¹¹⁰ These claims have resulted in investigations, penalties, and bounty rewards in the millions of dollars against violating corporations.¹¹¹ Under Dodd-Frank, a whistleblower still receives protection from retaliation if they report internally (under the SOX Act), but there is less incentive to do this if in doing so the whistleblower becomes ineligible for the bounty.¹¹²

The national security whistleblower structure is less clear. Based on current events and the current state of the law,¹¹³ the structure is almost exclusively internal (the exception being congressional oversight under the ICWPA, which is limited).¹¹⁴ A flowchart diagramming the line from the

¹⁰⁷ Rachel Louise Ensign, *Q&A: Sean McKessy, Chief of the SEC's Office of the Whistleblower*, WALL ST. J. (Sept. 25, 2013), <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-336403/>.

¹⁰⁸ Gregory Wallace, *\$168 Million Payout to Johnson & Johnson Whistleblowers*, CNN MONEY (Nov. 4, 2013, 5:04 PM), http://money.cnn.com/2013/11/04/news/johnson-and-johnson-whistleblower-payout/index.html?hpt=hp_t2.

¹⁰⁹ U.S. SEC. & EXCH. COMM'N, *supra* note 23, at 5-6.

¹¹⁰ *See, e.g.*, Press Release, Securities and Exchange Commission, SEC Announces Whistleblower Action (June 12, 2013), *available at* <http://www.sec.gov/news/press/2013/2013-06-announcement.htm>.

¹¹¹ Kelton, *supra* note 20; Press Release, *supra* note 20.

¹¹² *See, e.g.*, *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

¹¹³ *See supra* Part I.B.C.

¹¹⁴ Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2413 (1998), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ272/pdf/PLAW-105publ272.pdf>. Although it is not problematic for national security

national security whistleblower as she reports her complaint within the confines of the law is a straight line all the way up to the President with stops along the way in the relevant inspector general's office and the head of the agency where the whistleblower works. Conversely, the line for the Dodd-Frank whistleblower begins in the private sphere of the corporation and, with the exception of internal reporters (which Dodd-Frank discourages), goes outside the corporation and across to the public sphere of the SEC and thus up to the President.

These structural differences represent the tension discussed¹¹⁵ between the President's need to protect national security information and the need to prevent abuses within the government by exposing fraudulent and abusive practices.¹¹⁶ It might also be suggested that the government does not want to encourage whistleblowing when it is the subject of the whistleblower's allegations. Therefore, with this in mind, it is critical to try and address this tension while still allowing for an effective whistleblower culture within the national security community. Otherwise, we are left with major news headlines and scandals as would-be whistleblowers, perceiving themselves as without options (e.g., Edward Snowden), go to the press. A scandal never looks good, but it is also possible that these leaks to the press have caused serious, real damage. Members of Congress say that a recent Pentagon report suggests that Snowden's leaks "have set back U.S. efforts against terrorism, cybercrime, human trafficking, and weapons proliferation."¹¹⁷

Corporations and the government are similar enough that corresponding structures should and could be applied to both effectively. Corporations and government share four important characteristics that make them agreeable to similar whistleblower provisions. First, shareholders of the corporation are similar to citizens of the government.¹¹⁸ Both shareholders and citizens generally have a right to vote on important matters ranging from leadership to amendments of bylaws¹¹⁹ and state

whistleblowers to begin whistleblowing internally considering the sensitive nature of protecting our national security (after all even SOX protects internal whistleblowers), the problem is national security whistleblowers are not even protected at any preliminary, internal stage, arguably leaving them with little to no options but to go to the press.

¹¹⁵ See *supra* Part I.A.

¹¹⁶ VAUGHN, *supra* note 27, at 212.

¹¹⁷ Ken Dilanian & Richard A. Serrano, *Snowden Leaks Severely Hurt U.S. Security, Two House Members Say*, L.A. TIMES (Jan. 9, 2014), <http://articles.latimes.com/2014/jan/09/nation/la-na-snowden-intel-20140110>.

¹¹⁸ See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146 (2010).

¹¹⁹ See, e.g., DEL. CODE ANN. tit. 8, § 109.

and federal constitutions. Second, the CEO of the corporation is analogous to the President of the government.¹²⁰ The CEO is responsible for the day-to-day operations of the corporation much like the President has control over the executive branch and its day-to-day operations. Third, the board of directors of the corporation is very similar to Congress.¹²¹ Both have oversight powers. Fourth, the Judiciary serves similar functions to both the corporation and the government.¹²²

In practice, both corporations and the government have similar hierarchical organizational and reporting structures. As a result, the whistleblowing employee in both organizations is faced with the same challenges. Their direct supervisors and those above them may be involved in the concerning conduct. The risk of retaliation through demotion or termination is the same for both. The consequences of the wrongful conduct directly affect the principal stakeholders in both organizations, shareholders in the case of corporations and citizens in the case of the government. Both organizations should have the same objective of promoting lawful conduct by its employees, including its leadership. Whether the offending conduct is accounting fraud or the violation of constitutional rights, both are worthy of prevention. Protection from retaliation and whistleblowing incentives are appropriate tools to motivate appropriate conduct by both organizations. Of course, where issues of national security are involved, the process must take into account the need for a potentially higher level of confidentiality.

III. A NEW WHISTLEBLOWER COURT

The Foreign Intelligence Surveillance Court (FISC) is a workable, constitutional way for the government to obtain prior judicial approval to engage in surveillance. The purpose of the FISC is to balance the government's need to investigate and seek out national security threats with the rights of individuals by gaining judicial approval first.¹²³ A whistleblower court would balance these same needs, and a court like the FISC is a working model upon which to base the whistleblower court.

¹²⁰ See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

¹²¹ See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

¹²² See, e.g., U.S. CONST. art. I-III; DEL. CODE ANN. tit. 8, §§ 141-142, 146.

¹²³ Federal Judicial Center, *History of the Federal Judiciary: Foreign Intelligence Surveillance Court* (Jan. 13, 2013), http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html.

A. *The Foreign Intelligence Surveillance Court*

Congress approved the creation of the FISC pursuant to its Article III power.¹²⁴ The FISC was created pursuant to the Foreign Intelligence Surveillance Act (FISA).¹²⁵ First, the Chief Justice of the United States Supreme Court appointed “11 district court judges from at least seven of the United States judicial circuits.”¹²⁶ In the FISC, any time a judge denies an application for an order of surveillance, that judge must write an opinion that is filed under seal.¹²⁷ FISA also creates a review court for the FISC consisting of “three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals” to review denials of applications, subject to Supreme Court review.¹²⁸

In order to obtain an order of surveillance, (1) the lawyers from the Department of Justice prepare an application for surveillance on behalf of the agency requiring the order, which is submitted to the FISC, (2) the FISC either approves or denies the application (since 1979 only 11 out of 33,946 have been denied),¹²⁹ and (3) the applying agency executes the surveillance, which ultimately may or may not lead to criminal prosecution.¹³⁰ The applications by the government and their contents are classified.¹³¹

In *United States v. Cavanagh*, the Ninth Circuit upheld the constitutionality of the FISC, holding that it did not violate Article III of the Constitution.¹³² First, the court dismissed the plaintiff’s argument that because the FISC judges are not tenured for life with fixed salaries, it violates Article III.¹³³ The court then dismissed the plaintiff’s argument that the surveillance applications need to be “passed upon by [A]rticle III judges” because “the judges assigned to serve on the FISA court are federal district judges, and as such they are insulated from political pressures by virtue of the protections they enjoy

¹²⁴ STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 593 (5th ed. 2011).

¹²⁵ 50 U.S.C. § 1801 et seq. (2010).

¹²⁶ *Id.* § 1803(a)(1).

¹²⁷ *Id.*

¹²⁸ *Id.* § 1803(b).

¹²⁹ Todd Lindeman, *The Foreign Intelligence Surveillance Court*, WASH. POST (June 7, 2013 11:53 PM), http://www.washingtonpost.com/politics/the-foreign-intelligence-surveillance-court/2013/06/07/4700b382-cfec-11e2-8845-d970ccb04497_graphic.html.

¹³⁰ DYCUS ET AL., *supra* note 124, at 594.

¹³¹ Lindeman, *supra* note 129.

¹³² 807 F.2d 787 (9th Cir. 1987).

¹³³ *Id.* at 791.

under [A]rticle III.”¹³⁴ Moreover, “[A]rticle III courts are not foreclosed from reviewing the decisions of the [FISC].”¹³⁵ Next, the court rejected the proposition that the temporary assignment to the court implicates “the principles of judicial interpretation and separation of powers that underlie [A]rticle III.”¹³⁶ The court found that the “temporary designation within the federal judicial system has never been thought to undermine the judicial independence that [A]rticle III was intended to secure.”¹³⁷ Finally, the court rejected the argument that Article II of the Constitution was violated by having the Chief Justice of the Supreme Court appoint the judges to the FISC stating that “temporary assignment of a federal district judge to another district did not violate the President’s appointment power under the Constitution.”¹³⁸ Therefore, with these basic provisions in place and approved by at least the Ninth Circuit, a similarly structured national security whistleblower court should have an appropriate and constitutional basis.

B. The Whistleblower Court

The national security whistleblower court would structurally mirror the FISC. It would consist of 11 judges, appointed by the Chief Justice of the United States Supreme Court. A review court would consist of three judges to review dismissal of whistleblower complaints. In support of the staffing structure of the whistleblower court, it is useful to consider the staff and amount of complaints handled by the SEC’s Office of the Whistleblower. The staff of the SEC’s Office of the Whistleblower consists of nine attorneys and three paralegals in addition to the head of the office, Mr. McKessy, and the deputy chief of the office, Ms. Jane A. Norberg.¹³⁹ During the fiscal year 2013, the Office of the Whistleblower received 3238 tips (a 7.9% increase from fiscal year 2012).¹⁴⁰ Considering the success of the Office of the Whistleblower in addressing and investigating over 3000 complaints, it is very likely the whistleblower court would be more than capable to handle complaints of this volume.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 791-92.

¹³⁷ *Id.* (internal citations omitted).

¹³⁸ *Id.* (citing *Lamar v. United States*, 241 U.S. 103, 118 (1916)).

¹³⁹ U.S. SEC. & EXCH. COMM’N, *supra* note 23, at 5.

¹⁴⁰ *Id.*

If any change would be made to the number of whistleblower court judges, then it would likely be to increase the whistleblower court staff because there were more Dodd-Frank Act whistleblower tips than there were applications to the FISC (the FISC received between 1750 and 2000 applications for orders of surveillance in the year 2012).¹⁴¹ Further, there are complaints that the FISC is a “rubber stamp” because it overwhelmingly approves government applications for orders of surveillance.¹⁴² Therefore, any reduction in staff might call into question the legitimacy of the process of the whistleblower court; that is, the process might be considered suspect if there are a large amount of complaints and an even smaller amount of staff than the FISC.

The process by which whistleblowers in the intelligence community would be heard in this new court is relatively straightforward and simple. First, a whistleblower would file a complaint, much like a plaintiff in a civil lawsuit. The complaint would be similar to those in the Inspector General Act,¹⁴³ detailing any “violation of law, rules, or regulations; or mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety.”¹⁴⁴ The phrase “intelligence community” would be defined the same way that the National Security Act of 1947 defined the term to include various intelligence agencies.¹⁴⁵ This includes the Office of the Director of National Intelligence, the CIA, the NSA, the DIA, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office, among others.¹⁴⁶ Additionally, intelligence community contractors would be covered as in PPD-19.¹⁴⁷ PPD-19 included supposed protection for those “who are eligible for access to classified information.”¹⁴⁸ In 2010, “out of 854,000 people with top secret clearances, 265,000 [we]re contractors.”¹⁴⁹

¹⁴¹ Lindeman, *supra* note 129.

¹⁴² Dina Temple-Raston, *FISA Court Appears to be Rubber Stamp for Government Requests*, NAT'L PUB. RADIO (June 13, 2013, 4:00 AM), <http://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests>.

¹⁴³ See 5 U.S.C. app. § 7(a) (1978), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector-sec7.pdf>.

¹⁴⁴ Boyd & Futagaki, *supra* note 41, at 21 (citing 5 U.S.C. app. § 7 (2012)).

¹⁴⁵ See Moberly, *supra* note 11, at 72 n.129 (citing 50 U.S.C. § 401a(4) (2012)).

¹⁴⁶ *Id.* at 72-73.

¹⁴⁷ Presidential Policy Directive-19, *supra* note 70.

¹⁴⁸ *Id.*

¹⁴⁹ Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST (July 20, 2010, 12:24 AM), <http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc/>.

Any employee or contractor of the intelligence community with any complaint that is enumerated in the Inspector General Act could submit a complaint to the court. At the same time that the complaint is submitted to the whistleblower court, the complaint should be submitted to the Inspector General office of the relevant agency. This notifies the agency that there is a complaint, and this allows them to investigate the claim. All of the intelligence community agencies enumerated in the National Security Act of 1947 have an Inspector General office.¹⁵⁰ This would obviate the need to create any new department within an agency to address whistleblower complaints.

It may seem that by inserting a whistleblower court into the process this note is creating a middle man; however, in the national security context, where whistleblowing is treated generally with “outright hostility[,]”¹⁵¹ at least under the Obama Administration, it is necessary to add a layer of protection for the whistleblower. This is achieved by inserting the independent judiciary into the process. Such a court addresses the tension between the executive’s compelling interest in national security and the interest of the public in transparency. In this case, the phrase “transparency” is a misnomer because the whistleblower court would be under seal and thus not transparent in the traditional sense of the word. Nevertheless, by including another branch of the government in the process, the judiciary, the potential for abuse and the concentration of power to address whistleblower complaints in the executive is very much limited. Additionally, filing under seal to the judiciary is not a new process because sealing different stages of the judiciary process occurs with enough frequency that there exists a guide on how to do it.¹⁵²

Just as in ordinary litigation, the relevant inspectors general office has the opportunity to respond to the complaint, which it would submit to the whistleblower court. It is important to note that there would be no jury trial. Rather, it would be much more in line with a bench trial, with the judges playing the role of fact finder. The inspectors general’s investigation, in line with

¹⁵⁰ See Council of the Inspectors General on Integrity and Efficiency, *Inspectors General Directory & Homepage Links*, <http://www.ignet.gov/igs/homepage1.html> (last visited Oct. 30, 2013).

¹⁵¹ Moberly, *supra* note 11, at 73.

¹⁵² See, e.g., Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, FED. JUDICIAL CTR. (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Sealing_Guide.pdf/\\$file/Sealing_Guide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sealing_Guide.pdf/$file/Sealing_Guide.pdf) (describing the different aspects of the judiciary as they related to being put under seal including national security issues).

their traditional role of neutral investigator,¹⁵³ should present to the whistleblower court its findings regarding the whistleblower's complaint. The whistleblower court, having the information necessary to make a decision on the merits of the complaint, would then decide whether or not there is a real issue raised by the complaint. This differs from the usual role of the courts deciding whether someone has a "winning" claim. But this difference is in line with the function of whistleblowing; that is, to seek out and prevent or fix abuses.

Next, there are two possible outcomes for the whistleblower's complaint. First, if the whistleblower court finds, after consideration of the inspectors general's investigation and the whistleblower's complaint, that no "violation of law, rules, or regulations; or mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to the public health and safety"¹⁵⁴ has been made out, then the complaint will be dismissed. Second, if the whistleblower court does find that there is a real allegation, then the best process forward would be a collaborative effort to redress the complaint, including input from the whistleblower court and its staff, the inspectors general's office and their staff, and the original whistleblower, either pro se or represented by counsel.¹⁵⁵ In this way, the whistleblower court would be able to collaboratively make a determination as to the best remedy of the complaint after considering the input from the inspectors general office, the whistleblower, and the court.

As an example, if Snowden were to decide that he does not like the extent of the NSA surveillance program and believes that it is a complete overstepping of the executive's power, he can file a complaint with as much detail as possible and submit it to the whistleblower court for consideration. This would be in lieu of going to *The Guardian* news outlet and then fleeing the United States for fear of prosecution. One possible

¹⁵³ Inspector General Act of 1978, Pub. L. No. 112-239, § 2, 92 Stat. 1101, available at <http://www.ignet.gov/pande/leg/igactasof1010.pdf> (describing the purpose as "to create independent and objective units").

¹⁵⁴ Boyd & Futagaki, *supra* note 41, at 21 (citing 5 U.S.C. App. § 7 (2012)).

¹⁵⁵ This process is being used by the newly created New York State Human Trafficking Courts. Recognizing that many people arrested for prostitution are likely victims of human trafficking who need help rather than to be punished, the new court is a "collaborative effort[] of the court system's criminal justice partners, service providers across the state and other stakeholders . . . where [the victim] will be evaluated by the judge, defense attorney and prosecutor." Press Release, New York State Unified Court System, NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative (Sept. 25, 2013), available at http://www.nycourts.gov/press/PR13_11.pdf. In this way, the best result regarding the issue at stake is reached.

complication in Snowden's case is the fact that he is employed by Booz Allen rather than the NSA. The whistleblower court, however, in addition to hearing complaints from government employees, would also hear complaints from people who work for government contractors.

Next, the whistleblower court would read through the complaint and send it to the NSA Office of the Inspector General (OIG) so that it can begin its investigation. In due time, the OIG completes its investigation of the surveillance being conducted and gives the whistleblower court its analysis of the issues raised in the complaint. Much like the debate going on today, the whistleblower court would consider whether what Snowden revealed is a violation of the law. Although it may seem that the whistleblower court would have to undertake the strenuous task of deciding if the NSA's conduct is illegal, the complaints can also be considered under the Inspector General Act's standard, which includes complaints relating to "a substantial and specific danger to the public health and safety."¹⁵⁶ This broadens the whistleblower court's analysis by considering, along with the inspectors general and the whistleblower, the potential harm that the practices would have on the public's health and safety.

The legal issue regarding the surveillance has been considered by the FISC in the past at least once, and there have also been two district court opinions relating to the NSA's surveillance program. The FISC opinion that was declassified with redactions, written by Judge John Bates, revealed that the FISC did find the NSA surveillance program improper.¹⁵⁷ After the government made improvements to their applications by fixing the problems noted by Judge Bates, the FISC approved the program once again.¹⁵⁸ But there is now a split in the district courts about the constitutionality of the NSA surveillance program. First, in *Klayman v. Obama*,¹⁵⁹ the District Court for the District of Columbia ruled that the surveillance "almost certainly"

¹⁵⁶ 5 U.S.C. app. § 7(a) (2012), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-inspector-sec7.pdf>.

¹⁵⁷ See Judge Bates's Opinion on N.S.A. Program, United States Foreign Intelligence Surveillance Court 32 available at <http://www.fas.org/irp/agency/doj/fisa/fisc0912.pdf> (last visited Jan. 3, 2015) (finding that the minimization procedures used by the government in the collection of data were inadequate to protect citizens); Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?pagewanted=1&_r=0.

¹⁵⁸ Savage & Shane, *supra* note 157.

¹⁵⁹ *Klayman v. Obama*, No. 13-0881 (RjL), 2013 WL 6598728 (D.D.C. Dec. 16, 2013).

violated a reasonable expectation of privacy under the Fourth Amendment.¹⁶⁰ Closely following the *Klayman* decision, the Southern District of New York ruled that the NSA surveillance was not only constitutional but that it was also “the Government’s counter-punch: connecting fragmented and fleeting communications to re-construct and eliminate al-Qaeda’s terror network.”¹⁶¹ Given the different opinions reached in the two courts, it is possible that the Supreme Court could end up hearing the case.¹⁶² The constitutionality of the surveillance program is beyond the scope of this note, but the fact that the FISC and two district courts are in disagreement with the government and each other over whether the surveillance is proper, it almost certainly could be argued it poses a substantial danger to public health and safety.

In addition to the legal analysis, the whistleblower court could make recommendations to the NSA and the executive branch or even permit legal action to be taken against the NSA, much like the SEC can bring actions against corporations that are violating laws or regulations. The whistleblower court could also issue opinions similar to the Judge Bates opinion, discussed above, finding that the NSA surveillance was improper, if the whistleblower’s complaint warranted such a finding.¹⁶³

C. *Merits and Drawbacks of a Possible Whistleblower Complaint Court*

The whistleblower court would enable someone like Snowden to proceed through channels that adequately balance the national security issues with the transparency, checks, and balances required to run an efficient government. Some of the drawbacks are exemplified by the Snowden example as well. The main problem is what the whistleblower court does with the information it hears. Does it have the authority to intervene and order the government to do anything? Considering that the FISC has the authority to deny or approve surveillance applications, it is likely that the whistleblower court would be able to issue orders to the offending government agency. The answer to this question may in fact improve the legitimacy and effectiveness of

¹⁶⁰ *Id.* at *19.

¹⁶¹ *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 757 (S.D.N.Y. 2013).

¹⁶² Orin Kerr, *Will the Supreme Court Review the NSA’s Telephony Metadata Program?*, THE VOLOKH CONSPIRACY (Jan. 2, 2008, 8:47 PM), <http://www.volokh.com/2014/01/02/supreme-court-take-bulk-telephony-case-circuit-courts-dont-invalidate-program/>.

¹⁶³ See Judge Bates’s Opinion on N.S.A. Program, *supra* note 157, at 31.

the whistleblower court. If Congress creates the whistleblower court as it did the FISC, then it can find the appropriate balance between the whistleblower court's new power and the executive's existing power. This adds to the legitimacy of the court and of the whistleblowing process as a whole because now all three branches of the government are represented and active in the process. With the three branches having input, the proper amount of checks and balances will be effective to ensure that the new whistleblower court does not exert too much control over the executive and that the executive is not dangerously untethered in its clearly legitimate goal and responsibility of providing for the national security of the United States.

There could also be the issue of whether the national security whistleblower needs to exhaust internal reporting mechanisms available to her. If it appears that requiring exhaustion of remedies is too onerous for the national security whistleblower, this suggests that requiring exhaustion before filing a complaint is not a good idea. In fact, requiring exhaustion would give the current government whistleblower apparatus control over whether the complaint ever makes it to the whistleblower court. For example, in the ICWPA, the complaint only went to Congress if the Office of the Inspector General deemed it credible. Therefore, requiring exhaustion would likely have the same effect and is thus not advisable.

There are still other considerations that would need to go into the formation of the whistleblower court. For instance, what kind of standard would be used to decide whether a complaint should be dismissed? These types of questions would best be answered in practice. The whistleblower court would create its own jurisprudence and precedent as issues arise.

One thing is certain: the whistleblower court (rather than a leak to the media) is a much more appropriate and efficient way to expose government wrongdoings. Attorney General Eric Holder said that "the mechanisms that [Snowden] used' to publicize his concerns with the government's surveillance aren't 'worthy of clemency.'"¹⁶⁴ Nonetheless, he admitted that "Snowden sparked a necessary conversation."¹⁶⁵ This conversation has resulted in President Obama "announc[ing] the end of the telephone metadata program, the way it exists now, after the

¹⁶⁴ Evan Perez & Leigh Ann Caldwell, *CNN Exclusive: Holder Fears 'Lone Wolf' Terrorist Attack, Doesn't Want TSA Armed*, CNN (Nov. 6, 2013), http://www.cnn.com/2013/11/05/politics/holder-terror-snowden-interview/index.html?hpt=hp_t2.

¹⁶⁵ *Id.*

disclosure of the practice by the former National Security Agency contractor Edward J. Snowden.”¹⁶⁶ The obvious question then, is how would this conversation have been started if Snowden did not do what he did? This is the role that the whistleblower court would play. It would, at least when the public health and safety is concerned, start the conversation. It is true that the whistleblower court would be under seal but, at a certain point, the findings, much like the announcements of the SEC’s actions after investigating whistleblower tips, would be made public to the extent the information did not endanger national security. At worst, if the whistleblower court found itself in a gray area such as the legality of the NSA’s surveillance program, then it could have begun the conversation by notifying Congress through the appropriate channels.

Importantly, the whistleblower court begins to look more like the Dodd-Frank Act provisions that the executive branch has fully embraced and encouraged. Reverting back to the flowchart,¹⁶⁷ the national security whistleblower’s complaint no longer goes straight up to the President. Rather, it now looks much more like the Dodd-Frank Act whistleblower’s line, which begins in the private sphere and goes outside the corporation, across to the SEC, and thus up to the President. The national security whistleblower’s complaint now goes outside the internal structure of the executive branch of the government and into the judiciary that was legislated by Congress. From there, the judges and other parties concerned have a much better chance at resolving any issues that may exist.

CONCLUSION

A whistleblower court would push the executive branch toward the middle of a spectrum that has at one end the Dodd-Frank Act whistleblowing apparatus, which highly encourages the practice, and at the opposite end, the Obama Administration prosecuting whistleblowers under the 1917 Espionage Act. Although not enjoying the robust protections and the monetary rewards that corporate whistleblowers have under the Dodd-Frank Act, national security whistleblowers will no longer need to disclose confidential information to the public because of the ability to report government fraud or abuse to the whistleblower

¹⁶⁶ Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. TIMES (Jan. 17, 2014), http://www.nytimes.com/2014/01/18/us/politics/obama-nsa.html?_r=0.

¹⁶⁷ See *supra* Part II.

court. The debate in this country over Snowden's disclosure definitely suggests that the NSA surveillance program is a hotly contested issue. Rather than suffer the problems caused by uncontrolled public disclosures that the Obama Administration now faces, encouraging whistleblowing and having an effective mechanism in place to foster an appropriate environment for whistleblowing are steps toward preventing and addressing frauds and other violations of law while at the same time protecting the government's legitimate need for secrecy when it comes to our national security. The whistleblower court is an effective mechanism and strikes this balance by providing a legitimate means for national security whistleblowers to safely transmit their concerns to the judiciary thereby preventing the leaks of classified information to the press.

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