Blowing in the Wind: Answers for Federal Whistleblowers

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> And how many times can a man turn his head,
> and pretend that he just doesn't see?
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> Bob Dylan, *Blowin' in the Wind* (Columbia Records 1963)

Whistleblower protection laws have been on the books for over thirty years, encouraging United States Government employees to report fraud, waste, and abuse, while promising to protect them from retaliation. Unfortunately, the laws have become an unexpected minefield for the intrepid Federal employee who unknowingly risks his or her career by taking the promise of protection at face value. This article documents the nearly complete failure of whistleblower legislation either to curb government malfeasance through whistleblowers' disclosures or to protect workers who act on the false promise of protection from reprisal. Whereas the author provides a brief guide to filing a whistleblower appeal with the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB), he demonstrates that both agencies have essentially nullified the Whistleblower Protection Act (WPA). The article shows that the MSPB has rejected the vast majority of whistleblower appeals that have come before it, as has the Federal Circuit Court of Appeals. The author argues that this ignominious record is a direct result of excessive judicial deference for initial decisions made by a large cadre of hearing examiners employed by the MSPB. The author demonstrates that MSPB's self-styled "administrative judges" are a deceptive and inadequate substitute for "administrative law judges," with none of the Congressionally-mandated qualifications and independence of the latter. The article concludes with support for legislative reforms, including a new proposal to eliminate or at least curb the dominant role of biased initial decision-makers.

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I. PROMOTING FEDERAL EMPLOYEE DISCLOSURES OF AGENCY WRONGDOING BY PROMISING PROTECTION FROM RETALIATION

Whistleblower protection laws have been on the books for over thirty years, encouraging United States Government employees to report fraud, waste, and abuse, while promising to protect them from retaliation. Whistleblower Protection has its origins in the Civil Service Reform Act of 1978 (CSRA).[1] Upon signing the CSRA into law, President Jimmy Carter declared that "[t]he act assures that whistleblowers will be heard, and that they will be protected from reprisal."[2] The Senate Report accompanying passage of the Act likewise reflected the twin goals of encouraging disclosure while protecting whistleblowers from retaliation.

> Often, the whistle blower's reward for dedication to the highest morale [sic] principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses.[3]

In addition to creating whistleblower rights, the CSRA gave most non-probationary Federal employees the right to file appeals with the Merit Systems Protection Board (MSPB or Board), contesting prohibited personnel practices (PPPs), such as removals, reductions in pay, and suspensions.[4] The CSRA also created the Office of the Special Counsel (OSC) and charged it with both investigating disclosures and defending

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[1] Civil Service Reform Act of 1978 (CSRA), October 13, 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at various sections of 5 U.S.C.).

[2] President Jimmy Carter, *Statement on Signing CSRA into Law*, Oct. 13, 1978, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29975#ixzz1mI2LnUJ7.

[3] S. REP. 95-969 (1978 U.S.C.C.A.N. 2723, 2746).

[4] Pub. L. No. 95-454, Sec. 101, codified at 5 U.S.C. § 2301 (2006) *et seq.* The law proscribes twelve prohibited personnel practices (PPPs). Agency officials are not permitted to (1) discriminate, (2) consider improper recommendations, (3) coerce political activity, (4) obstruct competition or (5) encourage a candidate to withdraw from competition, (6) grant a preference not authorized by law, (7) engage in nepotism, (8) retaliate for whistleblowing or (9) the exercise of a grievance or appeal right, (10) discriminate on the basis of conduct that does not affect job performance, (11) knowingly violate the preference rights of a veteran, or (12) engage in other actions that would violate a law, rule or regulation that implements the merit system principles. 5 U.S.C. § 2302(b). The MSPB is authorized generally to hear and adjudicate appeals from PPPs. *See* 5 U.S.C. § 1204(a)(1). The Board comprises 3 members appointed by the President, with the advice and consent of the Senate, not more than 2 of whom may be of the same political party. 5 U.S.C. § 1201.

whistleblowers against retaliatory personnel actions before the MSPB.[5] A decade later, finding that "OSC had not brought a single corrective action case since 1979 to the [MSPB] on behalf of a whistleblower,"[6] Congress passed the Whistleblower Protection Act (WPA) of 1989, granting whistleblowers the right to pursue their own cases before the MSPB.[7] The OSC also retained its obligations to assist whistleblowers[8] and investigate disclosures.[9]

The WPA is today the primary Federal statute seeking to encourage and protect Federal employee whistleblowers.[10] In enacting the WPA, Congress found that:

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[5] Pub. L. No. 95-454, Sec. 202 (codified at 5 U.S.C. §§ 1211–1219).

[6] S. Rep. 103-358, 2 (1994 U.S.C.C.A.N. 3549, 3550). The OSC, in turn, blamed the MSPB and the courts for the failure of the CSRA to protect whistleblowers. *See* Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015 (1991) (Mr. Fong is an OSC attorney).

[7] Pub. L. No. 101-12, 103 Stat. 32 (1989) (codified in scattered sections of 5 U.S.C.). *See also* 5 U.S.C. § 1221 (Individual Right of Action).

[8] *See* 5 U.S.C. § 1201.

[9] *See, e.g.*, 5 U.S.C. § 1213; 5 U.S.C. § 2302(b)(8)(B).

[10] Although this article is limited to the WPA, numerous other statutes include whistleblower protections for specific types of disclosures. The Inspector General Act contains substantive protections against whistleblower reprisal for disclosures made to an inspector general, unless made "with the knowledge that it was false or with willful disregard for its truth or falsity." 5 U.S.C. App. § 7(c). The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL) administers the whistleblower provisions of 21 laws covering U.S. workers. *See* http://www.whistleblowers.gov/. *See also* National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142 (2006); Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C.A. § 5567 (2011); Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087 (2006); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2006); Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651 (2006); Sarbanes–Oxley Act, 18 U.S.C. § 1514 (2006); Occupational Safety and Health Act, 29 U.S.C. § 660 (2006); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367 (2006); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2006); Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (2006); Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (2006); Clean Air Act (CAA), 42 U.S.C. § 7622 (2006); Comprehensive Environmental Response, Compensation and Liability Act (Super Fund), 42 U.S.C. § 9610 (2006); Seaman's Protection Act (SPA), 46 U.S.C. § 2114 (2006); International Safe Container Act (ISCA), 46 U.S.C. § 80507 (2006); Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2006); Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (2006); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2006); Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129 (2006); Affordable Care Act (ACA), Pub. L. No. 111-148, Sec. 1558 (2009); Food Safety Modernization Act (FSMA), Pub. L. No. 111-353, Sec. 402 (2011). The DOL also has some responsibilities, sometimes shared with other agencies, for enforcing the whistleblower provisions of statutes such as the Dodd-Frank Act, 15 U.S.C. § 78u-6 (2006); Family and Medical Leave Act (FMLA), 29 U.S.C. § 2615 (2006); Fair Labor Standards Act (wage & hour, child labor, minimum wage, overtime) 29 U.S.C. § 215(a)(3) (2006). *See also* William Dorsey, *An Overview of Whistleblower Protection*

> (1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures; [and]
> (2) protecting employees who disclose Government illegality waste and corruption is a major step toward a more effective civil service.[11]

Congress declared that the purpose of the WPA "is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government."[12]

Unfortunately, the WPA has become an unexpected minefield for the intrepid Federal employee who unknowingly risks his or her career by taking the law's promise of protection at face value.[13] Whistleblower legislation has failed to either curb government malfeasance through whistleblowers' disclosures,[14] or protect workers who act on the false promise of protection from reprisal.[15] Analyzing the language of the WPA, cases decided under the Act, other scholarly accounts, and reports by the

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Claims at the United States Department of Labor, 6 J. NAT'L ASS'N ADMIN. L. JUDGES 43, 48–52 (2006).

The Equal Employment Opportunity Commission (EEOC) hears complaints under the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (2006); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d) (2006); Equal Pay Act, 29 U.S.C. § 206(d) (2006); and Americans with Disabilities Act (ADA), 42 U.S.C. § 12203(a) (2006). Some statutory provisions for whistleblower protection simply provide for a cause of action in Federal district court. *See, e.g.*, Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1132(a), 1140 (2006); False Claims Act, 31 U.S.C. § 3730(h) (2006); Title IX (gender equity in education), 20 U.S.C. § 1681 (2006) (*see* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1508 (2005)). The National Labor Relations Board hears complaints under the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(4) (2006). In addition to Federal laws, virtually all states recognize some sort of common law or statutory protections for whistleblowers. *See, e.g.*, Courtney J. Anderson Dacosta, *Stitching Together the Patchwork: Burlington Northern's Lessons for State Whistleblower Law*, 96 GEO. L. J. 951, 955–56 (2008); Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1641–44 (2008).

[11] Pub. L. No. 101-12, Sec. 2 (1989); *see* 5 U.S.C. § 1201.

[12] *Id.*

[13] Skeptics anticipated and have chronicled many of the law's shortcomings. For contemporaneous perspectives on the relative significance of the WPA's adoption, *see* Thomas M. Devine & Donald G. Aplin, *Whistle Blower Protection—The Gap Between The Law And Reality*, 31 HOW. L.J. 223 (1988); Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope For Whistleblowers*, 43 RUTGERS L. REV. 355 (Winter, 1991). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-93-3, WHISTLEBLOWER PROTECTION: DETERMINING WHETHER REPRISAL OCCURRED REMAINS DIFFICULT 1 (1992) ("We found that even though the Whistleblower Protection Act of 1989 was intended to strengthen and improve protection for whistleblowers, employees claiming reprisal for whistleblowing at OSC are finding that proving their cases is as difficult now as it was before the act was passed."), *available at* http://161.203.16.4/d36t11/148065.pdf.

[14] *See* Part II, *infra.*

[15] *See* Part V, *infra*.

OSC and the MSPB, this article reveals that the vast majority of courageous Federal whistleblowers have been left adrift in the wind, while even the relatively small percentage of government employees who "successfully" invoke whistleblower protection law still suffer significant personal and career damage.[16] Meanwhile, the perpetrators of fraud, waste, and abuse, including those who also are guilty of retaliation against the whistleblowers, routinely escape any discipline for their conduct, and the damages they cause continue unabated.[17]

It is a Federal employee's legal obligation to report fraud, waste, and abuse.[18] Nevertheless, caution is strongly advisable. If history is any guide, it is very unlikely that the whistleblower will receive assistance from the OSC, either through investigation of the disclosure or defense against agency retaliation.[19] Although some Federal employees may be inclined to blow the whistle anonymously, the OSC refuses to investigate anonymous disclosures.[20] An agency Inspector General will accept an anonymous disclosure, but anonymity is very difficult to maintain, and if retaliated against the whistleblower will have a much more difficult time proving that the adverse personnel action was in retribution for the disclosure.[21]

Therefore, this article provides a brief guide to filing a whistleblower appeal with the MSPB,[22] and discusses MSPB case law, highlighting its traps for the unwary.[23] The article then proceeds to catalogue the appalling record of the MSPB in rejecting the vast majority of whistleblower appeals that have come before it, and the even more pusillanimous record of the

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[16] *See infra* Part V.
[17] *See infra* Part II.
[18] Federal employees are required to report such wrongdoing. *See* 5 C.F.R. § 2635.101(b)(11) (2011) ("Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities"); *see also* E.O. 12674, Sec. 101(k) (1989). Federal employees also have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General. 28 U.S.C. § 535(b) (2006). In addition, there are a variety of other statutes and regulations that mandate particular types of reporting and/or reporting by certain categories of employees. *See, e.g.*, 43 C.F.R. § 3.104-7 (violations of the Federal Acquisition Regulation); 31 U.S.C. §§ 1351, 1517(b) (2006) (violations of the Antideficiency Act); 38 C.F.R. § 1.201 (2011) (Employee's duty to report violations of Veterans Affairs laws or regulations); 45 C.F.R. §§ 73.735-1301, 1302 (2011) (Employee's duty to report violations of fraud, waste or abuse in programs of the Department of Health and Human Services); 41 U.S.C. § 2106 (2006) (Food and Drug Administration); 40 U.S.C. § 611 (2006) (General Services Administration).
[19] *See infra* Part II.
[20] *See, e.g.*, MERIT SYSTEMS PROT. BD., BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES 23 (Nov. 2011), *available at* www.mspb.gov.
[21] *See id.* at 23–24.
[22] *See infra* Part III.
[23] *See infra* Part IV. *See also* MERIT SYSTEMS PROT. BD., WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES (Sept. 2010) (emphasizing case law), *available at* www.mspb.gov; L. PAIGE WHITAKER, CONG. RESEARCH SERV., THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW (March 12, 2007) (emphasizing statutory language and legislative history), *available at* http://www.fas.org/sgp/crs/natsec/RL33918.pdf.

Federal Circuit.[24] The article next turns to a central reason that the WPA has been such an utter failure: a large cadre of extremely biased MSPB "administrative judges," cut-rate agency servants who masquerade as "administrative law judges," with none of the Congressionally-mandated qualifications or independence of the latter.[25] Finally, the article briefly discusses current proposals to further amend whistleblower protection laws for the third time in thirty years, before concluding with the author's proposal to mandate an end to judicial deference for decisions of MSPB's glorified hearing examiners.[26]

II. THE OSC'S ABDICATION OF ITS STATUTORY DUTIES.

Matters that have come to public attention because of whistleblower disclosures include some of the most disturbing revelations of government malfeasance in recent memory: "the lack of intelligence supporting the invasion of Iraq, prisoner abuse at Abu Ghraib, unauthorized wire-tapping, memos supporting the use of torture in interrogations, and unconstitutional procedures for classifying detainees as enemy combatants."[27] The OSC itself cites other shocking disclosures, including misconduct at a U.S. military mortuary, where body parts of service members killed while on active duty were lost and dismembered, fetal remains of military families were shipped inside plastic pails and used cardboard boxes, and management exposed mortuary staff to a corpse that may have been infected with contagious tuberculosis; patient abuse and neglect, medical errors, unsanitary and unsafe conditions, and records falsification at a Veteran's Affairs Medical Center; retaliatory surveillance of whistleblowing employees' emails by the Food and Drug Administration (FDA), and FDA attempts to initiate criminal prosecution of the whistleblowers; numerous disclosures by Federal Aviation Administration officials about unsafe airline conditions; and many others.[28]

As a Field Solicitor for the United States Department of the Interior, I myself made such disclosures and even testified in a United States District Court that the Bureau of Indian Affairs (BIA) relied on "something like an honor system" to keep track of monies owed to over 300,000 Native Americans by companies that leased their lands and extracted their mineral resources, evidence that was cited in the court's opinion finding a government breach of trust, a claim later settled by Congress in the amount of $3.5 billion.[29] More recently, as Chief Counsel for the United States

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[24] *See infra* Part V.
[25] *See infra* Part VI.
[26] *See infra* Part VII.
[27] Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 422 (2010) (internal citations omitted).
[28] *See* http://www.osc.gov ("News" tab).
[29] *See* Cobell v. Kempthorne, 532 F. Supp. 2d 37, 44 (D.D.C. 2008). *See also* Robert J. McCarthy, *Transcript of Trial Testimony*, 1679–1732, Oct. 23, 2007, *available at*

Section of the International Boundary and Water Commission, U.S.-Mexico (IBWC), I disclosed a wide range of illegal, costly and dangerous fraud, waste, and abuse that imperils millions of people on both sides of the border as well as the entire boundary ecosystem.[30]

Whereas disclosures such as these are a vital source of information essential to a democracy, most fraud, waste, and abuse that is personally observed by Federal employees goes unreported to anyone with authority to investigate or take other remedial action. A random survey of more than 40,000 Federal employees in 2010 by the MSPB reveals that more than ten

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http://www.justice.gov/civil/cases/cobell/docs/pdf/10232007_pmtranscript.pdf. In retaliation for my testimony, I was accused of a criminal violation of the "Trade Secrets Act." *See* PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER), *Lawyer Exposing Rip-Off of Indian Assets Faces Firing Threat*, Aug. 28, 2007, *available at* www.peer.org/news/news_id.php?row_id=911. After resigning as part of a settlement, I was awarded a "Courageous Lawyer Award" by the Oklahoma Bar Association. *See* 79-29 OKLA. BAR J. 2558 (Nov. 8, 2008).

For a history of the BIA and its centuries-long breach of the Federal trust responsibility, see Robert J. McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1 (2004). For a recent analysis of the use of criminal laws to retaliate against whistleblowers, see Jesselyn Radack and Kathleen McClellan, *The Criminalization of Whistleblowing*, 2 AM. U. LAB. & EMP. L. F. 57, 57–58 (2011) ("The Obama administration has prosecuted five criminal cases under the Espionage Act, which is more than all other presidential administrations combined.").

[30] Although whistleblowers normally find it very hard to find subsequent employment, interim leaders at the IBWC ironically viewed me as a potential ally when I was hired to help deal with decades of gross mismanagement. Unfortunately, a lame-duck Commissioner appointed by President Bush following the 2008 election had a different agenda. I was removed three days after making disclosures of fraud, waste, and abuse, allegedly for being insufficiently "collegial." On the day I filed my appeal to the MSPB, the IBWC planted on the internet an unbelievably obscene attack on me. Although denied MSPB discovery, I traced the post back to the agency with the use of subpoenas directed to the internet providers, obtained pursuant to a state court defamation complaint. *See* McCarthy v. John Do Re, No. 2010-3008 (El Paso County, Tex., filed Aug. 11, 2010). Agency officials defended a subsequent FOIA action by declaring that they had wiped and disposed of dozens of computers, thereby inadvertently admitting as well their systematic destruction of potentially relevant evidence throughout the MSPB appeal. *See* IBWC Declaration filed in McCarthy v. USIBWC, EP-11-CV-00208-PRM (W.D. Tex. 2011). In yet another FOIA suit, the court harshly condemned IBWC's unwillingness to produce other records sought in relation to my MSPB appeal. Memorandum Opinion, PEER v. USIBWC, No. 10-19-RCL, at 8 (D.D.C. Feb. 7, 2012) ("The most charitable reading of the Commission's interpretation [of the FOIA request] was that it was reasonably calculated to provide PEER with as few documents as possible."). Notwithstanding allegations of discovery misconduct and falsification of evidence (including an admittedly false personnel document describing me as "at will" and "probationary"), the MSPB upheld my removal, a decision that is now on appeal at the Federal Circuit. *See* McCarthy v. IBWC, 116 M.S.P.R. 594 (2011), *petition for rev. filed* Sept. 27, 2011 (Fed. Cir. 2011-3239). Meanwhile, I have published a historical legal analysis and proposal for reinvention of the IBWC: Robert J. McCarthy, *Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S.—Mexico*, 14-2 WATER L. REV. 197 (2011).

percent of Federal employees had personally observed "illegal or wasteful activities" in their own agencies in just the prior 12 months.[31] Although the WPA designates OSC as the primary recipient of whistleblower disclosures,[32] a mere one percent of those who observed wrongdoing said they reported it to the OSC.[33] Approximately one percent of those who observed wrongdoing said they reported it to the Government Accountability Office (GAO), one percent reported it to law enforcement, and five percent said they reported the misconduct to an Agency Inspector General (IG).[34] Thus, less than one in ten employees who observed wrongdoing reported it to a designated outside reporting agency.

According to the survey, approximately one-third of those who observed wrongdoing reported the activities to a supervisor or higher-level agency official, although more than one-third said they reported to no one, and many respondents appear to have reported only to co-workers, family, or friends.[35] Thus, considering both internal agency reports and external reports, it appears that fewer than half of those who said they personally observed wrongdoing also said they reported it to someone arguably in a position to address it.

Nine out of ten survey respondents said they would be more likely to make disclosures if they thought "[s]omething would be done to correct the activity,"[36] yet more than half reported that a "[b]elief that nothing would be done to stop it" would make them less likely to report wrongdoing.[37] The OSC has done little to instill faith in whistleblowers either that their

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[31] MERIT SYSTEMS PROT. BD., *supra* note 20, at 2, 4. Survey respondents were asked to respond yes or no the following question: "During the past twelve months did you personally observe or obtain direct evidence of one or more illegal or wasteful activities involving your agency? (Note: Do not answer 'yes' if you only read about the activity in the newspaper or heard about it as a rumor.)" *Id.* at 29. Such activities included stealing Federal funds or property; waste caused by unnecessary or deficient goods or services; waste caused by a badly managed program; tolerating a situation or practice which poses a substantial and specific danger to public health or safety; use of an official position for personal benefit; unfair advantage in the selection of a contractor, consultant, or vendor; and other serious violation of law or regulation. *Id.* at 5. Although the MSPB did not attempt to determine the actual cost of such wrongdoing, survey respondents who reported knowledge of such activities estimated that 35% involved more than $100,000, and another 35% involved amounts between $5,000 and $100,000. *Id.* at 7, Figure 1. Of course these dollar figures do not begin to take into account the cost represented by threats to human safety and health, loss of respect for the public sector, and the corrupting influence of such Government misconduct.

[32] *See, e.g.*, 5 U.S.C. § 1213, 2302(b)(8)(B) (2006).

[33] MERIT SYSTEMS PROT. BD., *supra* note 20, at, 8, Table 4.

[34] *Id.*

[35] *Id.* Exact percentages are unavailable because respondents were asked to "mark all that apply." *Id.*, Appendix at 31.

[36] *Id.* at 16, Figure 2.

[37] *Id.* at 17, Figure 3.

disclosures will be investigated or that they will be protected against retaliation:

> Upon receipt of a disclosure, [OSC] attorneys review the information to evaluate whether there is a substantial likelihood that the information discloses one or more of the categories of wrongdoing described in 5 U.S.C. § 1213. If the Special Counsel determines that there is a substantial likelihood that the information falls within one or more of those categories, he or she is required by § 1213(c) to send the information to the head of the agency for an investigation.
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> Upon receipt of a referral for investigation from the Special Counsel, the agency head is required to have the allegations in the disclosure investigated, and to send a report to the Special Counsel describing the agency's findings. The whistleblower has the right to review and provide OSC with comments on the report. The [OSC attorneys] and Special Counsel review the report to determine whether the agency's findings appear to be reasonable. When that review is complete, the Special Counsel sends the agency report, any comments by the whistleblower, and any comments or recommendations by the Special Counsel, to the President and congressional oversight committees for the agency involved. A copy of the agency report, and any comments on the report, are placed in OSC's public file.[38]

The OSC "processed and closed" a total of 1,086 whistleblower disclosures in FY 2010, including 961 new disclosures, and 125 pending disclosures carried over from the prior fiscal year.[39] However, OSC's investigations in FY 2010 substantiated whistleblowers' disclosures in only 62 cases and found the disclosures to be unsubstantiated in just five cases, apparently closing 94 percent of disclosures without concluding an investigation.[40] OSC referred 24 disclosures to agency heads for investigation and report in FY 2010 and sent just two disclosures to agency IGs for further investigation. Whereas OSC forwarded a total of 67 Agency head reports to the President and Congress, the vast majority of whistleblower disclosures apparently were investigated by no one.[41]

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[38] U.S. OFFICE OF SPECIAL COUNSEL, REPORT TO CONGRESS FOR FISCAL YEAR 2010, at 19 (2011).

[39] *Id*. at 24, Table 6.

[40] *Id*.

[41] *Id*. For the most part, I cite herein FY 2010 case statistics, for both OSC and MSPB. They are generally the most recent readily available, but they also tend to present OSC and MSPB in what should be the most favorable possible light. Former OSC Special Counsel, Scott Bloch, an appointee of President Bush, served from 2004 to 2009. After leaving office, he pleaded guilty to contempt of Congress for withholding information from Congressional investigators, concerning his destruction of evidence of his own illegal partisan political activity. *See* Carol D. Leonnig, *Bush Special Counsel Bloch to Plead Guilty to Withholding Evidence from Probe*, WASH. POST, April 23, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/04/22/AR2010042205724.html; Memorandum Opinion (sentencing), United States v. Scott J. Bloch, Magistrate No. 10-0215m-01, (D.D.C. Feb. 2, 2011), *available at* http://legaltimes.typepad.com/files/bloch_ruling.pdf.

Although the OSC may also seek disciplinary action against an employee who has committed whistleblower retaliation,[42] the OSC has been loath to use this power.[43]

A minority of MSPB survey respondents, 42 percent, said they felt "that I could disclose wrongdoing without any concerns that the disclosure would make my life harder."[44] MSPB reports that "approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing also perceived either threats or acts of reprisal, or both."[45] About half reported these or other negative consequences, including supervisors and co-workers being "unhappy with me."[46]

The WPA charges the OSC with the duty to receive allegations of PPPs and to investigate such allegations,[47] as well as to conduct an investigation of possible PPPs on its own initiative, absent any allegation.[48] The OSC may require agency investigations and reports concerning actions the agency is planning to take to rectify those matters referred;[49] seek an order for "corrective action" by the agency before the MSPB;[50] seek "disciplinary action" against officers and employees who have committed PPPs;[51] intervene in any proceedings before the MSPB, with the individual appellant's consent;[52] and seek a stay from the MSPB for any personnel action pending an investigation.[53]

While providing whistleblowers with an alternate avenue to the MSPB in the WPA, Congress reiterated the "primary role" of the OSC to protect whistleblowers from retaliation.

> 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 by (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing—(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices; (B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and (C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help

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[42] 5 U.S.C. § 1212(a), 1215 (2006).
[43] *See, e.g.*, U.S. OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2008 11 (2008), *available at* www.osc.gov.
[44] MERIT SYSTEMS PROT. BD., *supra* note 20, at 20, Figure 4.
[45] *Id.* at Transmittal Letter.
[46] *Id.* at 32.
[47] 5 U.S.C. § 1212(a)(2).
[48] *Id.* § 1214(a)(5).
[49] *Id.* § 1213(c).
[50] *Id.* §§ 1212(a)(2), 1214(b)(2).
[51] *Id.* §§ 1212(a)(2), 1215.
[52] *Id.* § 1212(c).
[53] *Id.* § 1212(a)(2).

> accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[54]

Unfortunately, OSC protects whistleblowers no better than it has pursued corrective action for the fraud, waste, and abuse they report.[55] OSC received 2,431 PPP Complaints during FY 2010, and carried over an additional 769 complaints from FY 2009.[56] OSC filed zero Corrective Action Complaints with the MSPB in FY 2010, none in the prior two years, and only one each in 2006 and 2007.[57] OSC filed no Disciplinary Action Complaints against the perpetrators of PPPs with the MSPB in FY 2010, none in 2009, three in 2008, and none in 2006 or 2007.[58] OSC says it negotiated a total of 55 "favorable" resolutions of disciplinary actions on behalf of whistleblowers in FY 2010.[59] This number ranges from 20 to 37 per year from 2006 to 2009.[60] OSC survey respondents who had filed PPP Complaints with OSC were overwhelmingly dissatisfied with OSC's response.[61]

III. HOW TO FILE A WHISTLEBLOWER APPEAL

U.S. Park Police Chief Theresa Chambers was fired by the Interior Department for warning that cutbacks in NPS personnel had compromised public safety in the Capitol.[62] After seven long years of appeals, including two trips to the Federal Circuit and three to the MSPB Appeals Board, Chambers finally won her job back.[63] She is considered both a whistleblower success story and a stark warning to would-be whistleblowers that for the few who "succeed," this is the price of success.

Jesselyn Radack, an ethics advisor at the Department of Justice, was repaid for disclosing FBI misconduct in the "American Taliban" case by being put on the No-Fly List from 2003 through 2009 (at one point, she was even asked to drink her own breast milk by a TSA agent).[64] Bunnatine

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[54] Pub. L. No. 101-12, Sec. 2 (1989); *see* 5 U.S.C. § 1201.
[55] *See* U.S. OFFICE OF SPECIAL COUNSEL, FY 2010 ANNUAL REPORT TO CONGRESS (2010), *available at* http://www.osc.gov/documents/reports/ar-2010.pdf.
[56] *Id*. at 13.
[57] *Id*. at 14, Table 4.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] For example, 22 of 263 Survey respondents said they obtained the result that they wanted from OSC. 241 said they did not. *Id.* at 32, Appendix B.
[62] Chambers v. Dep't of the Interior, 116 M.S.P.R. 17 (2011).
[63] *Id.*; *see also*, Public Employees for Environmental Responsibility, *Teresa Chambers Restored As Chief Of The U.S. Park Police—Resounding Legal Victory Appears to Finally Resolve 7-Year Whistleblower Case*, Jan. 11, 2011, *available at* http://www.peer.org/news/news_id.php?row_id=1445. PEER attorneys represented Chambers throughout her ordeal. *Id.*
[64] *See* Dylan Blalock, WHISTLEBLOWER.ORG, *Traitor: The Whistleblower and the 'American Taliban'—A Must Read*, Feb. 16, 2012 (book review), *available at* http://www.whistleblower.org/blog/42-2012/1753-qtraitor-the-whistleblower-and-the-

Greenhouse was the highest-ranking civilian contracting official at the Army Corps of Engineers when she exposed an illegal multi-billion dollar no bid contract to Halliburton for the reconstruction of Iraq, an act for which she lost her position. Career FBI Special Agent Jane Turner exposed FBI failures to protect child sex crime victims on North Dakota Indian Reservations, for which she was removed from her position. Dr. David Lewis produced scientific research that forced the EPA to stop promoting the application of sewage sludge on farm land, for which he was fired. Robert Ranghelli disclosed that military veterans awaiting burial at Arlington National Cemetery were stored unrefrigerated and allowed to decompose before burial, for which he, too, was fired by the National Funeral Home.[65] These stories are more typical of the whistleblower experience.[66]

Nevertheless, when a Federal employee does the right thing and is confronted with a retaliatory personnel action, a WPA appeal provides the only recourse. The WPA expanded existing civil service protections that were available to permanent Federal employees by extending protection to probationers and temporary employees, and even to applicants for employment.[67] Additionally, the protection of the law has been extended to "an employee believed to have engaged in protected activity even though the employee may not have actually done so."[68] Congress also changed the phrase "a disclosure" to "any disclosure," a measure that emphasizes the lack of a *de minimis* standard.[69] In 1994, the WPA was further amended, in part because MSPB case law failed to reflect this change in statutory language.[70] The 1994 amendments also clarify and strengthen rules governing OSC responsibilities to protect whistleblowers.[71]

Although they are not the subject of this article, the WPA also expressly protects employees from prohibited personnel practices taken not

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american-talibanq-a-must-read. *See* JESSELYN RADACK, TRAITOR: THE WHISTLEBLOWER AND THE "AMERICAN TALIBAN" (2012).

[65] Some of their cases are still on appeal. *See* National Whistleblowers Center, http://www.whistleblowers.org/index.php?option=com_content&task=blogcategory&id=71&Itemid=108&limit=11&limitstart=0.

[66] *See, e.g.*, C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER (2001); David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 113 (1995) ("A recent study of eighty-four whistleblowers revealed that 82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to attempted suicide.").

[67] *See* 5 U.S.C. § 2302(a)(2)(A) (2006); *see also, e.g.*, Horton v. Dep't of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995).

[68] *See, e.g.*, Special Counsel v. Dep't of the Navy, 46 M.S.P.R. 274, 280 (1990).

[69] *See* S. REP. 100-413 (1988) at 13.

[70] "Perhaps the most troubling precedents involve the Board's inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind." H. REP. 103-769 (1994) at 19.

[71] S. REP. 103-358, 1–2 (1994 U.S.C.C.A.N. 3549, 3550).

due to whistleblowing but because an employee may have engaged in activities that are often related to whistleblowing, such as exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation;[72] testifying for others or lawfully assisting others in the exercise of any appeal, complaint, or grievance right;[73] cooperating with or disclosing information to an Inspector General or Special Counsel;[74] or refusing to obey an order that would violate the law.[75]

The WPA does not cover all employees or all agencies, specifically excluding certain confidential or policy-making positions, and others designated by the President.[76] The statute does not apply to federal workers employed by the Postal Service or the Postal Rate Commission,[77] the Government Accountability Office,[78] the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities.[79] Although not mentioned in the WPA, government lawyers are not excluded from its coverage.[80] Their unique situation, bound by sometimes competing legal obligations and ethics rules, has been the subject of considerable comment.[81]

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[72] 5 U.S.C. § 2302(b)(9)(A).
[73] *Id.* § 2302(b)(9)(B).
[74] *Id.* § 2302(b)(9)(C).
[75] *Id.* § 2302(b)(9)(D).
[76] *Id.* § 2302(a)(2)(B).
[77] *Id.* § 2105(e). The Postal Service has adopted a whistleblower protection regulation. *See* USPS EMPLOYEE AND LABOR RELATIONS MANUAL (ELM), Section 666.18, *available at* http://about.usps.com/manuals/elm/html/elmc6_031.htm.
[78] § 2302(a)(2)(C)(iii).
[79] § 2302(a)(2)(C)(ii). Statutes other than the WPA may provide certain protections for whistleblowers excluded from coverage under the WPA. *See, e.g.*, 5 U.S.C. § 2303 (2006) (FBI); 10 U.S.C. § 1587 (2006) (Civilian Employees of the Armed Forces); 10 U.S.C. § 2409 (2006) (Contractor Employees of the Armed Forces); 50 U.S.C. § 2702 (2006) (Department of Energy defense contract employees Whistleblower protection program); 10 U.S.C. § 1034 (2006) (Military Whistleblower protection program).

The misnamed Intelligence Community Whistleblower Protection Act (ICWPA), § 5 U.S.C. App. § 8H, does not actually protect whistleblowers against reprisal. Instead, it simply authorizes employees of intelligence agencies to bring matters of "urgent concern" to congressional attention through the Office of Inspector General. Such whistleblowers are protected under the Inspector General Act, however, the Secretary of Defense may restrict IG action in certain intelligence and national security matters. 5 U.S.C. Appx. § 8(b)(1). Additionally, any disclosure to someone other than the IG would be illegal under the Espionage Act of 1917, 18 U.S.C. §§ 793–799.
[80] *See, e.g.*, McCarthy v. IBWC, 116 M.S.P.R. 594 (2011); Wilcox v. IBWC, 103 M.S.P.R. 73 (2006); Cosby v. Department of Justice, 80 M.S.P.R. 409 (1998).
[81] *See, e.g.*, Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 128 (2003); Charles S. Doskow, *The Government Attorney*

There are three avenues to MSPB review of a whistleblower case: (1) from a complaint filed by the OSC under the Board's original jurisdiction;[82] (2) from an "otherwise appealable action" (OAA) in which an employee with certain statutory appeal rights aside from the WPA contests an adverse personnel action on grounds in addition to whistleblower retaliation;[83] or (3) from an "individual right of action" (IRA) appeal filed by a person alleging retaliation.[84]

As documented above, it is highly unlikely that OSC will file a complaint with MSPB on behalf of a whistleblower.[85] Therefore it is essential that a whistleblower know how to file an appeal, either as an OAA or an IRA. In an IRA appeal, the appellant is someone who lacks OAA appeal rights.[86] An IRA appeal begins with a complaint to OSC.[87] Employees who have OAA appeal rights are defined by statute, and normally are non-probationary employees who have served for one or two years continuously.[88] The employee raises the defense of reprisal for

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and the Right to Blow the Whistle: the Cindy Ossias Case and Its Aftermath (a Two-Year Journey to Nowhere), 13 FED. CIRCUIT B.J. 117 (2003); Kristina Hammond, *Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers*, 18 GEO. J. LEGAL ETHICS 783 (2005); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L.Q. 1033 (2007); Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008); Jessica Shpall, *A Shakeup for the Duty of Confidentiality: the Competing Priorities of a Government Attorney in California*, 41 LOY. L.A. L. REV. 701 (2008); Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421 (2010). Federal government lawyers are not excused from mandatory duties to report wrongdoing, therefore the more likely ethical and legal violations to be on the part not of whistleblowers but of those lawyers who choose to stay silent in order to protect their careers. *See* James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEM. POL. & CIV. RTS. L. REV. 633 (2005).

[82] 5 U.S.C. § 1214(b)(2)(C) (2006).

[83] *See id.* §§ 7701, 7513(d).

[84] *Id.* §§ 2302(b)(8), 1214(a)(3).

[85] *See supra* Part II.

[86] 5 U.S.C. § 1221, 1214(a)(3).

[87] § 1214(a)(3). An appellant may not bring a different allegation of whistleblowing before the Board than he or she brought before OSC. *See* Ward v. Merit Systems Protection Board, 981 F.2d 521 (Fed. Cir. 1992).

[88] *See* 5 U.S.C. § 7511(a). Depending on whether the employee is in the "competitive" or "excepted" service, he or she normally must have served continuously for one or two years, respectively. *Id.* A detailed discussion of the statute and case law regarding appeal rights may be found at Merit Systems Prot. Bd., *Navigating the Probationary Period after* Van Wersch *and* McCormick, Sept. 2006, *available at* www.mspb.gov. "These cases, Van Wersch v. Department of Health & Human Services and McCormick v. Department of the Air Force, provide that some individuals who have traditionally been thought of as probationers with limited rights may actually be entitled to the same rights afforded to employees with finalized appointments." *Id.* at ii. *See also*, Van Wersch v. Dep't of Health & Human Servs., 197 F.3d 1144 (Fed. Cir. 1999), and McCormick v. Dep't of the Air Force, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003).

whistleblowing to one of two kinds of adverse personnel actions, either for "such cause as will promote the efficiency of the service" (generally referred to as conduct-based adverse actions)[89] or performance-based adverse actions against employees for "unacceptable performance."[90]

MSPB regulations define the procedure for adverse action appeals.[91] There is an additional set of regulations for whistleblower appeals,[92] although the same procedural rules apply regardless of the nature of the appeal.[93] Upon receipt of an appeal, MSPB assigns the case to an administrative judge, who typically will determine jurisdiction, conduct a hearing, consider the evidence, and issue an initial decision.[94] The decision of the administrative judge is subject to review by the three-member Board of the MSPB.[95] That decision, in turn, is subject to review on appeal to the United States Court of Appeals for the Federal Circuit.[96]

The administrative judge must first determine whether MSPB has jurisdiction over the appeal before proceeding to the merits.[97] The employee must occupy a covered position in a covered agency to bring a claim under the WPA, as discussed above. If the appeal is an IRA, the appellant must establish that he or she exhausted remedies through the OSC.[98] The time limits for filing an IRA appeal depend on the action taken by OSC.[99] If OSC notifies the whistleblower that it has decided not to file on the whistleblower's behalf, then the whistleblower has 60 days in which to file the direct appeal.[100] If OSC takes no action on the complaint within 120 days, the whistleblower may file the appeal directly with the MSPB.[101] MSPB will decline jurisdiction over any issues that were not raised and exhausted before the OSC.[102] In an OAA, if the appellant sought relief from

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[89] 5 U.S.C. § 7513(a) (2006).
[90] *Id*. § 4303(a). Appeals from such actions are filed pursuant to 5 U.S.C. §§ 4303(e), 7701.
[91] 5 C.F.R. § 1201 (2011).
[92] *Id*. § 1209.
[93] § 1209.3.
[94] *Id.* § 1201.
[95] *Id*.
[96] 5 U.S.C. § 7703(b)(1) (2006). Cases where jurisdiction is shared by both the MSPB and the Equal Employment Opportunity Commission (mixed cases) are appealable to the Federal district courts, and then to the respective circuit courts rather than the Federal Circuit. *Id*.
[97] *See* Schmittling v. Dep't of the Army, 219 F.3d 1332 (Fed. Cir. 2000). However, if it is clear that the Board has jurisdiction over the appeal, the Federal Circuit will not remand the case as a prerequisite to making its own decision on the merits. *See* Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367 (Fed. Cir. 2001).
[98] *See* 5 C.F.R. § 1209.5(a) (2011).
[99] *See id.* § 1209.5(a).
[100] 5 U.S.C. § 1214(a)(3)(A). The Board's regulation provides a 65-day time limit from the date of issuance of OSC's notification. *See* 5 C.F.R. § 1209.5(a)(1).
[101] *Id*.; *see also* 5 U.S.C. § 1214(a)(3)(B).
[102] *See, e.g.*, Ward v. MSPB, 981 F.2d 521, 526 (Fed. Cir. 1992).

OSC, the same time limits apply;[103] if not, the deadline for filing an appeal is 30 days after the effective date of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later.[104] Appeals may also come to the MSPB from grievances brought by the employee under negotiated grievance procedures.[105]

The appellant must make non-frivolous allegations that: (1) he or she engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action.[106] The Federal Circuit has held that "non-frivolous jurisdictional allegations supported by affidavits or other evidence confer Board jurisdiction."[107]

A request to stay the personnel action pending appeal to the MSPB may be granted by the administrative judge when raised in connection with a whistleblower appeal, either an IRA or an OAA.[108] An order granting or denying a stay request is not a final order and therefore cannot be the subject of a petition for review.[109] An interlocutory appeal is the only means for securing immediate review of an order regarding a stay request.[110] A party may file a motion asking the administrative judge to withdraw on the basis of personal bias or other disqualification;[111] however, the MSPB "Judge's Handbook" suggests that such a motion would be futile.[112]

The administrative judge must hold a hearing on the merits if the appellant requests one, the appeal has been timely filed, and it is within the Board's jurisdiction. The appellant's burden at the hearing on the merits is to prove the facts supporting the nonfrivolous allegations by preponderant evidence.[113] The Board has held that there are three steps in a complete analysis of an employee's whistleblower defense to an adverse personnel action: first, is the employee's disclosure a protected whistleblowing

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[103] 5 C.F.R. § 1209.5(a).
[104] *Id.* § 1201.22(b)(1).
[105] 5 U.S.C. § 7121.
[106] *See* 5 C.F.R. § 1209.6(a)(5); *see also, e.g.*, Rusin v. Dep't of the Treasury, 92 M.S.P.R. 298 (2002).
[107] Dick v. Dep't of Veterans Affairs, 290 F.3d 1356, 1364 (Fed. Cir. 2002).
[108] *See* 5 C.F.R. §§ 1209.8–11 (2011). The Administrative Judge has discretion to certify an interlocutory appeal of an order regarding a stay request in accordance with 5 C.F.R. § 1201.92.
[109] *See* Weber v. Dep't of the Army, 47 M.S.P.R. 130 (1991).
[110] 5 C.F.R. §§ 1201.91–93.
[111] *See* 5 C.F.R. § 1201.42.
[112] *See* MERIT SYSTEMS PROTECTION BOARD JUDGE'S HANDBOOK 10 (2007), *citing* Bieber v. Dep't of the Army, 287 F.3d 1358, 1362–63 (Fed. Cir. 2002) (according an agency administrative judge essentially the same presumption of neutrality enjoyed by an Article III Federal Judge).
[113] *See* 5 C.F.R. § 1209.7(a); *see also, e.g.*, Langer v. Dep't of the Treasury, 265 F.3d 1259, 1265 (Fed. Cir. 2001).

activity under 5 U.S.C. § 2302(b)(8). Second, was the disclosure a contributing factor in the personnel action? Third, can the agency prove by clear and convincing evidence that it would have taken the same personnel action absent the disclosure?[114]

MSPB regulations specify an administrative judge's powers and authority.[115] Although discovery is controlled by MSPB regulations,[116] an administrative judge may look to the Federal Rules of Civil Procedure for additional guidance.[117] An administrative judge has authority to order parties to respond to discovery motions.[118] An administrative judge's discovery-related rulings are reviewed under an abuse of discretion standard.[119] An administrative judge has the authority to order the parties to produce evidence and witnesses whose testimony would be relevant, material, and not redundant.[120] The agency must arrange for the appearance of its employees as witnesses when ordered to do so by the administrative judge.[121] When an appeal presents material credibility issues, the administrative judge must address them.[122] All material allegations raised by the parties, even if they are not reviewable by the Board, must be mentioned in the administrative judge's initial decision. A verbatim record made under the supervision of the administrative judge must be kept of every hearing and will be the sole official record of the proceeding.[123]

The initial decision may be appealed to the three-member Board by filing a Petition for Review (PFR) with the MSPB within 35 days of issuance.[124] Alternatively, the appeal from the initial decision may be made directly to the Federal Circuit.[125] The Board must overturn an initial decision sustaining an agency action if the petitioner establishes that the agency action was based on harmful procedural error, or that it was otherwise not in accordance with law.[126] The Board must invalidate an agency decision that is based on a violation of constitutional due process, including advance notice and opportunity to respond prior to the agency decision.[127] The Board may reverse the initial decision when the petitioner

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[114] *See* Sanders v. Dep't of the Army, 64 M.S.P.R. 136 (1994), *aff'd,* 50 F.3d 22 (Fed. Cir. 1995) (Table); *see also* 5 C.F.R. § 1209.7.
[115] 5 C.F.R. § 1201.41.
[116] *Id.* §§ 1201.71–75.
[117] *Id.* § 1201.72(a).
[118] *See id.* § 1201.41(b)(4).
[119] Montgomery v. Dep't of the Army, 80 M.S.P.R. 435, 438–42 (1998).
[120] *See* 5 C.F.R. § 1201.41(b)(10).
[121] *See generally id.* §§ 1201.81–85.
[122] Hillen v. Dep't of the Army, 35 M.S.P.R. 453 (1987).
[123] 5 C.F.R. § 1201.53(a).
[124] *Id.* § 1201.114(d).
[125] 5 U.S.C. § 7703 (2006).
[126] *Id.* 7701(c)(2).
[127] The appellant must establish a "property right" in his or her employment before he is entitled to constitutional due process, which in most cases excludes probationary and

shows there is new and material evidence that, despite due diligence, was not available when the record closed; or that the decision is based on an erroneous interpretation of statute or regulation.[128] To overcome an administrative judge's findings of fact, the petitioner must establish, by specific reference to the record, that the initial decision is based on an erroneous interpretation or application of the statutory requirements governing the weight of evidence.[129]

The Federal Circuit Court of Appeals employs the following standard of review on appeal of MSPB decisions.

> We may only reverse a Board decision if we find the decision to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law; or unsupported by substantial evidence. . . . We must reverse a decision of the Board if it . . . is not in accordance with the requirements of the Due Process Clause of the Fifth Amendment or any other constitutional provision.[130]

Factual findings are reviewed under the substantial evidence test, whereas rulings on discovery are reviewed for abuse of discretion.[131] Legal and jurisdictional rulings are reviewed *de novo*.[132] These are the APA standards of review as applied to hearings conducted by Administrative Law Judges.[133]

IV. HOW TO ESTABLISH ELEMENTS OF A WHISTLEBLOWER DEFENSE

To be entitled to protection under the WPA, a whistleblower must first disclose information that he or she reasonably believes to be a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.[134] The test for determining whether an employee had a reasonable

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temporary employees. There is a body of case law that addresses ex parte communications at the agency level prior to the decision on a personnel action. *See, e.g.*, Stone v. Fed. Deposit Ins. Co., 179 F.3d 1368 (Fed. Cir. 1999); Sullivan v. Dep't of the Navy, 720 F.2d 1266 (Fed. Cir. 1983). In accordance with these decisions, the Board or the court may find that a due process denial resulted from an ex parte communication on the merits that was not reflected in the charges under certain circumstances. The Board has ruled that it has no jurisdiction over constitutional issues in IRA appeals. *See, e.g.*, McCarthy v. IBWC, 116 M.S.P.R. 594, 19–20.

[128] 5 C.F.R. § 1201.115 (2011). Evidence is "material" when it is of sufficient weight to warrant an outcome different from that of the initial decision. Russo v. Veterans' Admin., 3 M.S.P.R. 345, 349 (1980).

[129] 5 C.F.R. § 1201.115.

[130] Ward v. U.S. Postal Serv., 634 F.3d 1274, 1278 (Fed. Cir. 2011) (citations and internal quotation marks omitted).

[131] Kirkendall v. Dep't of the Army, 573 F.3d 1318, 1321 (Fed. Cir. 2009).

[132] Coradeschi v. Dep't of Homeland Sec., 439 F.3d 1329, 1331 (Fed. Cir. 2006).

[133] 5 U.S.C. § 706.

[134] *Id.* § 2302(b)(8).

belief that his or her disclosures revealed wrongdoing is: "could 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 in 5 U.S.C. § 2302(b)(8)?[135]

Even if the whistleblower establishes his or her reasonable belief, not all disclosures are protected. For example, disclosure of information that is publicly known is not considered to be a disclosure under the WPA.[136] Disclosure of information that is required by law or Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs is unprotected, unless made to the agency's Inspector General, to "another employee designated by the head of the agency to receive such disclosures" or to the Office of the Special Counsel.[137]

If it is the regular duty of the employee to make the disclosure in question, and the disclosure is made through the usual channels employed in the performance of those duties, then the disclosure is not protected.[138] "Criticism directed to the wrongdoers themselves is not normally viewable as whistleblowing."[139] Even if the potential whistleblower makes a report to the employee's own supervisor, if the supervisor is the wrongdoer, there is no protected disclosure.[140] The WPA expressly provides that the statute is "not to be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[141]

The first category of protected disclosures includes information the whistleblower reasonably believes to be a violation of any law, rule, or regulation.[142] Whereas the statute appears plain on its face, the Federal Circuit has held that "disclosures of trivial violations do not constitute protected disclosures."[143] However, it is not necessary that the disclosure specify a particular kind of fraud, waste, or abuse that the WPA was intended to reach,[144] nor must the whistleblower cite a specific law, rule, or

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[135] Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).
[136] Meuwissen v. Dep't of the Interior, 234 F.3d 9, 13 (Fed. Cir. 2000).
[137] 5 U.S.C. § 2302(b)(8) (2006).
[138] Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1354 (Fed. Cir. 2001).
[139] Horton v. Dep't of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995).
[140] Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1350 (Fed. Cir. 2001).
[141] 5 U.S.C. § 2302(b). *See also id.* § 7211, providing that an employee is guaranteed the right to freely petition or furnish information to Congress, a Member of Congress, a committee, or a Member thereof.
[142] *Id.* § 2302(b)(8)(A)(1).
[143] Drake v. Agency for Int'l Dev., 543 F.3d 1377, 1381 (Fed. Cir. 2008). *But see* Horton v. Dep't of the Navy, 66 F.3d 279, 283 (Fed. Cir. 1995) (holding that disclosing a seemingly minor event can be a qualified disclosure when its purpose is to show the existence of a repeated practice).
[144] Mogyorossy v. Dep't of the Air Force, 96 M.S.P.R. 652, ¶ 11 (2004).

regulation, provided that there was sufficient information in the disclosure to indicate that a law, rule, or regulation was violated.[145]

The whistleblower may also disclose what he or she reasonably believes to be gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[146] The inclusion of the word "gross" when referring to disclosures about mismanagement creates a *de minimis* standard.[147] An abuse of authority requires an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons."[148] The term "an abuse of authority" also does not have a qualifier such as "gross," and therefore a disclosure may qualify for whistleblower protection even if the abuse is not substantial.[149] The Federal Circuit has provided some guidance on what is meant by a substantial and specific danger to public health or safety, finding that disclosure by a U.S. Park Police Chief to the media of information that traffic accidents had increased on the Baltimore-Washington Parkway as a result of staffing shortages qualified as a protected disclosure.[150]

Assuming the whistleblower has made a protected disclosure, the next question is whether he or she has suffered a personnel action, the agency's failure to take a personnel action, or the threat to take or not take a personnel action as a result of the disclosure. "A personnel action" is defined to include a wide range of employment decisions, including "[a]ny . . . significant change in duties, responsibilities, or working conditions."[151]

Unlawful retaliation occurs when an "employee who has authority to take, direct others to take, recommend, or approve any personnel action" proceeds to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment

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[145] Daniels v. Dep't of Veterans Affairs, 105 M.S.P.R. 248, ¶ 12 (2007).

[146] 5 U.S.C. § 2302(b)(8)(A)(2) (2006).

[147] *See, e.g.*, Czarkowski v. Dep't of the Navy, 87 M.S.P.R. 107, ¶ 12 (2000) (holding that gross mismanagement "is a decision that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."). The actions of the agency must be so serious "that a conclusion the agency erred is not debatable among reasonable people." White v. Dep't of the Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

[148] D'Elia v. Dep't of the Treasury, 60 M.S.P.R. 226, 232 (1993).

[149] Embree v. Dep't of the Treasury, 70 M.S.P.R. 79, 85 (1996) ("Abuse of authority does not incorporate a de minimis standard.").

[150] *See* Chambers v. Dep't of the Interior, 602 F.3d 1370, 1379 (Fed. Cir. 2010).

[151] 5 U.S.C. § 2302(a)(2)(A) (2006). Covered actions may include: an appointment; a promotion; a disciplinary action; a reassignment; a reinstatement; a performance evaluation; a decision concerning pay, benefits, or awards, or concerning education or training; a decision to order psychiatric testing; and "[a]ny other significant change in duties, responsibilities, or working conditions." *Id*.

because of" the disclosure of the wrongdoing.[152] Retaliation against an employee for reasons other than the employee's disclosure of fraud, waste and abuse does not violate the WPA, although it may violate other law.[153] For an agency's personnel action, inaction, or threat to constitute reprisal, the whistleblowing must be a contributing factor in the agency's decision to take, not take, threaten to take, or threaten not to take the personnel action.[154] "The words a contributing factor . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[155]

A whistleblower can establish that a disclosure was a contributing factor in one of two ways: (1) through the use of the knowledge/timing test; or (2) through the use of any other evidence demonstrating that the disclosure was a contributing factor. To establish under the knowledge/timing test that the disclosure was a contributing factor in the decision to take a personnel action, the whistleblower only needs to show that the deciding official knew of the disclosure and that the adverse action was initiated within a reasonable time of that disclosure.[156]

If the whistleblower cannot satisfy the knowledge/timing test, the contributing factor standard is determined by weighing factors such as "the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant."[157]

If the whistleblower establishes all of the foregoing, he or she is still unprotected "if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of" the whistleblowing.[158] When determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the MSPB considers three factors: (1) whether the agency had legitimate reasons for the personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision to take the personnel action; and (3) any evidence that the agency takes similar personnel actions

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[152] *Id*. § 2302(b).

[153] For example, retaliation against an employee for filing a grievance or an appeal, for cooperating with the OSC or an Inspector General (IG), or for refusing to obey an order that would require the individual to violate a law is prohibited by 5 U.S.C. § 2302(b)(9). *See* Spruill v. Merit Systems Prot. Bd., 978 F.2d 679, 690–92 (Fed. Cir. 1992).

[154] 5 U.S.C. § 1214(b)(4)(B)(i), 1221(e)(1).

[155] Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

[156] 5 U.S.C. § 1221(e)(1)(A), (B).

[157] Powers v. Dep't of the Navy, 69 M.S.P.R. 150, 156 (1995) (internal citations omitted).

[158] 5 U.S.C. § 1221(e)(2). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard of proof than preponderance of the evidence. 5 C.F.R. § 1209.4(d) (2011).

against employees who are not whistleblowers but who are otherwise similarly situated.[159]

The Board may order corrective action including placing the whistleblower "as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred," and "back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes."[160] An appellant who prevails on a WPA claim is entitled to an award for attorney fees.[161] An award of attorney fees may not be granted to an agency.[162] Finally, when the Board "determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215."[163]

V. THE MSPB'S NULLIFICATION OF WHISTLEBLOWER PROTECTION

MSPB statistics for cases decided by MSPB administrative judges show that the judges are "astoundingly biased in favor of the federal employers."[164] According to the National Whistleblowers Legal Defense & Education Fund, "[i]n all non-benefit cases decided in fiscal year 2008 the MSPB judges ruled in favor of employees a total of 1.7% of the time."[165]

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[159] Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir. 1999).

[160] *See* 5 U.S.C. § 1221(g)(1)(A); 5 C.F.R. § 1201.202(b). The Board may award compensation for future medical expenses that are the result of the retaliation and can be proven with reasonable certainty, under its authority to reimburse for "medical costs incurred." *See* Pastor v. Dep't of Veterans Affairs, 87 M.S.P.R. 609 (2001). The Board may not award nonpecuniary damages for mental distress under the consequential damages provision, however. Bohac v. Dep't of Agric., 239 F.3d 1334 (Fed. Cir. 2001). *See generally* Markiewicz-Sloan v. U.S. Postal Serv., 77 M.S.P.R. 58 (1997).

[161] 5 U.S.C. § 1221(g)(1)(B). A successful appellant is also entitled to an award of costs he incurred directly. Bonggat v. Dep't of the Navy, 59 M.S.P.R. 175 (1993) (reversing Wiatr v. Dep't of the Air Force, 50 M.S.P.R. 441 (1991)). Subpart H of 5 C.F.R. § 1201, applies to requests for attorney fees and consequential damages arising from these appeals. *See* 5 C.F.R. § 1209.3.

[162] *See* 5 C.F.R. §§ 1201.201–203, 1201.205; *see also* Lewis v. Dep't of the Army, 31 M.S.P.R. 476 (1986).

[163] 5 U.S.C. § 1221(f)(3) (2006).

[164] *See Federal Employees Have Less than 2% Chance of Success before MSPB Judges*, National Whistleblowers Legal Defense & Education Fund (March 11, 2010), at http://www.whistleblowersblog.org/2010/03/articles/legislation/federal-employees-have-less-than-2-chance-of-success-before-mspb-judges/.

[165] *Id*. *See also, Whistleblowers Still Run Daunting Gauntlet Under Obama—Minuscule Chances of Success, No New Policies and Key Slot Remains Unfilled*, Public Employees for Environmental Responsibility, July 14, 2010, http://www.peer.org/news/news_id.php?row_id=1374 ("An examination of decisions from Merit Systems Protection Board (MSPB) judges who hear whistleblower cases reveals that, on average, federal employees won less than one in 50 hearings (1.6%) in 2008, the latest year for which statistics are available . . . .").

These analyses, based on 2008 case statistics, were originally reported by a public interest group that routinely updates the existing record by attaining new case information pursuant to detailed Freedom of Information Act (FOIA) requests.[166] The most recent statistics posted on the group's website are for FY 2010, which are analyzed here just for IRA appeals to screen out non-whistleblower appeals. Of course, many whistleblower appeals are OAAs. Unfortunately, the MSPB does not specify which cases are OAAs. Of 6,537 initial decisions issued by administrative judges in 2010, 242 concerned IRAs. Of these 242 IRA decisions, just three ordered corrective action—a little over one percent.[167] Subtracting the 45 decisions that recorded a settlement agreement, the percentage of cases in which whistleblowers won a favorable outcome creeps up to 1.5%.[168]

Statistics compiled in MSPB's Annual Report confirm the accuracy of this analysis, although the MSPB puts a more positive spin on the numbers.[169] In addition to IRAs and OAAs, the reported cases include other adverse action appeals, retirement appeals, veterans' appeals and other miscellaneous issues. Of cases heard by administrative judges, four percent were IRAs, and 41 percent were adverse actions.[170] MSPB confirms that administrative judges heard 242 IRA appeals, dismissing 172 or 71 percent of them, mainly on jurisdictional grounds. Of the total cases heard, 45 or 20 percent were settled, and only 25 or ten percent were adjudicated. The MSPB does not report OAA whistleblower cases separately, although the administrative judges heard 2,668 appeals from "Adverse Actions by Agency" concerning non-probationary employees, and dismissed 1,366, or 51 percent. Of the total "adverse action" cases heard by administrative judges in FY 2010, 926 or 32 percent were settled and only 376 or 14 percent were adjudicated.[171] Of appeals of any type that were not dismissed

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166 *See* GOVERNMENT ACCOUNTABILITY IS A CITIZEN'S RESPONSIBILITY, http://civilservicechange.org (last visited May 9, 2012).

167 *Id.*

168 *Id.*

169 *See, e.g.,* MERIT SYSTEMS PROTECTION BD. FISCAL YEAR 2010 ANNUAL REPORT, at 25, Table 1 (Jan. 2011) (total cases) [hereinafter MSPB 2010 ANNUAL REPORT]. The total excludes "addendum" cases (e.g. petitions for enforcement, attorneys fees requests), and other miscellaneous matters. *Id.* The total is similar to the 5,917 cases heard by administrative judges in FY 2008. MERIT SYSTEMS PROTECTION BD. FISCAL YEAR 2008 ANNUAL REPORT at 19, Table 1 (November 2008) [hereinafter MSPB 2008 ANNUAL REPORT].

170 *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 27, Figure 1. The FY 2008 figures are similar: 4% IRAs and 47% adverse action cases. MSPB 2008 ANNUAL REPORT, *supra* note 169, at 20, Table 2.

171 *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 26, Table 2. In FY 2008 the figures were similar. Administrative judges heard 210 IRA appeals, dismissing 74% of them. Of the total IRA cases, 15% were settled, and 11% were adjudicated. The administrative judges heard 2,668 appeals from "Adverse Actions by Agency" concerning non-probationary employees, and dismissed 48%. Of the total "adverse action" cases heard

or settled, but actually adjudicated by administrative judges, including veterans and retirement appeals, MSPB reports that the agency action was upheld in 76 percent of the cases.[172] However, when you add in cases dismissed (initial decisions erroneously dismissing appeals are frequently remanded by the Board, as discussed below), the agency prevailed in a shocking 95 percent of all initial decisions.[173]

This means not just that the vast majority of appellants and virtually all whistleblowers then have the added burden of taking another appeal from the administrative judge to the Board, it also means that they are saddled with a record that has been created by a biased administrative judge. The administrative judge has vast discretion whether to grant a stay of the personnel action pending the appeal, to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, to rule on objections, and to declare the testimony of a witness credible or not. These rulings can be appealed, but the administrative judge's decisions are accorded considerable deference. Worst of all, as the Board is fond of saying, "[t]he credibility determinations of an administrative judge are virtually unreviewable on appeal."[174]

The three-member MSPB appeals Board disturbs precious few initial decisions that are issued by MSPB administrative judges.[175] In FY 2010, the Board received 639 PFRs seeking review of initial decisions.[176] Of 44 IRA appeals, five percent were dismissed, two percent were settled, 59 percent were denied, 18 percent were denied but reopened, and just 16

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by administrative judges in FY 2008, 35% were settled and only 17% were adjudicated. *See* MSPB 2008 ANNUAL REPORT, *supra* note 169, at 20, Table 2.

[172] *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 28, Figure 3. In FY 2008, by comparison, a mere 12% of appellants prevailed. *See* MSPB 2008 ANNUAL REPORT, *supra* note 169, at 21, Figure 2. This figure is higher than that earlier reported for all "non-benefit" appeals.

[173] *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 26, Table 2. In FY 2008, also counting dismissals that favor the agency, the agency prevailed in 93% of appeals before administrative judges. *See* MSPB 2008 ANNUAL REPORT, *supra* note 169, at 20, Table 2.

[174] *See, e.g.*, Reeves v. USPS, 2011 MSPB 102 at ¶ 15(2011) (citing Bieber v. Dep't of the Army, 287 F.3d 1358, 1364 (Fed. Cir. 2002)).

[175] "In its first 2,000 cases from 1979–88, the Board only ruled in favor of whistleblowers four times on the merits." From 2000 to 2009, the record is 3-53. "Most of the Board's rulings against whistleblowers are on grounds that the employee did not engage in protected speech, or that there was clear and convincing evidence the agency would have taken the same action even if the employee had remained silent." *Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372, Before the Subcomm. on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Comm. on Homeland Security and Governmental Affairs Comm*., 111th Cong., Appendix at 57 (2009) (prepared statement of Thomas Devine, Government Accountability Project), *available via* http://www.gpoaccess.gov/congress/index.html.

[176] *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 25, Table 1. The total again excludes "addendum" cases and certain miscellaneous matters. Id. In FY 2008, the Board received almost twice that number of PFRs, or 1,211. *See* MSPB 2008 ANNUAL REPORT, *supra* note 169, at 26, Table 5.

percent were granted.[177] Thus, the Board essentially affirmed 84 percent of IRA initial decisions. Of 251 PFRs concerning "Adverse Actions by Agency" filed by non-probationary employees, five percent were dismissed, two percent were settled, 69 percent were denied, nine percent were denied but reopened, and just 15 percent were granted.[178] The initial decision was ultimately reversed in only one percent of those PFRs "Denied but Reopened."[179] Thus, the Board again essentially affirmed 85 percent of "adverse action" initial decisions, which themselves had a 95 percent rate of affirmance for agency action. Comparable figures for FY 2008 indicate there has been some increase in the rates of reversal for all types of initial decisions appealed from administrative judges since the Obama-appointed Board members took over the majority from the Bush appointees, although it is unclear why the new Board heard only about half as many PFRs.[180]

The Board issued only 31 whistleblower decisions in calendar year 2010, granting the appellant's request for corrective action just once, for a whistleblower "success" rate of three percent. The administrative judges' initial decisions denying relief were affirmed in 15 cases, a rate of 48 percent. The remaining 16 cases, or 52 percent of the total, were remanded for further proceedings, mostly on grounds that the administrative judges had erroneously dismissed the appeals for lack of jurisdiction. In 2008, the Board issued just 20 whistleblower decisions, granted no requests for corrective action, affirmed the administrative judges' initial decisions denying relief in nine cases (45 percent), and remanded 11 cases (55 percent), again mainly due to erroneous dismissal for lack of jurisdiction. This analysis shows no greater reversal rate for whistleblower initial decisions under the Obama Board, but rather a continuation of the same apparent hostility toward whistleblowers.[181]

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[177] *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 32, Table 5. In FY 2008, the Board granted only 9% of IRAs. *See* MSPB 2008 ANNUAL REPORT, *supra* note 169, at 26, Table 5.

[178] *See* MSPB 2010 ANNUAL REPORT, *supra* note 169, at 32, Table 5. In 2008, the Board granted 13% of PFRs from "Adverse Actions by Agency." MSPB 2008 ANNUAL REPORT, *supra* note 169, at 26, Table 5

[179] MSPB 2010 ANNUAL REPORT, *supra* note 169, at 34, Figure 6.

[180] Because whistleblower cases are not reported separately we cannot tell exactly how they fared in relation to other personnel appeals. Thus, perhaps the best indicator for whistleblower appeals is the subset consisting of IRA appeals, where whistleblowing is the only issue. As indicated above, in FY 2008, the Board granted only 9% of IRA PFRs, whereas the Board granted 16% of IRA PFRs in 2010. The Board does not provide data for administrative judge rulings on IRAs in either year, thus it is not possible to say whether there has been any change in the rate at which administrative judges deny IRAs, however, there is no reason to expect that there would be.

[181] This finding is at odds with the initial expectations of many whistleblower advocates. *See, e.g., AFGE Applauds President Obama's Nominees for Merit System Protection Board*, American Federation of Government Employees, July 31, 2009, http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=1032. (AFGE is

The Federal Circuit has done little to balance the scales.[182] The court issued 21 decisions in whistleblower cases in 2010, none of which ordered corrective action. The court affirmed the Board's denial of whistleblower appeals in 18 cases and remanded for further proceedings in three. MSPB boasts that 98 percent of its decisions in FY 2011 were "left unchanged by the U.S. Court of Appeals for the Federal Circuit," exceeding MSPB's more modest goal of 92 percent.[183] The Government Accountability Project (GAP), which keeps close tabs on whistleblower appeals, says "[t]he

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"the nation's largest federal employees union." *Id.*) Indeed, employee advocates had good reason to expect a friendlier Board. *See, e.g.*, Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. L. & EMP. L. 707, 761–62 (2006). Yet such optimistic expectations have slowly evaporated as advocates have been disappointed by both the Board and the administration itself. Lawyers for U.S. Park Police Chief Theresa Chambers bemoaned the Obama administration's unwillingness to cut short her seven years of appeals, noting "the last two years of litigation occurred under the Obama administration which, to the surprise of many, showed no interest in resolving Chief Chambers' or other holdover whistleblower cases." *Teresa Chambers Restored as Chief of the U.S. Park Police—Resounding Legal Victory Appears to Finally Resolve 7-Year Whistleblower Case*, Public Employees for Environmental Responsibility, Jan. 11, 2011, http://www.peer.org/news/news_ id.php?row_id=1445. The Coalition for Change (C4C), a civil rights group comprising former and present Federal employees who have been victims of discrimination or reprisal had harshly criticized the outgoing Board. "As a result of very ideological administrative judges appointed to the [EEOC] and the MSPB, terminated Federal employees have not received fair hearings before these bodies." COALITION FOR CHANGE 2010 ANNUAL REPORT 1 (Feb. 2011) *available at* http://www.coalition4change.org/CforC%20annual% 20report.pdf. Yet C4C has since called for removal of MSPB Vice-Chair Wagner, citing a discrimination suit brought by a senior trial attorney that Wagner had supervised in the Government Accountability Office, alleging "age, race, and sex discrimination, retaliation, and a hostile and abusive work environment." *See* COALITION FOR CHANGE, LETTER TO OFFICE OF GOVERNMENT ETHICS (Oct. 20, 2011), *available at* http://www.scribd.com/doc/69664424/C4C-Requests-Investigation-of-MSPB-Vice-Chairman-Anne-Wagner. *See also* Williams v. Dorado, 576 F. Supp. 2d 72 (D.D.C. 2008); Williams v. Dorado, 691 F. Supp. 2d 52 (D.D.C. 2010). The suit was eventually settled out of court. *See* Williams v. Walker, *Discrimination Case Involving MSPB Vice Chair Anne Wagner, Settles out of Court*, MSPBWATCH.COM (Jan. 13, 2012), http://mspbwatch.net/ projects/nominees/Stipulation_of_Dismissal. Expectations of change in some other fields of law have also been met with disappointment. *See, e.g.*, Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 220–21 (2011) ("Additionally, in FOIA litigators' experience, the Justice Department's litigation positions were not perceptibly changed after the Obama transparency policies were announced.").

[182] "From its 1982 creation until passage of [the WPA in 1989], the Federal Circuit only ruled in whistleblowers' favor twice." *Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372, before the Subcomm. on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Comm. on Homeland Security and Governmental Affairs Comm*., 111th Cong., Appendix at 57 (2009) (prepared statement of Thomas Devine, Government Accountability Project).

[183] MSPB, PERFORMANCE AND ACCOUNTABILITY REPORT (PAR) FOR FISCAL YEAR (FY) 2011 9 (November 2011).

Federal Circuit Court of Appeals has a 3–219 track record against whistleblowers since Congress last reaffirmed the law in 1994."[184]

Yet even in those extremely rare cases when whistleblowers prevail, they still pay a high price. In many cases, agencies and the Board itself engage in wholesale character assassination to rationalize adverse agency actions by painting the whistleblower as a malcontent, incompetent, or worse.[185] Administrative judges compound the problem by cherry picking the record they have created in order to provide the strongest possible support for their decisions upholding agency actions. Few employers want to hire someone who has just been fired from government employment and is being publicly characterized as nothing more than a troublemaker. The stress of unemployment and defamation take a toll on family and other relationships, as well as personal health and well-being. There are also expenses of waging a years-long appeal against the combined forces of the Federal Government, including the seemingly bottomless purse of the agency and the backing of the Department of Justice in court appeals. A successful appeal may take several years,[186] during which time an appellant could well be without employment or income.

VI. JUDGING THE JUDGES

Administrative judges' bias has been the cause of much spilled ink over many decades. Most observers agree that a lack of independence from the agencies they serve is the main reason for the seemingly uniform bias of administrative judges in favor of those agencies.[187] Agency performance

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[184] *See House Oversight Committee Passes Key Federal Whistleblower Protections in 35-0 Vote*, GOVERNMENT ACCOUNTABILITY PROJECT (GAP) (Nov. 03, 2011), http://www.whistleblower.org/press/press-release-archive/2011/1575-house-oversight-committee-passes-key-federal-whistleblower-protections.

[185] Unfortunately, defamation is one of the intentional torts exempted from the government's waiver of sovereign immunity under the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2680(h). The FTCA also precludes suing federal employees individually for torts committed within the scope of their employment. 28 U.S.C. § 2679(b)(1). When a removal is accompanied by charges that impugn the employee's "good name," however, due process is violated in the absence of pre-termination notice and opportunity for the employee to clear his name. *Paul v. Davis*, 424 U.S. 693, 709 (1976). This fact is of special significance to IRA appellants who would otherwise have no such due process rights, because a liberty interest may be found even where there is no property interest. *Owen v. City of Independence*, 445 U.S. 622, 630 n.10, 633, n.13 (1980); *Codd v. Velger*, 429 U.S. 624, 627–28 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972). A liberty interest may be implicated "where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." *Brandt v. Board of Coop. Educ. Servs*., 820 F.2d 41, 45 (2d Cir. 1987).

[186] *See, e.g.*, Chambers v. Dep't of the Interior, 116 M.S.P.R. 17 (2011).

[187] *See, e.g.*, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57, 499–500 (1986); John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 34 WIDENER J. PUB. L. 33, 35 (2002), *citing* Hon. Edwin L. Felter, Jr., *Special Problems of State Administrative Law*

evaluation policies and decisions concerning pay and job tenure are believed to motivate administrative judges to support agency decisions on appeal.[188] Additionally, the historic underrepresentation of women and

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Judges, 53 ADMIN. L. REV. 403, 403-04 (2001); Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 782 n.76 (2005) (quoting a judge describing himself as the 'guardian of the Social Security Trust Fund'); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1195 (2006) ("Often, one of the litigants before the administrative judge is the judge's employer. When the agency appears in the matter, one of the lawyers before the administrative judge is a co-worker, at least in some broad sense. Often, the experts for one of the litigants are co-workers of the judge; often, the administrator of one of the litigants is in control of the judge's budget."); Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, XVII KAN. J. L. & PUB. POL'Y 362, 379 (2008) ("The problem with internal administrative review is that it is often a mere technicality because the decision-maker does not have the true independence and impartiality that is needed to reach fair resolutions"); Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 643 (2010) ("When an ALJ considers herself a protector of the treasury rather than a fair adjudicator of the law and facts, the result is that the claimant must essentially prove every element of her case beyond a reasonable doubt in order to prevail.") (internal citations omitted). Some argue that administrative law judges who are subject to the APA are now sufficiently insulated from agency influence. Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 26–27 (2005) (citing 5 U.S.C. §§ 554(d), 557(d)(1) (2006)). However, "[T]he American Bar Association felt it necessary to adopt a resolution supporting the decisional independence of administrative law judges, conditioned on the proposition that 'members of the administrative [law] judiciary be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct.'" Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 86 DENVER U. L. REV. 1, 7 (2008).

[188] *See, e.g.*, VICTOR ROSENBLUM, EVALUATION OF ADMINISTRATIVE LAW JUDGES: ASPECTS OF PURPOSE, POLICY, AND FEASIBILITY 1 (1983); L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 602 (1986); Paul R. Verkuil, *Reflections on the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992); Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997). *See also, e.g.*, Hummel v. Heckler, 736 F.2d 91, 94 (3d Cir. 1984) (administrative law judges alleged that HHS kept statistics on the percentage of cases in which each administrative law judges allowed and disallowed benefits, in order to discourage such awards). Nevertheless, some method of holding administrative adjudicators accountable is needed. *See, e.g.*, Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 592 (1994). One expert has proposed outside review by Federal judges and magistrates. *See* Charles H. Koch, *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 274 (1994). *See also id.* at 272 ("I perceive that the problems involve the failure of an unacceptable number of presiding officials, particularly those in the privileged position of ALJ, to perform their function fairly and with an acceptable level of competence and diligence. As with any large group, there are poor performances and failures of integrity.").

minorities among the ranks of the administrative judiciary, or other reasons for racial, class, or gender bias, has frequently been cited.[189]

Administrative agencies have employed "hearing examiners" to adjudicate appeals since at least 1906.[190] With the passage of the Administrative Procedure Act (APA) in 1946, Congress sought to limit agencies' control of these "examiners," to make them more secure in tenure and compensation, and to specifically prohibit performance evaluations.[191] A quarter-century later, the title "administrative law judge" was created by regulation,[192] and still later adopted by statute.[193] In 1978, with the adoption of the CSRA, Congress reaffirmed the APA's prohibition against performance evaluation of administrative law judges.[194] Other laws and regulations have been adopted to ensure that administrative law judges go through a rigorous screening and selection process, and maintain a degree

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[189] Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995); Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769 (2005); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (reporting "amazing disparities" in asylum grant rates among immigration judges); Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 642 (Fall 2010) ("some public assistance appellants are disadvantaged when they confront ALJs who hold a general bias against them because of their class, race, gender, disability or addiction").

[190] PAUL VERKUIL ET AL., THE FEDERAL ADMINISTRATIVE JUDICIARY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 799–800 (1992) [hereinafter ACUS REPORT], *available at* http://www.archive.org/stream/gov.acus.1992.rec.2/adminconf199202unse_djvu.txt. The ACUS REPORT relied, in part on JOHN H. FRYE, III, SURVEY OF NON-ALJ HEARING PROGRAMS IN THE FEDERAL GOVERNMENT, ACUS (Aug. 1991), *reprinted in* 44 ADMIN. L. REV. 261 (1992). The ACUS REPORT is summarized by Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJ's*, 7 ADMIN. L.J. AM. U. 589 (1993) (also proposing an alternative system for evaluation of administrative law judges that attempts to preserve their autonomy). Parts of the Report have also been published in Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992). Other participants have written about the data gathered for the Report. *See, e.g.*, Koch, *supra* note 188.

[191] *See* ACUS REPORT, *supra* note 190, at 803. *See also* Administrative Procedure Act (APA), 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301(d), 5372, 7521. *See also* S. REP. NO. 752, 79th Cong., 1st Sess. 29 (1945), *reprinted in* Administrative Procedure Act Legislative History, 1944–46, S. Doc. No. 248, 79th Cong. 233 (1946); O'Keeffe, *supra* note 188 (outlining legislative history and other aspects of performance evaluation of federal administrative law judges).

[192] 37 Fed. Reg. 16, 787 (1972).

[193] Pub. L. No. 95-251, 92 Stat. 183 (1978) (codified as amended at 5 U.S.C. § 5108 (2006)).

[194] *See* 5 U.S.C. § 4301(2)(D) (excluding administrative law judges from the definition of "employees" subject to performance evaluation. *See also* H.R. REP. NO. 1403, 95th Cong., 2d Sess. 87 (1978), *reprinted in* HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, 96th Cong., 1st Sess. 659 (Comm. Print 1979).

of independence from their employers.[195] Administrative law judges are entitled to absolute immunity from damages liability for their judicial acts.[196]

Doubts about the independence and judicial character of administrative law judges persist, despite the many reforms enacted in recent decades.[197] The notion that administrative law judges are akin to Article III federal judges in terms of judicial independence has been rejected by the Supreme Court.[198] Administrative Law Judges themselves have claimed agency interference in their judicial independence, in whistleblower appeals filed with the MSPB.[199]

Coast Guard administrative law judges were the subject of recent Congressional hearings regarding allegations that they are extremely biased to issue decisions that favor the agency, although the charges have been deemed unsubstantiated by the Government Accountability Office (GAO)[200] and the agency's own Inspector General.[201] A class action

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[195] *See* 5 C.F.R. § 930.203 (2011). Administrative law judges are exempt from performance evaluations by their agencies, 5 U.S.C. § 4301, and can be removed only for cause after a hearing before the MSPB. *Id.* § 7521. They receive periodic step increases in pay without approval by their employing agency, id. § 5335, and are not subject to the usual probationary period for agency employees. *Id.* § 3321(c). Cases are assigned to administrative law judges on a rotating basis, as far as is practicable, so that agencies cannot fix the results by choice of administrative law judge. 5 U.S.C. § 3105. Administrative law judges are independent of investigative or prosecutorial personnel in the agency. *Id.* § 554(d). They may not perform duties inconsistent with their duties as judges, *id.* § 3105, and may not consult any person or party, including agency officials, concerning a fact at issue in the hearing, unless with notice and opportunity for all parties to participate. *Id.* § 554(d)(1).

[196] Butz v. Economou, 438 U.S. 478, 508–14 (1978).

[197] Research suggests decisions made by administrative law judges employed by the National Labor Relations Board (NLRB) are significantly influenced by personal preferences rather than legal norms. *See* Cole Taratoot & Robert Howard, *Accountability and Independence: Administrative Law Judges and NLRB Rulings*, 1, 25 (July 1, 2009), *available at* http://ssrn.com/abstract=1428518.

[198] Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 142–43 (1953).

[199] *See, e.g.*, Schloss v. Soc. Sec. Admin., 93 M.S.P.R. 578 (2003); Pulcini v. Soc. Sec. Admin., 83 M.S.P.R. 685 (1999); Carr v. Soc. Sec. Admin., 78 M.S.P.R. 313 (1998); White v. Soc. Sec. Admin., 76 M.S.P.R. 447 (1997); Lawson v. Dep't of Health and Human Serv., 64 M.S.P.R. 673 (1994).

[200] GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESS, COAST GUARD ADMINISTRATIVE LAW JUDGE PROGRAM CONTAINS ELEMENTS DESIGNED TO FOSTER JUDGES' INDEPENDENCE AND MARINER PROTECTIONS ASSESSED ARE BEING FOLLOWED (June 2009). Ironically, the GAO cites as evidence that "the ALJs are not subject to undue influence from Coast Guard officials" the fact that "personnel actions against a judge, such as the removal of an administrative law judge, may only be taken through an independent agency, the Merit Systems Protection Board." *Id.* at cover page. The GAO also relies on the role of the Office of Personnel Management in maintaining an unbiased administrative judiciary. *Id.* at 11–12.

[201] U.S. OFFICE OF THE INSPECTOR GENERAL, DEPT. OF HOMELAND SECURITY, ALLEGATIONS OF MISCONDUCT WITHIN THE COAST GUARD ADMINISTRATIVE LAW JUDGE

recently filed in New York alleges systematic bias by Social Security administrative law judges against low-income disabled individuals seeking Social Security disability benefits. The lawsuit alleges that the judges conduct adversarial hearings, routinely cherry-pick and manipulate facts to support their preordained conclusions, willfully ignore established law (even explicit instructions from federal district courts and the Social Security Appeals Council), disregard evidence from treating physicians, engage in bullying and unprofessional behavior, thwart meaningful review of their decisions by deliberately failing to develop the evidentiary record, and effectively hold claimants to a higher evidentiary standard than what is set forth by law.[202]

A United States District Judge has offered one explanation for the continued perception of administrative law judges' bias, notwithstanding their theoretical insulation from corrupting influences.

> [j]udges in specialized courts, typically appointed for a term of years, have a temptation to look over their shoulders at the impact of their decisions on their future employment outside the specialized court, thus compromising their independence. This is notoriously a problem for administrative law judges, who regularly seek employment at the end of their terms with law firms that have regularly appeared before them. As a result, it is widely believed, though perhaps unfairly, that the decisions made by an outgoing administrative judge near the end of her term will seemingly be affected by the interests of the kind of clients represented by the law firms she would most like to join once her term is over.[203]

In 1992, a study of the "Federal Administrative Judiciary" by the Administrative Conference of the United States (ACUS) resulted in recommendations to change the process of administrative law judge

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PROGRAM (August 2010) (partly redacted), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-108_Aug10.pdf. The OIG report relies in part, ironically, on the assumption that detailed allegations of systematic bias provided by a retired administrative law judge were less reliable because she did not blow the whistle while still employed by the Coast Guard. *Id*. at 28–33.

[202] Complaint, Padro v. Astrue, 11-CV-1788 (E.D.N.Y. Apr. 12, 2011). Case documents are available at *http://www.urbanjustice.org/ujc/litigation/mental.html*. *See also*, Sam Dolnick, *Suit Alleges Bias in Disability Denials by Queens Judges*, N. Y. TIMES (Apr. 12, 2011) *available at* http://www.nytimes.com/2011/04/13/nyregion/13disability.html.

[203] The Honorable Jed Rakoff, *Lecture: Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4, 10 (2012). Of course Federal judges are not necessarily unbiased either, although one hopes they try to keep their prejudices out of the courtroom. *See, e.g., Judge Cebull's Racist 'Joke*,' N. Y. TIMES, A26, (Mar. 6, 2012) (editorial calling for resignation of the chief federal judge for Montana, following his "e-mail containing a joke based on sexual and racist slurs against President Obama"), *available at* http://www.nytimes.com/2012/03/06/opinion/judge-richard-cebulls-racist-joke. "He admitted the joke—involving suggestions of bestiality and the president's mother—was racist, but he said he personally was not." Kirk Johnson, *Montana: Judge Sends Racist Joke about Obama*, N.Y. TIMES, A13, Mar. 2, 2012, *available at* http://www.nytimes.com/2012/03/06/opinion/judge-richard-cebulls-racist-joke.

selection and to implement an annual performance review.[204] These recommendations resulted in part from findings that the current selection process, including the statutory veterans' preference, resulted in too few female and minority administrative law judges,[205] and that the restrictive administrative law judge appointment process produced an increased use of non-administrative law judge hearing officers, many of whom use the deceptively similar title, "administrative judge."[206]

The report caught many by surprise, as to this day it seems few people know or bother to appreciate that there is in fact a difference between administrative law judges and so-called administrative judges.[207] The former enjoy statutory guarantees of tenure and decisional independence, almost akin to those of a federal judge, whereas administrative judges' pay and job security depend on the performance evaluations of a superior.[208] Because administrative judges are paid far less than administrative law judges, agencies prefer them despite their relative lack of qualifications.[209]

The ACUS Report notes that agencies are free to use administrative judges rather than administrative law judges without much worry of violating due process, because the Supreme Court requires little in the way of decider independence to satisfy due process.[210] The APA itself imposes strict separation-of-functions requirements on presiding officers,[211] and it also mandates adjudication by independent administrative law judges.[212]

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[204] *See* ACUS REPORT, *supra* note 190, at 1056–62 (Conclusions and Recommendations).

[205] *Id*. at 944–45 ("In March 1990 there were 1,090 ALJs and only 59 (5.41%) were women. Minorities are similarly underrepresented. Of the 1,090, 32 (2.93%) were black and 30 (2.75%) were Hispanic.").

[206] *Id*. at 788–89.

[207] Even the distinguished former Chair of the National Conference of the Administrative Law Judiciary, Judicial Division, American Bar Association, mistakenly describes the MSPB as "an independent agency that has its own independent administrative law judges," who are immune from agency pressures. Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: the Right and the Wrong Kind*, 86 DENVER U. L. REV. 1, 1, 15 (2008). He contrasts that alleged situation with the ostensibly much less desirable position of state administrative law judges "who are civil servants" subject to "'judgmental' performance evaluations, which could result in a firing, demotion, pay raise or promotion." *Id*. at 16. As discussed *infra*, the MSPB employs a large cadre not of administrative law judges, but of administrative judges. *See also, e.g.*, Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L. J. 1477, 1478 and n. 2 (2009) (purporting to examine "intuitive" bias in 14,100 "administrative law judges," but citing to U.S. Department of Labor statistics that explicitly lump together "administrative law judges, adjudicators, and hearing officers.").

[208] ACUS REPORT, at 1031.

[209] *Id*. at 788.

[210] As noted in the ACUS REPORT, *supra* note 190, at 791–92, Goldberg v. Kelly, 397 U.S. 254 (1970), which signaled the "due process revolution" of the 1970s, required only that deciders not have previously participated in decisions they are called upon to review. 397 U.S. at 271. *See also, e.g.,* Amett v. Kennedy, 416 U.S. 134 (1974).

[211] 5 U.S.C. § 554 (2006).

[212] *Id*. § 556.

However, because cases involving "the selection or tenure of an employee" are exempt from the hearing provisions of the APA, MSPB is permitted to use administrative judges rather than administrative law judges.[213] The MSPB is authorized to assign such hearings to itself, to an administrative law judge or to an employee designated by the Board to hear such cases.[214]

MSPB historically has employed "one of the larger groups of non-ALJ adjudicators in the government."[215] As for its selection process for administrative judges, the MSPB reported to ACUS that "[p]ositions are filled in accordance with Schedule A appointment authority. The methods used for selecting applicants may include recruitment from a Vacancy Announcement, college recruitment, reassignment of in-house attorneys and inquiries from unsolicited outside applicants."[216] MSPB administrative judges are employed as GS-13 to GS-15 attorneys, "serving at the will of the Board."[217] The MSPB Chief Administrative Law Judge completes an annual performance appraisal for each administrative judge.[218]

Whereas the perception of administrative law judge bias persists, administrative judges like those employed by MSPB are far more suspect. Indeed, the performance of administrative judges at MSPB and elsewhere

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[213] *Id*. § 554(a)(2). The MSPB has an "Office of the Administrative Law Judge," that adjudicates appeals by Board employees and a limited class of cases arising under the Board's original jurisdiction, including disciplinary action complaints brought by the Special Counsel, proposed agency actions against an administrative law judge, and appeals by employees removed from the Senior Executive Service. However, MSPB contracts with other agencies (including, ironically, the Coast Guard) for the performance of administrative law judge duties in such cases. *See* MERIT SYSTEMS PROTECTION BD. FISCAL YEAR 2011 ANNUAL REPORT 6, 8 (2011) [hereinafter MSPB 2011 ANNUAL REPORT]; *see also* 5 C.F.R. § 1201.2 (2011) (original jurisdiction); *id.* § 1201.13 (appeals by Board employees); *id*. § 1201.125(a) (disciplinary action complaint brought by the Special Counsel); *id.* § 1201.140(a) (agency action against an administrative law judge).

[214] 5 U.S.C. § 7701(b). The MSPB organic statute makes specific references to "administrative law judges" but nowhere speaks of "administrative judges," although there are references to other "employees" to whom the MSPB may delegate authority. *Id.; see also, e.g.*, 5 U.S.C. § 1204(B)(1). The Board's regulations coin the term "administrative judge" by defining "judge" to include "[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board." 5 C.F.R. § 1201.4(a).

[215] ACUS REPORT, *supra* note 190, at 860.

[216] *Id.*

[217] *Id*. at 860 (citations omitted).

[218] *Id*. at 860. A search of federal employment records indicates there are no "Administrative Law Judges" employed by MSPB. The job title "Administrative Judge" does not officially exist. A search for "General Attorney," however, returns the names of MSPB's administrative judges, all of whom are GS 13 to GS 15 lawyers. *See* http://php.app.com/fed_employees10/search.php. In addition, the MSPB itself uses the term "Attorney Examiner" for performance evaluations of so-called administrative judges. *See* http://peer.org/docs/doj/7_14_10_MSPB_AJ_Performance_Standards.pdf (copy of 2010 "Performance Elements and Standards for MSPB Attorney Examiners").

evidences precisely such hyper-partiality. Federal immigration judges are akin to those of the MSPB, for example, lacking the statutory protections of administrative law judges.[219] Thus, they are subject to agency political pressures. "An example is the recent removal of more than a dozen Immigration Judges by the executive branch for an alleged failure to deport aliens at a fast enough pace."[220] Immigration judges allegedly are hired on the basis of "partisan political ties over expertise."[221] Circuit Courts of Appeals have been united in their criticism of such bias. The Seventh Circuit is particularly critical. In 2005 it reversed 40 percent of immigration administrative appeals, compared to a reversal rate of 18 percent for other cases in which the government was the appellee.[222] Such administrative judges are viewed by some not as "independent adjudicators" but as employees who report to the Department of Justice.[223]

Similarly, MSPB administrative judges exhibit numerous symptoms of bias. Aside from the circumstances of their employment, their sycophantic record of judgments in favor of administrative agencies belies any possibility of neutrality. Comparison of case statistics under the WPA with those under comparable statutes where initial decisions are made by administrative law judges reveals a vast disparity in outcomes. To recap: fewer than two percent of MSPB administrative judge rulings in whistleblower reprisal appeals reverse agency personnel actions; the Board, in turn, grants corrective action in about three percent of the whistleblower appeals that come before it; the Federal Circuit grants whistleblowers relief in fewer than two percent of WPA appeals. A recent study analyzed reversal rates in district court reviews of administrative decisions made after hearings held before administrative law judges concerning (1) social security disability, under the substantial evidence standard of review; and (2) veterans disability cases, under the standard of clearly erroneous review of material facts.[224] The study also examined reversal rates for FOIA cases, heard by district courts under a statutory *de novo* review standard on records compiled by the agency, since there is no administrative hearing.[225]

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[219] Jeffrey S. Lubbers, *Closing Remarks, Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 621, 627 (2007).

[220] Dobkin, *supra* note 187, at 380 (citing Carol Marin, *Patronage "Crime" Does Pay—for Justice Dept*., CHI. SUN-TIMES, Mar. 25, 2007, at B6, *available at* http://findarticles.com/p/articles/mi_qn4155/is_20070325/ai_n18757004).

[221] *Id*. at 381 (quoting Amy Goldstein & Dan Eggan, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1).

[222] Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1024–25 (2007).

[223] Dobkin, *supra* note 187, at 381 (quoting Brian G. Slocum, *Courts vs. the Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law*, 5 GEO. J. L. & PUB. POL'Y 509, 515 (2007)).

[224] Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 703 (2002).

[225] *Id*.

The administrative law judges themselves reversed more than 50 percent of agency social security disability determinations.[226] After further appeal through the Social Security Appeals Council, where more determinations were reversed, the district courts still reversed an average of 50 percent of the cases they reviewed.[227] Veterans' appeals from initial disability claims determinations had a reversal rate of 18 percent before the Board of Veterans Appeals (BVA), and the Court of Veterans Appeals reversed 50 percent of BVA decisions.[228]

Considering the similar standard of review, one might hypothesize that the Federal Circuit rate for reversals of MSPB cases would approximate that of Federal courts hearing social security disability appeals. The actual rates, however, are two percent versus 50 percent, respectively.[229] This is even more alarming considering the elevated rate of reversal by social security administrative law judges as compared to the MSPB administrative judges and Board. Using a similar but slightly less deferential standard of review, approximately half of initial veterans' disability determinations are eventually reversed by the courts, even after a significant rate of reversal at the BVA.

Federal district courts even reversed greater than ten percent of appeals from agency denials of document requests under FOIA, for which there is no administrative hearing, and many cases are decided on motions for summary judgment.[230] The author of the study was struck, ironically, by the paltry FOIA reversal rate, suggesting that "District courts seem to affirm FOIA cases almost instinctively."[231] Whistleblowers, as a group, would benefit immensely from a ten percent reversal rate at the Federal Circuit.

Numerous groups study appellate courts' reversal rates in a wide variety of cases. Virtually all of these organizations' comparisons suggest that something is awry with Federal Circuit review of whistleblower appeals. Some studies report, for example, that the U.S. Courts of Appeals affirmed 90 percent of all cases they decided from 1995 to 2005, whereas the U.S. Supreme Court reversed 64 percent of the cases it heard.[232] Other studies suggest an overall affirmation rate for all types of federal civil

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[226] *Id*. at 705.
[227] *Id*. at 705–06.
[228] *Id*. at 711.
[229] MSPB 2011 ANNUAL REPORT, *supra* note 213, at 9.
[230] Verkuil, *supra* note 224, at 712–13. Although Verkuil estimated 90% of FOIA cases are decided on summary judgment, *id*., a more recent analysis found that only about 38% are decided on pre-trial motions, however, less than 1% ever go to trial. The method of resolution of the remainder is unexplained. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 256–60 (2011).
[231] Verkuil, *supra* note 224, at 713.
[232] *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 (2005) (citations omitted).

appeals to be about 80 percent.[233] The Federal Circuit's especially high reversal rate of patent construction cases has been the subject of much comment.[234] A study of the nearly 6,000 state court death sentences imposed from 1973 to 1995 found 40 percent had been reversed by state or federal courts by 1995, 54 percent were still on appeal, and 87 percent of cases fully reviewed on appeal had been reversed by state or federal courts.[235] A recent large study of state court civil trials found the reversal rates for plaintiff appeals is 21.5 percent, compared with 41.5 percent for defendant appeals.[236] A series of studies of federal court employment discrimination cases over three decades finds employment discrimination plaintiffs, in particular, have far less success at trial and on appeal than defendants, something the authors attribute to federal court bias.[237] Notwithstanding such strong allegations of consistent bias, employment discrimination plaintiffs, like all types of plaintiffs, fared far better than whistleblowers, winning up to 40 percent of trial adjudications.[238] Employment discrimination plaintiffs also prevailed in 60 percent of appellate challenges to their trial court wins, and in ten percent of plaintiff appeals from defendants' trial court victories.[239]

Whereas bias against whistleblowers may contribute to the Federal Circuit's high affirmation rate with respect to MSPB decisions against whistleblowers, the more likely culprit is the institutional bias that infects the appeals process from the outset, contaminating the Court's review with a prejudicial administrative record constructed by unqualified administrative judges, to whom undeserved deference is liberally granted. Studies of whistleblower statutes comparable to the WPA, but which are not subject to the same type of administrative nullification, demonstrate this point.

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[233] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse***,** 3 HARV. L. & POL'Y REV. 103, 106 (2009).

[234] *See*, *e.g.*, S. Jay Plager, *The Federal Circuit as an Institution: On Uncertainty and Policy Levers*, 43 LOY. L.A. L. REV. 749, 756–63 (2010).

[235] Andrew Gelman, *et al*., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

[236] Theodore Eisenberg and Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38(1) J. LEGAL STUD. 121 (2009).

[237] Clermont & Schwab, *supra* note 233, at 103–04; *see also* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont *et al*., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003). For a lively debate about allegations of federal court bias, see Harry T. Edwards and Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L. Q. 723 (2002); Kevin M. Clermont & Theodore Eisenberg, *"Judge Harry Edwards: A Case in Point!"*, 80 WASH. U. L.Q. 1275 (2002).

[238] Clermont & Schwab, *supra* note 237, at 441.

[239] Clermont & Schwab, *supra* note 233, at 110.

A recent study of whistleblower complaints under the Sarbanes-Oxley Act, which protects corporate employees from reprisal for disclosing securities fraud, indicates a considerably better chance of complainant success than under the WPA.[240] The Occupational Safety and Health Administration (OSHA) is the agency initially charged with investigation of such complaints, and is thus perhaps somewhat analogous to OSC in the WPA regime. OSHA found for employees in 3.6 percent of complaints.[241] On appeal to administrative law judges, the reversal rate was 6.5 percent.[242] Although decisions may be further appealed for discretionary review by the OSHA Administrative Review Board, and then to the Circuit Courts,[243] the study did not include the third and fourth level of review.[244] The study concludes that the Sarbanes-Oxley Act, although much more protective than the WPA, does not protect employee whistleblowers to the extent Congress envisioned, nor to the degree provided under "comparable employee statutes" (not including the WPA).[245] The author recommends legislative fixes, including more employee-friendly provisions regarding the statute of limitations, jurisdiction, and burden of proof.[246]

In yet another study, GAO examined the success rate of whistleblowers in approximately 1,800 complaints filed in FY 2007 under the whistleblower protection statutes administered by OSHA.[247] Upon receipt of a complaint, OSHA investigates and issues a decision. The whistleblower and the employer have the right to appeal the decision within the Labor Department, normally to the Office of Administrative Law Judges (OALJ), and, ultimately, to the Administrative Review Board (ARB). After this administrative appeals process, either party may

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[240] Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007).
[241] *Id*. at 67.
[242] *Id*.
[243] *Id*. at 82.
[244] *Id*. at 86–87.
[245] The statutes the study compared include other OSHA whistleblower laws, EEOC cases, and Federal court cases (employment, torts and contracts). *Id*. at 93, Table 2.
[246] *Id*. at 131. Whistleblowers have had a surprising degree of success before the United States Supreme Court in cases involving a variety of statutory retaliation claims. *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 375 (2011). The Court has not agreed to hear any cases under the WPA, however.
[247] GOV'T ACCOUNTABILITY OFFICE, GAO-09-106, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY (January 27, 2009), *available at* http://www.gao.gov/assets/290/285189.pdf. *See also* GOV'T ACCOUNTABILITY OFFICE, GAO-10-722, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES (August 2010), *available at* http://www.gao.gov/new.items/d10722.pdf.

normally bring a legal action in a U.S. District Court or a U.S. Court of Appeals.[248]

GAO found that "[w]histleblowers received a favorable outcome in a small proportion of the complaints that were closed in fiscal year 2007, both in terms of initial decisions and on appeal, but the actual proportion may be slightly lower than Labor's data show."[249] Specifically, according to OSHA data, the agency's initial decisions favored whistleblowers in about 21 percent of complaints.[250] "At the appellate level, whistleblowers similarly won a minority of the cases closed in fiscal year 2007—not more than one-third of outcomes favored the whistleblower."[251] The Appeals Committee reviewed 69 appeals under the three statutes for which it hears appeals and eventually denied 68 of those cases. The whistleblower withdrew his complaint in the final case.[252] Under the remaining statutes, the OALJ heard 207 appeals in 2007, of which about one-third were settled or found in favor of the whistleblower.[253] About 50 cases were further appealed to the ARB, which dismissed or denied about 50 percent of the cases it decided.[254] GAO did not examine reversal rates on appeals to the federal courts.

Once again, although this broad array of whistleblower statutes provides much greater protection than the WPA, even without considering court appeals, the GAO called for improvements in OSHA investigations and data management, just as it did 20 years earlier.[255] The judgment of whistleblower advocacy groups has been even more harsh, citing "more than 20 years of malpractice and neglect," and calling for creation of a new "national Whistleblower Protection Office [with] its own budget, programmatic identity, strategic plan, staff, and leadership."[256]

Finally, GAO most recently completed an analysis of whistleblower protection under the Military Whistleblower Protection Act.[257] "To initiate

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[248] The process varies somewhat by statute. *See* GAO-09-106, *supra* note 247, at 2.
[249] *Id*. at 23.
[250] "[N]early all of these were settled through a separate settlement agreement involving the whistleblower and the employer." *Id.* at 23.
[251] *Id*.
[252] *Id*. at 29.
[253] *Id*. at 30.
[254] *Id*. at 31.
[255] *Id*. at 40–42.
[256] *OSHA Should Get Out Of The Whistle Blowing Business—Scathing GAO Report Cements Case for a Separate Whistleblower Protection Agency*, Public Employees for Environmental Responsibility, Sept. 20, 2010, *available at* http://www.peer.org/news/news_id.php?row_id=1403 (citing joint demand by PEER, the Government Accountability Project and the National Whistleblower Center).
[257] GOV'T ACCOUNTABILITY OFFICE, GAO-12-362, WHISTLEBLOWER PROTECTION: ACTIONS NEEDED TO IMPROVE DOD'S MILITARY WHISTLEBLOWER REPRISAL PROGRAM, (Feb. 2012). Under the Military Whistleblower Protection Act, 10 U.S.C. § 1034, substantive protections are similar to those under the WPA, although the procedures are quite different. *See id*. at 40–41.

an investigation under the Act, a service member must typically make a reprisal allegation to an IG in DOD within 60 days of becoming aware of the personnel action alleged to have been taken in reprisal."[258] The IG then conducts an initial review to determine if the complaint warrants a "full review." If a full review thereafter substantiates reprisal, then the service member may seek relief through the respective military department's Board for Correction of Military Records (BCMR).[259]

The GAO analyzed whistleblower cases that were closed by the responsible office from 2006 to 2011.[260]

> Most service members with substantiated cases who seek relief from BCMRs receive it, but few apply for relief and so the secretaries of the military departments and the heads of the other DOD components are not generally able to take action to make the complainant whole in the vast majority of cases. . . .[261]
>
> Eighty percent of service members (20 of 25) with substantiated reprisal cases—closed between fiscal year 2006 through the first half of 2011—who sought relief from a BCMR received some sort of remedy. . . .[262]
>
> Although 80 percent of service members with substantiated whistleblower reprisal allegations who applied for relief received some relief, only about 1 in 5 service members with whistleblower reprisal allegations substantiated by DODIG applied to the BCMRs for relief during the time period we reviewed. . . .
>
> As a result, only 15 percent of service members with reprisal allegations substantiated by DODIG received some relief through their BCMRs.[263]

Although not mentioned by the GAO, the 80 percent rate of relief for substantiated whistleblower reprisal allegations may overstate the protection whistleblowers receive in yet another way. GAO found that the military closed on average 405 whistleblower reprisal cases a year between FY 2006 and the first half of FY 2011.[264] The IGs determined that an average of 286 cases a year, 71 percent of all cases, did not warrant full investigation over the same time period. The military fully investigated an average of 119 cases a year, 29 percent of all cases, with 25 of those full investigations substantiated, six percent of all cases, and 94 of those full investigations not substantiated, 23 percent of all cases.[265] Nevertheless, in a role analogous to that of OSC under the WPA, the military IGs

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[258] *Id*. at 8.
[259] *Id*. at 7–8. Appeal from the BCMR is to the Secretary of Defense. 10 U.S.C. § 1034(g) (2006).
[260] GAO-12-362, *supra* note 257, at 2–3.
[261] *Id*. at 34.
[262] *Id*. at 35–36.
[263] *Id*. at 37.
[264] *Id*. at 63.
[265] *Id*. at 64–65.

substantiated six percent of all whistleblower complaints, whereas OSC—even counting all of the cases in which it claims to have negotiated a favorable outcome for the whistleblower, is at about two percent.[266] While not directly comparable, the rate at which the BCMRs granted relief in response to reviewed complaints is 80 percent, compared to the MSPB rate of three percent.

In conclusion, the GAO recommends improvements in quality and processing times of whistleblower reprisal investigations, better record keeping, more oversight by DOD and Congress, and improved efforts to ensure corrective action is taken in response to substantiated military whistleblower reprisal claims.[267] Despite its problems, and allowing for different procedures and data discrepancies, the military whistleblower protection program appears far more effective than the WPA in protecting whistleblowers from retaliation, if for no other reason than the military's apparent willingness to acknowledge its own shortcomings.

Laws promising whistleblower protection for government employees have existed for three decades, yet younger "comparable" employee statutes offer greater protection than does the WPA, mainly by avoiding the introduction of overwhelming bias by agency administrative judges. Whereas those statutes no doubt need legislative fine-tuning, it is long past time for a more radical analysis of what ails the WPA. More specifically, there is simply no explanation but bias for the appalling rate at which whistleblower appeals are denied by MSPB administrative judges, and to a somewhat lesser extent by the MSPB Board. Giving the MSPB Board members the benefit of the doubt, bias on their part may be compounded by their obsequious deference to biased records compiled by the administrative judges. As for the Federal Circuit, the most generous characterization is that it affirms the MSPB "instinctively."[268]

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[266] *See* U.S. OFFICE OF SPECIAL COUNSEL, FY 2010 ANNUAL REPORT TO CONGRESS 13–14. It appears, nevertheless, that service members might benefit from an amendment similar to the one that paved a way around the OSC under the WPA, whereby they could file directly with the BCMRs rather than requiring a "substantiated" finding from the IGs.

[267] GAO-12-362, *supra* note 257 at 47–49. The DOD has belatedly released a report that is harshly critical of its own performance, finding that the IG has routinely ignored evidence of retaliation against whistleblowers. *See* R. Jeffrey Smith and Aaron Mehta, Pentagon report says Defense Department whistleblowers have been left vulnerable to reprisals, The Washington Post, May 5, 2012, http://www.washingtonpost.com/world/national security/2012/05/05/gIQAzHON4T_story.html?wpisrc=nl_headlines.

[268] It is well documented that political bias has a strong influence in federal courts' review of administrative actions. *See, e.g.*, Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L. J. 2193 (2009). Perhaps ironically, one interesting study purports to document the thesis that the presence "of a 'whistleblower' on the court-that is, the presence of a judge whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine (if such manipulation or disregard were needed to reach the majority's preferred outcome) is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers." Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and*

VII. ELIMINATING IMPROPER DEFERENCE TO AGENCY JUDGES

The WPA is a cruel hoax on Federal employees and the American public. Workers are encouraged to blow the whistle on fraud, waste, and abuse, and promised that they will be protected from retaliation, but the promise is hollow. An elaborate appeals system obscures the reality in an expensive costume of due process.[269] It would be less hypocritical—and cheaper if one doesn't count the lives and dollars saved by whistleblowers—to simply rescind the WPA in its entirety and stop luring conscientious Federal workers into a baited trap.[270]

Instead, for better or worse,[271] Congress has begun considering whistleblower reform legislation in the form of the Whistleblower Protection Enhancement Act (WPEA).[272] The WPEA has repeatedly failed

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Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 YALE L. J. 2155, 2156 (1998).

[269] The Annual Budget for the MSPB and its Regional and Field Offices is approximately $44 million. MSPB 2011 ANNUAL REPORT, *supra* note 213, at 17. The agency has up to 226 full-time employees with offices in Washington, DC (headquarters) and six regional and two field offices, which are located throughout the United States. *Id.* at 6. OSC's budget for FY 2010 was $18.5 million. U.S. OFFICE OF SPECIAL COUNSEL, FY 2010 SUMMARY OF PERFORMANCE AND FINANCIAL INFORMATION 6 (2010).

[270] Indeed, leading whistleblower protection advocates have reached the same conclusion. "The Make it Safe Coalition's easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps." *Whistleblower Protection Enhancement Act of 2009: Hearing on S. 372, before the Subcomm. on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Comm. on Homeland Security and Governmental Affairs Comm.*, 111th Cong., Appendix at 57 (2009) (prepared statement of Thomas Devine, Government Accountability Project).

[271] It has been argued "that power deliberately crafted whistleblower 'protection' laws so that whistleblowing is hazardous and costly to the ordinary citizen who blows the whistle." Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform versus Power*, 76 U. CIN. L. REV. 183, 185–86 (2007). The author also argues, however, that "[t]hose seeking enhanced whistleblower protections must be prepared to exploit opportune times when a political coalition in favor of more effective law enforcement against those with power may emerge. Such a reform moment could give rise to an omnibus whistleblower statute that can secure the policy foundations of whistleblowing." *Id.* at 186.

[272] Whistleblower Protection Enhancement Act of 2011, S. 743, H. Rep. 3289, 112th Cong. (2011). Similar legislation was introduced but failed to pass in 2009 and in 2007. Whistleblower Protection Enhancement Act of 2009, S. 372, 111th Cong. (2009) (as introduced Feb. 3, 2009); Whistleblower Protection Enhancement Act of 2009, H. Rep. 1507, 111th Cong. (2009) (as introduced Mar. 12, 2009); Whistleblower Protection Enhancement Act of 2007, H. Rep. 985, 110th Cong. (2007). For perspectives on the 2009 legislation, *see, e.g.*, Jocelyn Patricia Bond, Efficiency Considerations and the Use of Taxpayer Resources: an Analysis of Proposed Whistleblower Protection Act Revisions, 19 FED. CIRCUIT B.J. 107 (2009); Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 68–73 (2011). *See also* L. PAIGE WHITAKER, CONGRESSIONAL RESEARCH SERVICE, THE WHISTLEBLOWER

to pass in recent years, despite overwhelming broad bipartisan and coalition support.[273]

> It would, among other things: clarify the broad meaning of "any" disclosure of waste, fraud, and abuse that, under the WPA, a covered employee may make with impunity; expand the availability of a protected channel to make disclosures of classified information to appropriate committees of Congress; codify an anti-gag provision to allow employees to come forward with disclosures of illegality; allow certain whistleblowers to bring their cases in federal district court (this provision being subject to a five-year sunset); allow whistleblowers to appeal decisions on their cases to any federal court of appeals (this provision also being subject to a five-year sunset); provide whistleblowers protected under the ICWPA with a forum to challenge retaliation, with the right to appeal decisions to a federal court of appeals; and provide whistleblowers under both the ICWPA and the WPA with a forum for challenging retaliatory security clearance determinations.[274]

Unquestionably, the WPEA would go a long way toward extending whistleblower protections by expanding the protections available to employees in the Transportation Security Administration; adding specific protections for scientific freedom; strengthening the ability of OSC to assist whistleblowers and prosecute wrongdoers; and requiring MSPB to report annually on the outcomes of whistleblower cases, from initial decision through Board appeal. In a direct assault on the biased history of the MSPB and the Federal Circuit, the WPEA would provide alternate access to Federal courts, including a trial period during which MSPB appeals could be taken to a circuit other than the Federal Circuit.[275] Another trial provision would grant access to Federal district court jury trials in certain cases as an alternative to MSPB review.

> Section 108(a) creates a five-year pilot program that suspends the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit over whistleblower appeals and allows petitions for review to be filed either in the federal circuit or in any other federal circuit court of competent jurisdiction for a period of five years. Subject to a five-year sunset, the bill would allow claims involving major personnel actions to go to federal district court if at least one of the following conditions is

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PROTECTION ACT: AN OVERVIEW, at 14–15, (Mar. 12, 2007) (summarizing both the WPA and the Whistleblower Protection Enhancement Act of 2007).

[273] After overwhelming approval of slightly different versions by both houses in 2010, a single senator put an anonymous last-minute hold on the bill, which effectively killed it. *See, e.g.*, R. Jeffrey Smith**,** *Bill to protect whistleblowers fails in Senate***,** WASH. POST, Dec. 23, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122206248.html. Among the groups continuing to lead the reform efforts are the Government Accountability Project, Project on Government Oversight, Citizens for Responsibility and Ethics in Washington, Public Employees for Environmental Responsibility, the AFL-CIO, and many others. *See, e.g.*, http://www.whistleblower.org.

[274] S. REP. NO. 111-101 at 1 (2009).

[275] *See generally id.*

> met: the MSPB does not issue a final order or decision within 270 days after the request for corrective action was submitted; or if the MSPB certifies, upon motion from the employee, that the Board is not likely to dispose of the case within 270 days or that the case consists of multiple claims, requires complex or extensive discovery, arises out of the same set of facts as a civil action pending in a federal court, involves a novel question of law, or states a claim upon which relief can be granted.[276]

Unfortunately, the proposed legislation would leave the vast majority of whistleblowers at the mercy of MSPB administrative judges. Under the jury trial provision, for example, relatively few cases would be heard outside the MSPB forum, due to the cost and complexity of court proceedings.[277] Thus, in the absence of fundamental reform of the administrative appeals process itself, too many biased and unqualified administrative judges will continue to find ways to support the agencies and punish whistleblowers they consider dissident employees, the MSPB Board will continue rubber stamping those decisions, and the court system may well continue to instinctively affirm. One way around biased administrative judges would be to adopt the recommendation of the ACUS Report in letter as well as spirit, and mandate the use of independent federal administrative law judges, rather than administrative judges or hearing examiners, in any case where there is a substantial risk of deprivation of life, liberty, or property (including job tenure), and also for non-tenured whistleblower removals.[278]

Minimally, the MSPB Board and the Federal Courts should be mandated to drop the pretense that so-called administrative judges are owed any special deference, and certainly not the degree of deference accorded to administrative law judges for hearings held under the APA, much less the statutory deference paid to the United States District Courts by United States Courts of Appeals.[279]

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[276] *Id.*

[277] "The Committee anticipates, however, that most employees with the option of filing their case in district court will choose to remain in the administrative system through the MSPB because it is the lower cost, less burdensome alternative." *Id*., text at n.89.

[278] ACUS REPORT, *supra* note 190, at 1058 ("Congress should consider expanding the category of cases where ALJs are required (i.e., on-the-record hearings subject to APA formal procedures) to preserve the uniformity of process and decider qualifications contemplated by the APA.") Currently, ALJs are required only in appeals by Board employees, 5 C.F.R. § 1201.13; in appeals by ALJs themselves, *id*. § 1201.140; and in disciplinary action complaints brought by the OSC, *id*. § 1201.125.

[279] The Federal Circuit's precedents granting great deference to administrative judges stems from Fed. R. Civ. P. 52(a), which refers to findings by United States District Courts. *See, e.g*., Hambsch v. Dep't of the Treasury, 796 F.2d 430 (Fed. Cir. 1986) (MSPB appeal) (*citing* Anderson v. City of Bessemer City, 470 U.S. 564, 573–76 (1985) (a case explaining the rationale for appellate court to trial court deference under FRCP 52). Also, FRCP 52 concerns the "clearly erroneous" standard of "court/court" review, although that distinction seems less significant since the Supreme Court appears to view the substantial

Ideally, review of initial decisions would be *de novo*. Establishing a *de novo* standard of review is not unrealistic. As noted above, it is provided in FOIA appeals, although admittedly there are no administrative hearings under the FOIA. More analogous, then, is the right of an appellant "to have the facts subject to trial *de novo* by the reviewing court" in the case of discrimination brought under 5 U.S.C. § 7702.[280]

The ability of biased administrative judges to shape and distort the record must be curbed. Administrative judges found guilty of abusing their offices should enjoy no judicial immunity.[281] Appellants should have a greater opportunity to disqualify administrative judges for bias based, for example, on an overwhelming record of ruling for the agency. Rules of law that frequently are distorted and misapplied by administrative judges and the Board itself should be legislated. For example, credibility findings of administrative judges are due no deference when they are unsupported by the record (although it would be better to do away with such deference altogether).[282] Agencies that abuse discovery or destroy potentially relevant evidence should not be given a free pass by the administrative judge, but should be prohibited from offering any evidence themselves, and

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evidence standard under the APA, 5 U.S.C. § 706(2)(A) (2006), to involve essentially the same level of scrutiny. *See* Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999).

[280] *See* 5 U.S.C. § 7703(c). Cases brought under 5 U.S.C. § 7702 include discrimination cases filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)). In addition, many whistleblower protection laws provide for jury trials in Federal courts. *See, e.g.*, False Claims Act, 31 U.S.C. § 3730(h); Sarbanes Oxley, 18 U.S.C. § 1514A(b)(1)(B); Energy Policy Act, 42 U.S.C. § 5851(b)(4) (2006); Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c) (2006); Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3) (2006); National Transit Systems Security Act, 6 U.S.C. § 1142(c)(7) (2006); Consumer Products Safety Improvement Act, 15 U.S.C. § 2087(b)(4) (2006).

[281] "There is no authority for the proposition that 'judicial immunity' is a right protected by the U.S. Constitution." Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind*, 86 DENVER U. L. REV. 1, 3 (2008).

[282] Although the Board likes to say such credibility determinations by administrative judges are "virtually unreviewable," *supra* note 174, both the Board and the Federal Circuit have at times acknowledged that such extreme deference is inappropriate. *See, e.g.*, Haebe v. Dep't of Justice, 288 F.3d 1288, 1301 & n.29 (Fed. Cir. 2002) (credibility findings based on factors other than demeanor are reviewed solely under the substantial evidence test applied to all findings of fact); Faucher v. Dep't of the Air Force, 96 M.S.P.R. 203, 208 (2004) (no deference to credibility determinations which are incomplete, inconsistent with the weight of the evidence, and do not reflect the record as a whole); Redschlag v. Dep't of the Army, 89 M.S.P.R. 589, 602 (2001), review dismissed, 32 Fed. Appx. 543 (Fed. Cir. 2002) (credibility findings not entitled to deference because they were abbreviated, based on improper considerations, and often unsupported by the record).

responsible officials should be sanctioned in their personal capacities.[283] The OSC should be mandated, not merely authorized, to pursue disciplinary actions against officials who retaliate against whistleblowers.

These recommendations shift the focus to those aspects of the appeals process that are routinely abused by some unscrupulous agency officials, politically-motivated Special Counsels, duplicitous administrative judges, and hypocritical Board members. The only honest alternative is to simply throw in the towel and at last formally renounce Lord Coke's 400 year-old pronouncement of the fundamental proposition of natural justice, that no man can be a judge in his own cause.[284]

[283] Even the Board on at least one occasion has recognized that the suitable sanction for such misconduct is to bar the agency from asserting an affirmative defense that it would have taken the same action absent any protected disclosure. Armstrong v. Dep't of Justice, 107 M.S.P.R. 375, 389–90 (2007). The Board has recognized that federal law also prohibits even routine destruction of records. *See, e.g.*, Martinez v. Dep't of Homeland Sec., 116 M.S.P.R. 561, n.4 (2011) (concurring opinion of Anne M. Wagner), *citing, e.g.*, 44 U.S.C. chapter 31 (records management by federal agencies); 36 C.F.R. part 1220, subpart B (agency records management responsibilities); 36 C.F.R. parts 1222 (creation and management of federal records) and 1236 (procedures for electronic records management). Applying the Board's own precedent, the Federal Circuit has held that even merely negligent destruction of relevant evidence merits adverse inferences, and the Board's failure to impose them is an abuse of discretion. Kirkendall v. Dep't of the Army, 573 F.3d 1318, 1327 (Fed. Cir. 2009).

[284] *See generally* Bonham's case, 8 Coke 114a, 118a, 77 Eng. Rep. 646 (1610).