United States of America
Merit System Protection Board

Mark Abernathy	)	
	)	
v.	)	MSPB DC–1221–14–0364–W–1
	)	
Dept. of the Army	)	

Amicus Brief of Walsh & Son LLP

Now comes Michael Walsh,[1] who respectfully submits a brief as *amicus curie*, in response to the Board's call for such briefs in the Federal Register. Mark Abernathy, an employee of a federal contractor, made disclosures about government waste that he alleged fell within the Whistleblower Protection Act of 1989 and its 2012 sequel Act. When he was later not referred for consideration for a Federal civil service position, he alleged that the non-referral was retaliatory for his whistleblower disclosures and sough the aid of the Merit Systems Protection Board. The individual administrative law judge dismissed the appeal on jurisdictional grounds that a contractor is not an employee within the Act and that the disclosure was not timely enough to count Abernathy as an applicant. The Merit Systems Protection Board granted his petition for review, and sought *amicus curie* to comment on the relevant statutory framework.

Summary of the Argument

The Merit Systems Protection Board ("Board") should step forward to protect as many people as possible, as dictated by the legislative history, the Congressional intent, and the cases of the Supreme Court. The formulation of protected individuals now challenged, covering employees, former employees, and applicants for employment, broadly covers anyone who

[1] Attorney Michael Walsh has occasionally represented soldiers in personnel matters before Army boards, but has never appeared before the MSPB, and has never represented a civilian federal employee. The bulk of Walsh & Son's practice is civil litigation in Massachusetts and criminal defense, both military and civilian. The Amicus has no stake in the outcome of the litigation.

voluntarily interacts with the civil service system. The formulation might be better put "Employees: past, present, and future." Congress has several times previously chastised the Board for failing to effect the broad purpose of the whistleblower protection laws. The Board should follow the example of the Supreme Court in O'Hare Truck Service and Umbehr, to treat contractors as employees. It would also hamper and hamstring the future of the Federal civil service if "applicant" were narrowly construed or unwritten time requirements were read into the statute. In construing the statute the Board should look not to the Whistleblower Protection Act of 1989, but to the Civil Service Reform Act of 1978. Like any remedial statute, the whistleblower protections cannot be properly be read without an eye to the abuses the statute was enacted to correct, in this case a series of corrupt and calculated abuses by the Nixon White House uncovered during the Watergate Investigation.

Background

The Merit Systems Protection Board is the successor[2] to the United States Civil Service Commission and generally supervises the legions of federal civil servants. An administrative review of adverse disciplinary or personnel actions is a critical feature of a civil service system. Knowing that a free and fair hearing will be granted, and that statutory protections exist, is what allows for a fearless and neutral civil service who will do what is best for the government under all circumstances. Whistleblower statutes similarly provide protection to civil servants, by

[2] President Carter designated the Merit System Protection Board (MPSB) as the successor to the U.S. Civil Service Commission in the 2nd Reorganization Plan of 1978. 92 Stat. 3783, 3784 (1978) (§2(a) "The United States Civil Service Commission is hereby redesignated the Merit Systems Protection Board."). This plan was part of a two-step reform of civil service, the other being the Civil Service Reform Act of 1978. However, history informs us that a few short years later the Supreme Court would declare legislative vetoes of the kind used in the Reorganization Act as unconstitutional. I.N.S. v. Chadha, 462 U.S. 919 (1983). Indeed the dissenting opinion by Justice White lamented that the legislative veto was originally developed in the Reorganization act and then exported elsewhere. Id., at 968-969. The later unconstitutionality of the Reorganization Act, and reorganization plans under that act, invite speculation about the current integrity and legality of the Board itself. Given the unconstitutionality of the 2nd Reorganization Plan of 1978, one could argue that the Board is not legally convened, but the most probable outcome is that the Board is still properly and formally named the "United States Civil Service Commission" acting through the Board.

prohibiting retaliation or any adverse effect upon the employee, for doing what is considered a public service in disclosing otherwise hard-to-discover improprieties.

Civil Service is based upon a merit principle system, both in the selection, discipline, promotion, demotion, and termination of public employees. Civil service is supposed to minimize political interference and ensure a neutral and impartial administration of government on an even basis to all of its citizens. The original genius of the civil service system was to give employees tenure, allowing them to continue to do their jobs as they thought best, rather than leave the public employees at the mercy of traditional common-law "at-will" employment that was the heart of the patronage system.[3] Tenure, as a cornerstone of the civil service system, was significantly augmented by the development of merit based recruiting for the selection of new employees, usually through testing and ranking candidates. *See Generally* Arnett v. Kennedy, 416 U.S. 134, 148-149 (1974). These two provisions, merit-based recruiting and tenure interplay to make civil service an enduring system now considered a hallmark of stable government the world over.

The President's Men?

With the election[4] of President Nixon in 1968, the new administration set out to "politicize the executive branch" to ensure that the government was "responsive" to the incumbent. This

[3] Civil Service was first authorized by the Pendleton Act of 1883. Most cleverly, the civil service system relied on the patronage system to end itself, through the use of a declaration procedure. An outgoing president could appoint his own loyal members and then declare their jobs to be civil service henceforth, while immediately extending the tenure provisions to the job to protect the appointees from the incoming politically hostile administration. The civil service prevailed by attrition as the office-holders were replaced by those recruited through the merit system.

[4] This section of the brief contains some dense historical background information. For ease of reading, specific citations have been stripped out. The material is drawn primarily from:
1) Final Report on Abuses and Violations of Merit Principles in Federal Employment, House Rep. 94-28 (1976)by the House Committee on the Post Office and Civil Service ("House Committee Report") with its 1000+ page appendix, including original documents and affidavits from prior Civil Service Commission investigatons
2) *Final Report of the Senate Select Committee on Presidential Campaign Activities*, Senate Rep. 93-981 (1974) by the Select Senate Committee on Presidential Campaign Activities ("Watergate Committee Report") with its 27 volumes of testimony and documents.
3) Carl Bernstein & Bob Woodward, *All the President's Men* (1974)
4) Carl Bernstein & Bob Woodward, *The Final Days* (1976).

amounted to a concerted effort to develop patronage, and find ways to work around, or even flat out ignore civil service laws.[5] In the year before President Nixon's 1972 reelection, these high level concerns were crystallized around Fredrick Malek, who wrote a consultant report on how to use the advantages of incumbency to reelect President Nixon. The final draft of this "incumbency responsiveness program" was submitted to the President's Chief of Staff Harry R. Haldeman on March 17, 1971. Malek, in the meantime, had been appointed to head the White House Personnel Office in 1970, after the prior director of the personnel had been inefficient at placing Nixon loyalists in the ranks of government. The responsiveness program was a specific measure to address high level concern by Haldeman and the President that the entrenched civil servants, derisively regarded as "bureaucrats" and Democratic appointees of the Kennedy and Johnson administrations, had strenuously resisted efforts to bend the government to the President's will. The White House regarded this resistance as "disloyal," even though it was widespread in places such as the Bureau of Labor Statistics, the Office of Minority Business Enterprise, the GSA, and other diverse agencies. Essentially the merit system did what it was supposed to—delivering government services without regard to politics—and for that sin the White Personnel Office was instructed to work around or gut the merit system.

The President was successfully reelected in November 1972, although various crooked enterprises of his agents, such as a burglary at the Watergate headquarters of the Democratic National Committee, were later disclosed to the public through the investigations of the FBI, the GAO, and the GSA, the Civil Service Commission, the Miami-Dade District Attorney's Office, the Washington Post and others. Eventually a Select Senate Committee ("Watergate Committee")

[5] The House Committee on the Post Office and Civil Service would later report that the Nixon White House Personnel Office had co-opted the Chairman of the Civil Service Commission, Robert E. Hampton, to assist in evading or defeating the principles of the merit system.

under Senator Sam Ervin (D-NC) was formed and its hearings were televised live nationally. The Watergate Committee's proceedings features novelties such as the President's own lawyer, John W. Dean III, testifying against him and accusing him of crimes, and the revelations of Alexander Butterfield who disclosed that the President tape-recorded all of his conversations. The wide-ranging misconduct of President Nixon's men was astounding, and even the thousands of pages of testimony and documents compiled by the Watergate Committee were explicitly admitted to be only the tip of the iceberg.

Most relevant here was the disclosure of Malek's incumbency responsiveness program. The program was ambitious; with the redirection of grants to aid political considerations, government contracts awarded to political supporters, the hiring of party faithfuls, the investigation or auditing of opponents, the manipulation of the Civil Service Commission, and the unfavorable transfer or termination of civil servants who were not deemed "loyal" to the President's programs. This was, of course, only a small piece of the Nixon Administration's misconduct[6], such as the keeping of an enemies list, tax audits of opponents, or the opening of their private mail, burglaries to obtain blackmail material, the tailing and harassing of opponents, or the leaking of legitimate investigation files to the reelection campaign to make political use of official files. Washington Post reporters Carl Bernstein and Bob Woodward became famous for doggedly tracing the Watergate story.

Once President Nixon was reelected the responsiveness program was wound down and an even more sinister cousin appeared upon the stage. Malek, after a stint at the re-election campaign

[6] Bernstein and Woodward's journalism for the Washington Post lead them discover and write the story of Donald Segretti who was a political operative of the Nixon reelection campaign. Segretti described an orchestrated campaign of "dirty tricks" which were known under the term "ratfucking." Woodward and Bernstein would initially report the story using primarily unnamed sources, although Segretti later agreed to go on the record for Woodward and Bernstein's book *All the President's Men* (1974).

as deputy director, returned to the White House Personnel Office. A subordinate named Alexander May[7] wrote what became colloquially known as the "Malek Manual," which was a comprehensive cataloging of how to manipulate, evade, and avoid the strictures of the Civil Service laws, allowing for the appointment of favored political friends and the unfavorable transfer, demotion, or termination of those civil servants who were deemed enemies or not loyal. The reason to write a manual, although Malek was cautioned by Haldeman about putting such things into writing, was because the Personnel Office was now going to farm out the work of staffing the government with Nixon loyalists to the agencies themselves. The Personnel Office was too small, with only 12-16 people, to single-handedly staff a government then employing 2.8 million civil servants. The Personnel Office received approximately 500 unsolicited politically sensitive applications per month, and now they would delegate the work of placing the recruits to the agencies. A training covering the Malek Manual, and the oral relaying of policies deemed too dangerous to be put into print, was held for agency personnel at Camp David.

Also created were "referral units" in each agency who would recruit and place Nixon loyalists in government jobs, whether or not such jobs were career civil service positions. To aid the referral units, a paper screening form was created under which each applicant was rated based primarily on political considerations. Those who were deemed the most politically sensitive were "must place" cases, the House Committee later reported that these "must place" cases were an extraordinary drain of manpower and time with little results in return. The referral units were housed in diverse areas diverse, both politically and geographically, with several units being

[7] The manual was formally entitled the Federal "Political" Personnel Manual. In the 1970's the Washington press frequently reported that the manual was the creation of Malek. Malek himself denied authorship, but accepted moral responsibility for the work during an abortive confirmation hearing for Malek's proposed 1984 appointment as a governor of the Postal System. The Malek manual continued to dog the man into the 21st Century. The Manual itself, both the original more sarcastic draft and the later cleaned-up draft are included in the House Committee Report's appendix. House Rep. 94-28 (1976).

located in the far-flung field offices of the Civil Service Commission. The expanded Malek program was first discovered after the Washington Post reported that at least six officials in the General Services Administration, occupying civil service jobs, were blatantly unqualified for their positions. The news stories by the Post prompted an investigation by the Civil Service Commission, whose evidence was later turned over to the investigating Watergate Committee and the House Committee. The public reporting by the Post also generated investigations by other government agencies.

Initially the Watergate investigation was successfully "compartmentalized" by the Nixon Administration through an organized cover-up. The Post's dogged[8] reporting, aided by "Deep Throat,' perhaps the most celebrated and successful whistleblower yet," broke the cover-up, caused the convening of the Watergate Committee, the consideration and adoption of articles of impeachment, the resignation of the President, and the indictment and imprisonment of dozens of Administration Officials. Winters v. Houston Chronicle Pub. Co., 795 SW 2d 723, 729 n.9 (Tex. 1990) (J. Doggett, concurring) (waxing philosophically on the social utility of whistleblowing).

The Watergate scandal eventually devolved so far that the press and Congress essentially investigated and scrutinized every detail of the Nixon Administration, with the Watergate Committee and the Washington Post leading the charge. The Watergate Committee, charged with investigating the 1972 campaign, devoted an entire section of its final report and two whole volumes of testimony to the responsiveness program. The work of the Watergate Committee was followed up by a report by the House Committee on the Post Office and Civil Service. Among

[8] *See Generally*, Woodward and Bernstein, *All the President's Men* (1974) (the narrative story of uncovering wrongdoing and reporting it, including the first public revelation of "Deep Throat," whose identity was successfully kept secret for 33 years). *See Also* Woodward and Bernstein, *The Final Days* (1976) (picking up where 'All the President's Men' left off, but telling the story from the White House perspective with a focus on the President personally).

other things, the House Committee's report chastised the investigation and enforcement arms of the Civil Service Commission for not upholding the integrity of the merit system, and the conflict of interest in the multi-role nature of the Commission that made the political co-opting of the Chairman possible.

In response to the House Committee report, President Carter formed a working group to review the possibility of reforming the Civil Service Commission. The working group involved approximately 110 representatives from some 50 different agencies, and it took five months to work through its charter and develop recommendations. President Carter accepted the working group's study and made it a legislative centerpiece for 1978, proposing reform in his January 1978 State of the Union Address. The Address claimed that this was the "first comprehensive reform of the system since its creation nearly a century ago—reforms developed with the direct involvement of civil servants" and that the plan would "increase safeguards against abuses of official power."

It is in the Civil Service Reform Act (CSRA) of 1978 that we first see "whistleblower"[9] protections to protect a government employee disclosing misconduct or waste. Most of the definitions[10] used today is substantially the same as included in the 1978 Act. However the 1978 Act did not contain the same right of individual action that we now know. The individual right of action was instituted by the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16, 29-30 (April 10, 1989). However, the 1978 Act contained a number of protections. The CSRA prohibited any reprisals for the disclosures of fraud, waste, or illegalities by employees, former

[9] President Carter's March 2, 1978 Message to Congress on Civil Service Reform notes that the proposal will "help safeguard the rights of Federal employees who 'blow the whistle' on violations of laws or regulations by other employees, including their supervisors."

[10] Including the definition prohibiting the use of prohibited practices against employees, former employees, or applicants for employment.

employees, or applicants for employment.[11] The 1978 Act instituted the Office of the Special Counsel, following the recommendation of the Watergate Committee that a permanent independent public attorney be appointed. Whistleblower were, initially, not allowed to directly and individually get relief for reprisals, but they were given an attorney. Their attorney managed an investigatory process that required an agency head to personally review allegations of reprisal. Their attorney could, with the Board, stay any negative actions, or give the whistleblower a preference in a transfer out of the unit. The 1978 Act, and Reorganization Plan, separated the prosecution and adjudication functions of the Civil Service Commission to prevent the collusion that Malek had so carefully developed. The whistleblower's attorney was also both a sword and shield, as he was given the power to prosecute employees or supervisors who committed prohibited personnel practices, and a successful prosecution before the board could lead to termination of misbehaving supervisor.

These protections proved insufficient. It immediately became obvious that the way to circumvent the Carter reforms was to simply co-opt[12] the Special Counsel, which was easy as the Special Counsel was not independent and was a presidential appointee. The Whistleblower Protection Act of 1989 (WPA) made the Special Counsel independent, granted an individual right of action, and clarified that the Special Counsel must act in the interests of the employee. The Whistleblower Protection Enhancement Act of 2012 (WEPA) was enacted primarily as a response to several decisions of the Federal Circuit that Congress perceived as bad or erroneous, although

[11] The Announcement seeking Amicus Briefs focuses primarily on the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012, but those acts instituted and expanded upon the *enforcement* of the protected status rather than the definition of the prohibition.

[12] In describing the history of whistleblower protections, the 2012 Senate Committee described the performance of the Special Counsel during the Reagan years, "This Committee subsequently reported that employees felt that the OSC engaged in apathetic and sometimes detrimental practices toward employees seeking its assistance" Senate Rep. 112-155 at 3 (2012) *citing* Senate Rep. 100-413 at 6-16 (1988) (report sparking the WPA).

Congress also sought to correct some of the Board's errors, and to prevent the similar abuses to those that occurred when Scott Bloch was Special Counsel.

The Civil Service Reform Act of 1978, and the Watergate abuses it was addressed to, should be the starting point for the inquiry, rather than the 1989 Act. Since the Board itself has determined that 5 U.S.C. § 1221 and 5 U.S.C. § 2302 are to be read[13] together, it makes sense to start with the earliest appearance of the language.[14] The later repetition of substantially identical language in a related statute, read together with the earlier statute, provides no illumination on the meaning of the term because it lacks any change in Congressional intent or draftsmanship.

Contractors as Employees

Contractors are treated as employees for many legal purposes. The Supreme Court has endorsed this approach on multiple occasions "eschewing" a formalistic approach and preferring to look at the function. Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 679 (1996). To start at the beginning, there is an absence of language in the two statutes of any definition of "employee." Normally, the absence of a definition section impels the application of ordinary meanings of the term, unless the term is a term of art, or context requires a different answer. In this case context, and the command to read a statute in a way that addresses the mischief to be remedied, command a result in favor of the Appellant, Mr. Abernathy.

[13] Another statute that should be read together with the pair already identified is 5 U.S.C. § 2301, which governs merit principles, while §2302 defines prohibited personnel practices. When searching for the meaning of the statute, it is truly rare to find a preamble or aspirational language such as the merit principle in §2301, of which President Carter was inordinately proud of signing into law. One of those positive principles that was codified was the protection of whistleblowers. The positive expression of this principle is simply the reverse side of the coin, and a mirror-image, of the corresponding prohibited personnel practice which counsels against retaliating against whistleblowers.

[14] The canon of statutory construction *in paria materia* requires that words within a statute normally be interpreted the same way as identical words in related statutes. Burlington Northern & Santa Fe Rr v. White, 548 U.S. 53, 63-64 (rejecting argument to treat anti-retaliation provision as identical to anti-discrimination provision based on different purposes of statutes). Where the Board has already determined that the prohibited personnel practices law and the anti-retaliation provision must be read together, harmoniously, then it is the languages origins in the Civil Service Reform Act that must control.

CSRA as the Starting Point

Congress itself has told us why the 1978 Act, the 1989 Act, and the 2012 Act exist. The Congressional Findings in the CSRA state "It is the policy of the United States that—(1) in order to provide the People of the United States with a competent, honest, and productive Federal workforce…personnel management should be implemented consistent with merit principles and free from prohibited personnel practices…(3) Federal employees shall receive appropriate protection through…the Merit Systems Protection Board…(4)…the Special Counsel should…investigate allegations involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information…" Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111, 1112, §3 (October 13, 1978). The CSRA also statutorily codified the merit principles for the first time. 5 U.S.C. §2301. In the same year, Congress also enacted the Inspector General Act of 1978, P.L. 95-452, another statute addressed to the reform of Watergate abuses by the Nixon Administration. Indeed, the Senate Committee report on the Inspector General Act specifically references the CRSA and provides that the newly created Inspectors-General should provide an overlapping service:

> Subsection (a) gives the Inspector and Auditor General the authority to receive and investigate complaints from employees of the establishment the possible existence of an activity constituting a violation of law, rules or regulations, mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety… [T]he committee believes that the Inspector and Auditor General should handle employee complaints seriously and systematically. Because of an employee's position within the agency, employee complaints carry with them a high likelihood of reliability. Because it is never easy to "blow the whistle" on one's supervisors or colleagues the situation may be serious…In S. 2640, the Civil Service Reform Act of 1978, the committee demonstrated its concern for an effective internal channel for receiving and investigating employee complaints. In S. 2640, the committee provided that if an employee complaint is brought to the Special Counsel, the Special Counsel should in addition to safeguarding the employee from prohibited personnel practices, refer the complaint to the agency head for investigation…Subsection (b) provides that the Inspector and Auditor General may not disclose the complainant's identity unless…disclosure is

> unavoidable. This protection parallels the protection which the committee gave to employees who bring complaints to the Special Counsel…Protection of the complainant's identity is essential not only to prevent retaliation against the employee, but also to ensure the free flow of information…Subsection (c) protects career employees from reprisals by his supervisors for bringing a complaint to the Inspector and Auditor General…The Committee believes that the protections from reprisal for complaining employees who go to the Inspector and Auditor General must be close to absolute.

Report of the Senate Committee on Governmental Affairs on the Inspector General Act of 1978, at 4 U.S.C.C.A.N. 2710-2712 (1978). The Senate Committee was no less explicit in its ardent desire to protect whistleblowers in commenting upon the provisions of the CSRA:

> *Whistleblowers*
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> S. 2640 gives the Merit Systems Protection Board and the Special Counsel explicit authority to protect whistle blowers—Federal employees who disclose illegal or improper government activities. Often the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.
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> 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. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.
>
> S. 2640 will establish significant protections for whistle blowers. For the first time, and by statute, the Federal Government is given the mandate—through the Special Counsel of the Merit Systems Protection Board—to protect whistle blowers from improper reprisals. The Special Counsel may petition the Merit Board to suspend retaliatory actions against whistle blowers. Disciplinary actions against the violators of whistle blowers' rights also may be initiated by the Special Counsel.

Report of the Senate Committee on Governmental Affairs on the Civil Service Reform Act of 1978, Senate Report No. 95-969, Reprinted at 4 U.S.C.C.A.N. 2723, 2730 (1978). The above passage from the Committee report on the CSRA was also quoted in the Committee Report on the

Whistleblower Protection Enhancement Act of 2012 (WPEA). Senate Report 112-155, reprinted at 3 U.S.C.C.A.N 589, 590-591 (2012).

From this purpose of protecting whistleblowers, declared in the 1978 Act (CSRA), Congress has never wavered.[15] The 1989 Whistleblower Protection Act was designed only to eliminate loopholes in the Carter reforms, by granting an individual right of action to the whistleblowers and by separating the Special Counsel from the Board and clarifying his role. P.L. 101-12, 103 Stat.16 (April 10, 1989). Indeed, the Congressional findings indicate that whistleblowers are good and that the Special Counsel's office was instituted to protect whistleblowers. 103 Stat. 16, §2. One can only guess[16] at the magnitude of mischief that the Special Counsel had been getting into, that required Congress to direct that "in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to protect whistleblowers" §2(a)(3). The individual right of action, now a staple of the Board's workload, is an implicit concession that the Special Counsel did not perform the anticipated functions. 103 Stat. at 29. The WPA, although it grants additional protections such as a preference in transfers, simply builds upon the CSRA's foundation and therefore the WPA uses a substantially identical formulation of employees, former employees or applicants for employment, as is at issue here. To further correct deviations from Congressional intent through narrow construction of whistleblower

[15] *See Also* Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update*, 30-35 (1992). This is an official report by this Board to Congress, which primarily contains the results of an anonymous survey of federal employees and inspectors-general, combined with a history of whistleblowing and recommendations for more protections.

[16] The additional findings seemed to indicate that the Special Counsel had been using the prosecution power, to remove anyone who committed a prohibited personnel practice, without reference to the purpose of the office. Hence the findings declare that the Special Counsel "shall act in the interests of employees who seek the assistance of the [Special Counsel]" and that "while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration." 103 Stat. at 16, §§ 2(b)(2)(B) and 2(b)(2)(C). The 2012 Senate Committee report was more explicit, "This Committee subsequently reported that employees felt that the OSC engaged in apathetic and sometimes detrimental practices toward employees seeking its assistance." Senate Rep. 112-155 at 3 (2012)

protections, by the Special Counsel, the Board and the Federal Circuit, Congress against tinkered with the statute in 1994. P.L. 103-424, 108 Stat. 4361 (October 29, 1994). The most significant effect of the 1994 act was to clarify the Board's power to remedy problems, to ban pretextual psychiatric testing, and to provide attorney's fee.

The sequel act, the Whistleblower Protection Enhancement Act of 2012 (WPEA), adds many supplemental protections for whistleblowers, but its primary purpose is to "restor[e] the original congressional intent…to adequately protect whistleblowers." 3 U.S.C.C.A.N 589, 590 (2012) (Senate Committee Report on WPEA). The WPEA, like the WPA, cannot have any meaning without examining the original core of whistleblower protections, the CSRA of 1978.

Contractors as Employees pt 2

The Supreme Court has had no problem treating federal contractors as federal employees, or in the contractors fulfilling a governmental purpose as the government. A review of some relevant cases is in order.

In Boyle v. United Tech. Corp., 487 U.S. 500 (1989), the estate of a U.S. Marine who was injured and died in a military helicopter crash sued the manufacturer under state law for a design defect in the escape hatch. The Supreme Court, after noting that complying with the state law governing the design of aircraft hatch would contravene the design specifications under the federal procurement contract, accorded the military contractor immunity. Among other poignant observations the Court said, "The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done." Boyle, 487 U.S. at 505. This functional equivalency was an important feature of the Courts reasoning. "It makes little sense to insulate the Government against financial liability for the

judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." Boyle, 487 U.S. at 512.

With the benefits of being a government contractor, so run the costs. For example it is now definitive law that governmental contractors, even when acting at the insistence of the Government, may not discriminate based on race in selecting its subcontractors. Adarand Constructors v. Pena, 515 U.S. 200 (1995) (producing a majority opinion demanding strict scrutiny of any racial criteria by contractor in selecting subcontractors); Richmond v. J.A. Cronson, 488 U.S. 469 (1989) (plurality opinion condemning racial quota and set-aside for minority contractors by local government). The Supreme Court has also held that a government contractor must be accorded a Fifth Amendment privilege equal to that afforded to a government employee under the famed *Garrity* rule.[17] Lefkowitz v. Turley, 414 U.S. 70 (1973). The reasoning for that decision was that there is no "difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." Id., at 83.

Most pressingly, in the related areas of political speech by employees and First Amendment retaliation, the Supreme Court has decided to treat contractors equivalently to government employees. In O'Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996) the Supreme Court extended to independent contractors a line of cases that, under the First Amendment, prohibited patronage dismissals based on political affiliation. "Independent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association." O'Hare, 518 U.S. at 724. "We cannot accept the proposition, however, that those

[17] In Garrity v. New Jersey, 385 U.S. 493, 497 (1967) the Supreme Court held that a government employee, particularly a policeman, cannot be forced to choose between his livelihood and his constitutional rights. The specific holding was that a policeman cannot be forced to cooperate, upon penalty of job loss, in an internal affairs investigation that might result in criminal charges.

who perform the government's work outside the formal employment relationship are subject to what we conclude is the direct and specific abridgment of First Amendment rights." 518 U.S. at 720. In a twin case issued on the same day the Supreme Court extended to government contractors the protections of the First Amendment making it unconstitutional for the government to retaliate for free speech. Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668 (1996). In Umbehr the Court expressly rejected any distinction between contractors and government employees, and expressly extended the Pickering test[18] for government employee speech to protect contractors. The Umbehr court, after a lengthy analysis held that "[i]ndependent government contractors are similar in most relevant respects to government employees," for purposes of the First Amendment. Umbehr, 518 U.S. at 684. Indeed the Umbehr court quoted a law review article stating, "[N]o legally relevant distinction exists between employees and contractors in terms either of the government's interest in using patronage or of the employee or contractor's interest in free speech." Umbehr 518 U.S. at 679.

Reaching Out

[18] Pickering itself is the first major government employee free speech case. There a teacher wrote an editorial to a local newspaper which criticized the funding choices and unfulfilled political promises of a local school board. In what was then a novelty, the government claimed the right to suppress or punish the speech because it would damage the government's reputation and efficiency to have its employees publicly undermining it. The Supreme Court created a balancing test, hold that speech by employees on matters of public concern was protected, unless the government had a stronger interest outweighing the utility of the speech. Essentially the Pickering test distinguished between the dual capacities of the employee as an agent of the government and the employee as a citizen. Despite the uncertainty that the Pickering balancing test can yield, it was widely celebrated as a victory for whistleblowers. Indeed, in a 1992 report to Congress entitled *Whistleblowing in the Federal Government: An Update*, the Merit Systems Protection Board wrote that "the Supreme Court, in 1968, provided whistleblowers with a constitutional underpinning for making disclosures. In Pickering [] the Court held that First Amendment free speech guarantees protect public employees who criticized the actions of the Government." Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update*, pg. 33 (1992).
In 2006 it was widely reported that the Supreme Court had gutted Pickering, in all but name, in a case called Garcetti v. Cabellos, 547 U.S. 410 (2006). However in Lane v. Franks, 134 S.Ct. 2369 (2014), the Court held that when giving truthful testimony in court a government employee speaks as a citizen, since all citizens owe a duty to testify truthfully, and therefore the employee was exempt from any retaliation. There is clearly some constitutional backdrop to whistleblowing activities, but it is always preferable to resolve such concerns on statutory grounds, reflecting the so-called canon of constitutional avoidance. In this case the canon, which at base requires construing a statute to avoid constitutional issues under the perhaps mistaken belief that Congress knows what it is doing, urges a wider and stronger reading of the whistleblower protection statutes.

Congress has been exasperated that none of the relevant agencies have stepped up and seized the initiative to protect whistleblowers in the manner imagined. The Senate Committee Report on the WPEA opens with a dismay that "the Federal Circuit has wrongly accorded a narrow definition to the types of disclosure that qualifies for whistleblower protection." Senate Report 112-155, 3 U.S.C.C.A.N. 589, 590 (2012). The 2012 Committee report describes restrictive decisions by the Merit System Protection Board and the Federal Courts as the genesis of the 1989 WPA. 3 U.S.C.C.A.N. 589, 591 (2012). The 2012 Committee Report details yet more unresponsive decisions from the Special Counsel, the Merit System Protection Board, and the Federal Circuit as the reason for the 1994 Act, P.L. 103-424, 108 Stat. 4361 (October 29, 1994). 3 U.S.C.C.A.N 589, 591 (2012). Nor was the 2012 Senate Committee the only ones who were exasperated and disappointed with those charged with enforcing the whistleblower protections:

> Perhaps the most troubling precedents involve the [MSPB'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. No. 103–769, at 18 (1994) (House Committee on the Post Office and Civil Service reporting on the 1994 reforms). It's not every day that a congressional committee calls a federal agency "blind." The 2012 Senate Committee report notes "Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting [whistleblower protections]." Senate Report 112-155 at 4 (2012).

The 2012 Senate Report asserts in crystal clear terms that "Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on [whistleblower protections]." Senate Report 112-155 at 4-5 (2012). *See Also* Senate Report 112-155 at 26 (2012) ("In recent years, both the MSPB and the Federal Circuit Court of Appeals have repeatedly applied

the WPA in a manner inconsistent with congressional intent.") The 2012 Act was expressly intended to overrule bad court decisions. *See* Senate Report 112-155 at 3-4 (2012) ("Now, seventeen years after the last major revision of the WPA, it is again necessary for Congress to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws.")

Courts and adjudicative agencies are obliged to apply the intent of Congress, and it is nothing less than embarrassing that three times Congress has passed laws to the same end of simply trying to effect the language of a law passed 38 years ago, the CSRA. More simply put, Congress has placed all of the authorization and power needed to protect whistleblowers within the grasp of the Board, the only action required is that the Board reach out to take the power that is given and do what is expected of it. Congress has disapproved, on all occasions, of the narrowing of protections by the agencies and the Court. Congress wrote a broad law, amended it thrice more, and provided amazing powers that no other agency has. It is time that the Board use those power to protect anyone who might possibly be within the ambit of the statutory language. Just to remove all doubt, Congress, in the CSRA in addition to enacting the substantive prohibitions of law, also codified aspirational principles in 5 U.S.C.§ 2301. One of those principles is the protection of whistleblowers from reprisal. With the legislative branch cracking the whip hard, and urging the working branches of the executive and the courts forward, there is no danger whatsoever that the Board could extend past its remit. The only danger is that the Board will again shrink from what Congress seeks.

Applicants

The contested language, which includes employees, former employees, and applicants for employment, encompass anyone who would voluntarily seek to interact with the Federal civil

service. The inclusion of applicants for employment is slightly odd, but is well justified in light of the Watergate abuses. The Malek program,[19] was insidious both for forcing out or sidelining uncooperative federal civil servants, but also for rigging the normal merit-based recruitment process of the Civil Service Commission, by co-opting the Chairman and through the special "referral units."

> The select committee has received evidence suggesting that White House and campaign officials, acting through special personnel referral units established in various departments and agencies, were engaged in a program to place political supporters of the administration in Government positions regulated by the civil service merit system, that is, competitive service positions. It is unlawful for a department or agency to make determinations on staffing for competitive service positions on the basis of political considerations…The committee rejects the proposition that much of the conduct described in this chapter should be viewed as acceptable political practice.

Final Report of the Senate Select Committee on Presidential Campaign Activities ("Watergate Committee") Senate Rep. No 93-981 at 441 (1974). Indeed, for the idea of a neutral civil service to succeed it must have both merit recruiting, tenure, and the ability to resist untoward actions. Another portion of Malek's incumbency responsiveness program, was to influence legal and regulatory decisions of the government in favor of President Nixon's friends, "The March 17 Malek-to-Haldeman memorandum setting forth the basic precepts of the Responsiveness Program indicates that one of the goals of that program was the shaping of legal and regulatory proceedings to benefit the President's reelection campaign. And in a Malek-to-Haldeman memorandum dated June 7, 1972, Malek appears to claim that, for campaign purposes, his forces achieved successful results respecting EEOC and Labor Department proceedings." Id. Benefitting one side, or looking the other way for politically connected individuals, is the antithesis of the equal and neutral application of the laws. But the civil service, the law enforcers, must remain untampered with.

[19] Discussed *supra*.

It would seem odd to protect an applicant, someone who by definition is not an employee, from personnel actions. However personnel actions are defined by the statute to include appointment or consideration for training leading to appointment. This particular application of the whistleblower protection provision is a key part of the guarantee of neutral, non-political recruitment of civil servants based on strict merit. Without such a provision, the federal civil service could still be "gamed" through attrition as pointed out to the Watergate Committee by John Ehrlichman, President Nixon's Senior Domestic Policy Advisor, later sentenced to federal prison as a Watergate conspirator:

> Mr. Ehrlichman. It was an itch on our part to get friends in the departments rather than the people that we found there, but that was just a general ongoing desire on our part.
> Mr. Freedman. Was this in career positions as well as other positions?
> Mr. Ehrlichman. Sure. Just like—the Democrats did that.
> Mr. Freedman. And how would something like that be carried out?
> Mr. Ehrlichman. By attrition essentially. You'd get replacements and the people you get in the replacements would hopefully be sympathetic with the politics.

Watergate Committee Report, Senate Rep. No 93-981, Bk 18 at 8194 (1974). The House Committee on the Post Office and Civil Service, in its 1976 Report on abuses in the civil service focused extensively on the Malek Personnel Office in the Nixon administration. The House Committee was outraged at the many and varied violations committed by the Nixon White House, especially by the political manipulation of the civil service through Malek's "must-place" system, the preferential treatment of favored political operatives, and the fact that the Civil Service Commission would expedite jobs, at the request of the White House through the "pink tag"

system.[20] Indeed, it was the 1976 House Committee Report that is substantially responsible[21] for whistleblower protections as we now understand them. *See* Final Report on Violations and Abuses of Merit Principles in Federal Employment, House Rep. 94-28, at 247 (1976) ("we recommend legislation to protect from reprisal or intimidation those who are willing to come forward to expose wrongful acts by Government officials."). It should be noted that the recommendation which precipitated the anti-reprisal provisions[22] of the CSRA do not, in any way, limit the identity of the recipient of protection, other than "those who are willing to come forward." The use of "applicant" in the whistleblower protections is an attempt to guarantee, from the front-end, the integrity of the civil service system. It prevents any monkeying with the merit recruitment, by prohibiting the political apparatus from vetoing the appointment of qualified but politically unaligned individuals.

Conclusion

"[T]hose who are willing to come forward." That is the spirit in which the Board should broadly interpret both "applicant" and "employee" for purposes of the whistleblower protection provisions. Congress's aspirational goals in 5 U.S.C. §2301 should be taken into account, that whistleblowers should be affirmatively protected by all participants in the civil service system. It

[20] The House Committee Report explains the "pink tag" systemin great detail. House Rep. 94-28 at 6-7, 33 (1976). Senior personnel at the Civil Service Commission would apply a pink-red form to politically sensitive job applications. The pink tag was an internal signal to all Civil Service Commission personnel that the applicant was to receive priority treatment, which meant at least expedited treatment allowing the candidate to leap-frog other applicants, and at worst meant that the favored application must be found qualified and placed. The pink tag system was sufficiently odious that when the House Committee had conducted an earlier review of Commission processing of applicants, the Commission personnel who had been co-opted by the Nixon White House destroyed the pink tags to prevent discovery, by the House Committee, of the system. Despite being printed and approved in 1967 or 1968, the House committee did not learn of the pink tag system until 1975.

[21] The House Committee Report, which built upon the Watergate Committee report and several belated Civil Service Commission investigations, and good investigation by the press, was still the first to recommend anti-reprisal legislation. After President Carter was elected to clean up the corruption disclosed during the Nixon administration, it shocked to public to continue read about the depths of seediness to which the Nixon White House had stooped. The House Committee report lead President Carter to summon the interagency civil service workgroup, for reform proposals. Once those proposals were submitted to Congress by President Carter in March 1978, they were enacted by Congress in the first week of October in 1978.

[22] As discussed above, although the CSRA did not originally provide an individual right of action, the CSRA did codify anti-retaliation as a merit principle of civil service, and identically phrased provisions later added the whistleblower protections as we now know them.

should also be kept in mind that Congress was acting to correct the abuses of the Nixon White House: to prevent the reoccurrence of the Malek Manual, or its predecessor the "incumbency responsiveness program"; to prevent the co-opting of the civil service system like Chairman Hampton; to prevent political favoritism through political affiliation checks and the "pink tag" system detailed in the House Committee report. As the Board wrote in its Amicus solicitation, a remedial statute is to be read liberally to correct the errors addressed by Congress. In this case those errors to be remedied are two-fold, the Watergate abuses to be remedied, and the Board's prior lack of resolve to enforce Congress's broad mandate.

Mr. Abernathy clearly fits the model that Congress was trying to protect in enacting the CSRA, and its later more explicit cousins, the WPA, the 1994 Act, and the WPEA. It matter not whether this conclusion is reached through according contractors "doing the government's work" employee status, or whether the conclusion is reached through the proper application of "applicant" to prevent the gaming of the merit system. The Board can rest easy that the Supreme Court has eschewed any formalistic reliance on terminology in favor of looking at the substance of the matter. More importantly, Congress has tried for decades to urge the Board to live up to the promises that were made after Watergate that it could never happen again. Both terms, "employee" and "applicant," should be interpreted with a great deal of latitude, so that all federal employees: past, present, and future, will receive the protection that Congress has provided.

Respectfully Submitted,

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