

Protecting the Rights of Whistleblowers

Lauren Robinson

Coleen Rowley became one of the most famous whistleblowers in the United States in recent times when she blew the whistle on intelligence blunders at the FBI. The special agent's fiery 13-page letter to FBI Director Robert Mueller in 2002 detailed the FBI's failure to investigate Zacarias Moussaoui, a French national of Moroccan descent known as the "20th hijacker," in connection with the September 11 attacks. Rowley was named *Time* magazine's "Person of the Year" in 2002 along with two other whistleblowers.

Rowley's team, based out of the FBI's Minneapolis office, arrested Moussaoui just weeks before the 9/11 attacks. Moussaoui had attended terrorist training camps in the Middle East and spent \$8,000 on flight training for a Boeing 747. Rowley and her team requested a warrant to search his computer, but her supervisors denied the request. Moussaoui later pleaded guilty to conspiring to commit the atrocities, although he originally denied ties to 9/11, saying he had plans for a separate attack of his own.

In her memo to Mueller, Rowley criticized the FBI's failure to act:

Hopefully, with our nation's security on the line, you and our nation's other elected and appointed officials can rise above the petty politics that often plague other discussions and do the right thing. You do have some good ideas for change in the FBI but I think you have also not been completely honest about some of the true reasons for the FBI's pre-September 11th failures. Until we come clean and deal with the root causes, the Department of Justice will continue to experience problems fighting terrorism and fighting crime in general.¹

Rowley's concerns were met with a great deal of high-powered support, attracting media attention, and fueling congressional investigations and hearings. They even gained the attention of the Special Staff of the 9/11 Joint Intelligence Committee. Rowley made use of this attention to raise awareness of the FBI's systemic failings and to force the organization to correct



Coleen Rowley, the FBI agent who went public about the bureau's mishandling of the Zacarias Moussaoui case, is shown during an interview with the Associated Press in Washington, D.C., Sept. 9, 2004. Rowley warned that counter-terrorism agents may be getting more information than they can sift through. (AP Photo/Stephen J. Boitano)

inaction, unwieldy paperwork, tangled bureaucracy, and what she saw as a “risk-adverse culture.” Rowley’s whistleblowing contributed to a revamping of the intelligence community. She recently announced plans to run for Congress and said the focus of her campaign will be on “ethical decisionmaking by government leaders.”²

Rowley chose to be public with her actions, but another famous whistleblower chose to be exceedingly anonymous and was also very effective. This past summer it was revealed, to great public fanfare, that former FBI assistant director Mark Felt was the mysterious “Deep Throat” informant. Felt’s work with *Washington Post* reporters Bob Woodward and Carl Bernstein helped spark investigations into the Watergate break-in scandal that eventually forced President Richard Nixon to resign from office.

These two cases were fairly unique: most whistleblower cases do not receive media attention to the extent that Rowley’s and Deep Throat’s have. And not every whistleblower is allowed to make as much of an impact on the problems they witness. The road to exposing government errors or corruption is very bumpy and very costly.

Introduction to Whistleblower Issues

Thousands of federal workers, like Rowley and Felt, play key roles in achieving security for our nation. They do so as translators and investigators who handle sensitive intelligence, as officials who protect the safety and security of our nuclear weapons labs and power plants, as personnel who test the efficacy of airport baggage screening, and in many other ways.

Although the vast majority of federal employees and officials work in the best interest of the public, instances of wrongdoing do occur, not only in ways that waste tax dollars, but also in ways that compromise national security and the public health. Many workers raise their concerns to unresponsive employers and are then compelled to take those concerns to the press, Congress,

or to non-governmental organizations (NGOs). Currently, Congress is debating whether or not to strengthen federal whistleblower protections, particularly the Whistleblower Protection Act (WPA), which was originally passed in 1989 to better help these employees.

Since 9/11, the general public has had a heightened awareness of national security issues. This, coupled with the public visibility of whistleblowers like Coleen Rowley, has generated new dialogue about whistleblowing and ethical dilemmas. Official whistleblower reports in general are on the rise. According to Public Employees for Environmental Responsibility, the number of official whistleblower reports has risen significantly, from 380 in the year 2001 to 535 in 2003.

Whistleblower Retaliation

Many employers in the private and public sector do not want to be confronted with a whistleblower’s concerns. Coleen Rowley observed in a 2004 *Minnesota Law and Politics* article, “I’ve learned the sad lesson that most organizations are resistant to change and have a natural tendency to want to cover up problems and mistakes.” This organizational mindset is troubling, primarily because it can endanger the organization’s employees or the nation’s security. The compulsion to cover up problems rather than to address them openly is understandable: nobody wants to admit they made mistakes or to have those mistakes scrutinized, especially when an agency’s budget or a manager’s career is at stake. Addressing a whistleblower’s concerns often means a supervisor must admit to wrongdoing. Yet if agencies are truly to serve the public interest, they would benefit from zooming in on a flaw right away—without adding the hardship and drama of retaliating against whistleblowers.

When agencies retaliate against a whistleblower, they are simply “shooting the messenger,” and this does more harm than good. This is evident from the many instances of whistleblower retaliation. Some of the actions that employ-

ers take to intimidate workers who challenge the status quo include: job demotion, psychiatric evaluations, stripping away security clearances (meaning employees effectively lose their jobs), and transferring employees to new locations. The whistleblower may be forced to work in a hostile work environment and suffer physical threats or blacklisting, and other retaliatory acts.

Employees who go through the proper channels at work to report wrongdoing are often faced with hostility and find they can only turn to someone outside the agency to get problems fixed. A survey taken in 2000 by the Merit Systems Protection Board, which is an independent government agency created to protect federal employees from agency management abuses, found that 44 percent of the survey respondents who had made *formal* disclosures of wrongdoing experienced retaliation for the disclosures. Only 4 percent of those employees who did *not* make a formal disclosure experienced retaliation. This also suggests that many supervisors in federal agencies are unready to facilitate an office atmosphere that is open to in-house dialogue about workers’ concerns.

Outlining examples of the types of negative reactions whistleblowers face, Elaine Kaplan, former head of the U.S. Office of Special Counsel, testified in 2003 to the Senate Committee on Governmental Affairs:

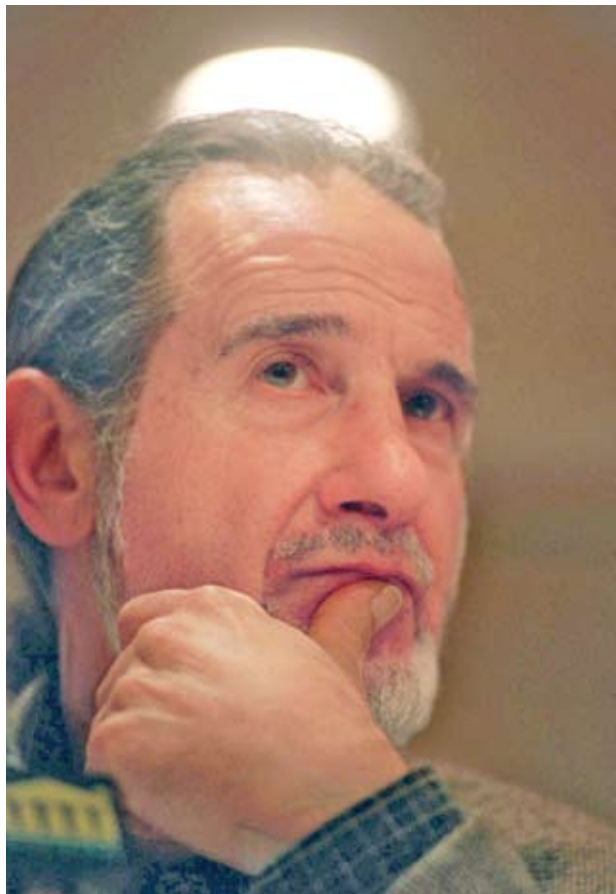
This same scenario could play out in any number of contexts: an inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a nuclear power plant’s license be revoked for violating safety regulations, an auditor who is denied promotions because he found improprieties in a federal grant program, or an investigator in the Inspector General’s office who is geographically reassigned because he has reported misconduct by a high level agency official.³

This type of sad and dramatic outcome can be seen time and again in many of the personal stories of whistleblowers. For example, FBI translator Sibel Edmonds was fired in 2002 after reporting ineptitude and possible espionage by a co-worker to her supervisors. Congressional briefings concerning Edmonds's case were retroactively classified by the Department of Justice (DOJ), sealing her national security concerns from dialogue and correction, despite a separate DOJ Inspector General report that confirmed much of Edmonds's allegations.

The case of New York City police officer Frank Serpico, made famous by a book and a movie entitled *Serpico*, illustrates that sometimes a whistleblower faces life and death situations for his actions. In the 1960s, Serpico became infamous among his colleagues for consistently refusing to take bribes or to turn a blind eye to corruption. In 1970, Serpico spoke out publicly about the corruption he witnessed, even testifying against a former partner. In 1971, after many death threats, he was shot in the face during a drug bust that appears to have been a set-up. His fellow officers left him for dead, without calling for medical care. Serpico survived because an elderly man found him and called for help. Serpico was the first police officer in U.S. history to report, publicize and testify about the rampant corruption of a police department, which included millions of dollars in cop payoffs and widespread abuse.

In another case, Richard Levernier worked for the Department of Energy (DOE) for 22 years and was in charge of testing security at U.S. nuclear weapons facilities. Levernier tried for years to get his supervisors to correct grave security weaknesses that might allow terrorists to detonate a nuclear device at one of the facilities. Levernier was stripped of

his security clearance, effectively ending the career of one of the best security analysts in DOE. In a November 2003 *Vanity Fair* article, Levernier said, "If I had to do this over again, I wouldn't.



Former New York undercover police officer Frank Serpico listened during a panel discussion on police brutality on Jan. 29, 1998, in New York. (AP Photo/Bebeto Matthews)

When they took my security clearance, it was like a scarlet letter was painted on my forehead. It's ruined my life." ⁴

Issues Right Now

Most members of the federal employee community, including the Department of Homeland Security, rely on the Whistleblower Protection Act (WPA) for protection from retaliation when they work to get wrongdoing and abuse corrected. However there are several loopholes in the WPA, and judicial decisions have undermined the level of protection employees receive.

For example, current judicial interpretations of the law require a whistle-

blower to meet a higher standard of proof than is required for prosecuting criminals. The 1999 case of *Lachance v. White* ruled that the WPA only protects employees who charge the government with misconduct and can back it up with "irrefragable proof," or proof that is impossible to refute.⁵ This standard was not mandated by the original legislation or in reports by Congress on the intent of the WPA.

There are several other loopholes in the WPA. It does not offer employees full protection from retaliation by their bosses. For example, employees are not protected by the WPA if an employee reports wrongdoing to the boss or to someone in the chain of command at work; if employees blow the whistle in the course of their job duties—for example, if they work as an auditor or investigator of wrongdoing; or if the employee is not the first one to report the problem.

As a result, an employee cannot simply take compelling, substantial evidence about potential health and security problems to a supervisor and try to have that person address it. Instead, they must spend the time and resources necessary to compile "irrefragable" evidence and then go outside their agency to get

problems corrected. The Government Accountability Project found that just three years before *Lachance v. White*, whistleblowers had a 36 percent success rate for decisions on their merits made by the Merit Systems Protection Board. After *Lachance*, the success rate dropped to 7 percent.

There are many federal employees who are not permitted to receive any WPA protections. These employees include those who work for the Defense Intelligence Agency, the Federal Bureau of Investigation, the Transportation Security Association, and the National Security Agency. These employees must rely entirely on their agency's own inter-

Teaching Suggestions

Provide students the above article for background information. Students should also read the following articles expressing differing perspectives on whistleblowers. Then, have students debate whether or not increased whistleblower protections are beneficial.

Positive:

Ratnesar, Romesh, and Michael Weisskopf, "How the FBI Blew the Case," *Time*, June 3, 2002, www.time.com/time/archive/pre-view/0,10987,1101020603-250017,00.html

Gray, Geoffrey, "Code of Quiet: The Secret War on Whistleblowers," *The Village Voice*, June 19-25, 2002, www.villagevoice.com/news/0225.gray,35781,1.html

Negative:

Gruber, Amelia, and Chris Strohm, "Don't Blow It," *Government Executive*, November 14, 2003, www.govexec.com/dailyfed/1103/111403lb.htm

Shafer, Jack, "Why did Deep Throat Leak?" *Slate*, August 19, 2005, slate.msn.com/id/2120148/

Discussion Questions:

1. Why do individuals decide to blow the whistle?
2. What are the larger, national ramifications of whistleblowing? Is national security at stake?
3. What are some possible results of whistleblowing (good and bad) in terms of legislation, government bureaucracy, etc.? Does it promote "good government?"
4. What are the personal costs of whistleblowing? How could it affect relationships with work colleagues? Family? Could it affect your personal security, both financial and personal?
5. What would you do if you witnessed fraud or wrongdoing at school or at work? Would you report it if you knew your grades, conduct record, or job security were at risk?
6. How would you respond to a whistleblowing complaint if you were an employer?
7. States also have their own particular whistleblower protection legislation. With the guidance of your instructor, investigate and summarize what these protections are in your state and how effective they are.
8. What do you think of whistleblowers? Are they heroes or snitches?

Students can also track the progress of current whistleblower legislation at capwiz.com/govexec/issues/bills/?bill=7409391&size=full

nal process for addressing whistleblower concerns. This means that many federal employees can only seek redress for any retaliation they suffer from the agency where it occurred. Proponents of enhanced whistleblower protections see this as a conflict of interest.

Pending Protections

Last session, Congress debated the Federal Employee Protection of Disclosures Act (S.2628) in the Senate, and the Whistleblower Protection Enhancement Act (H.R. 3281) in the House. The two pieces of legislation had great potential but, because of resistance from the Department of Justice, they fell by the wayside. Now the 109th Congress has once again breathed new life into a whistleblower protection bill, the Federal Employee Protection of Disclosures Act (S.494 and H.R. 3097).

The Senate version of the bill (S.494) would strengthen current law by giving whistleblowers the opportunity to take their retaliation cases through a multi-circuit court review for up to five years, rather than relying solely on the

Federal Circuit Court of Appeals—the only court that currently has authority to hear Whistleblower Protection Act appeals. The bill would also force government agencies to educate their employees about their whistleblower rights, how to make their concerns known, and how to get them addressed, particularly when handling classified information. The bill ensures that any disclosure based on "reasonable belief" of waste, fraud or abuse is protected under the law. It would also protect those whistleblowers who are retaliated against by having their security clearances revoked.

The House version of the Federal Employee Protection of Disclosures Act (H.R. 3097) does not provide as much protection as would S. 494. For instance, it does not offer due process rights to whistleblowers who have been stripped of their security clearance. Many whistleblowers have security clearances snatched away by employers who want to retaliate against an employee for blowing the whistle, and to make sure they can't do it again. This is an effective

form of retaliation because employers are allowed to remove security clearances without providing a reason, and without clearance, an employee cannot perform his or her job. If the clearance is suspended or revoked, the employee can be fired for not having the necessary clearance required for that position.

However, the House bill would also require the Government Accountability Office (GAO) to conduct a study on all security clearance revocations about which employees had filed claims since 1996. A previous version of the House bill included a controversial exemption from protections for national security personnel. Watchdog groups and whistleblowers with the National Security Whistleblowers Coalition alleged that Government Reform Committee Chairman Tom Davis (R-VA) had surreptitiously included the homeland security exemption in the previous bill, but a spokesman from Davis's office told the *National Journal* that the provision had been there since the bill's introduction and that "the committee unanimously reported a bill with the same provision

during the 108th Congress.” The previous bill (H.R. 1317) received significant opposition from the minority leadership of the House Government Reform Committee and from employee unions, which led Congressman Todd Platts (R-PA) to introduce H.R. 3097 without the controversial exemption. The bill is currently in referral with the House Committee on Government Reform, awaiting markup.

Whistleblowing: Pros and Cons

There are some who do not support strengthening whistleblower protection laws, saying whistleblowers are motivated by profit and greed. Others, for example the Department of Justice, are concerned that disgruntled employees will be shielded under the new legislation. A 2003 article from *Federal Human Resources Week* discussed the 2003 version of the Federal Employee Protection of Disclosures Act (S.1358) and cited the DOJ’s criticisms of increased whistleblower protections: “[R]ather than promote and protect genuine disclosures of matters of real public concern, it would provide a legal shield for unsatisfactory employees.”⁶

Testifying against this same legislation, DOJ Assistant Attorney General Peter Keisler argued that the bill would lead to inefficiencies in the management of federal employees; he also feared that it would encourage employees to leak classified information without first seeking approval from the appropriate powers.

The Whistleblower Protection Act seeks to protect a federal employee’s right to speak up when he or she witness security, financial or other problems that compromise the agency’s commitment to the public interest. An open line of com-

munication between the management and employees of an agency, in which the opportunity to raise concerns and have them addressed is facilitated and respected, would solve a great number of these problems. It would also avoid the current situation where whistleblowers find themselves having to go outside the agency to get problems fixed.

Some whistleblower advocates include NGOs such as the Project On Government Oversight, the Government Accountability Project, Taxpayers Against Fraud, the National Whistleblower Center, and Public Employees for Environmental Responsibility, to name a few. They believe whistleblowers are integral to maintaining national security and ensuring that the government works properly. In their view, without employees who are willing to draw agency or Congressional attention to problems, those problems will go uncorrected. According to U.S. Representative Edward Markey (D-MA), “These people [whistleblowers] should be rewarded, not punished. ... Instead these latter-day Paul Reveres who patriotically serve their country are punished. They’re blackballed, they go broke and their lives are ruined.”⁷

Notes

1. Coleen Rowley’s FBI memo, www.coleenrowley.com/documents/MOUSAQUL-letter.rtf; an edited version is available in “The Bombshell Memo,” *TIME* magazine, www.time.com/time/covers/1101020603/memo.html.
2. “Rowly Announces Congressional Bid,” Associated Press (June 28, 2005).
3. Testimony of Elaine Kaplan, former U.S. special counsel, before the Senate Committee on Governmental Affairs (November 12, 2003), hsgac.senate.gov/ (click on Hearings, then Witness Testimony, and scroll to find Elaine Kaplan).
4. Mark Hertsgaard, “Nuclear Insecurity,” *Vanity Fair*, November 2003. www.pogo.org/m/ep/ep-vanityfair-112003.pdf
5. *Lachance v. White* (<http://laws.findlaw.com/fed/983249.html>); Shawn Zeller, “Bill Would Protect Whistleblowers,” *Government Executive* (July 21 2004) www.govexec.com/dailyfed/0704/072104sz1.htm
6. “DOJ Opposes Broadened Whistleblower Protections,” *Federal Human Resources Week* 10, no. 32 (Dec 1, 2003).
7. Stephen Losey, “Names Will be Named if Protections Aren’t Strengthened,” *Federal Times* (May 2, 2005).

LAUREN ROBINSON is a development associate at the Project On Government Oversight (www.pogo.org), a Washington, D.C.-based nonprofit watchdog group that works to expose corruption and promote a more accountable federal government. **Danni Downing**, POGO’s editor, and **Beth Daley**, POGO’s communications director helped prepare and edit this article.

RESOURCES:

Films:

Whistleblowing-themed films such as the following might help students understand the personal side of blowing the whistle as well as its public and legislative impact:

Silkwood, *Serpico*, *The Insider*, *Erin Brokovich*, and *All the President’s Men*.

Print and other resources:

Rose, David, “An Inconvenient Patriot,” *Vanity Fair*, September 2005.

Von Drehle, David, “FBI’s No. 2 Was ‘Deep Throat,’” *The Washington Post*, June 1, 2005.

www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100655.html

Brian, Danielle, and Martin Edwin Anderson, “Don’t Fault the Messenger,” *The Washington Times*, May 24, 2005. www.washingtontimes.com/op-ed/20050523-093236-3354r.htm

Strohm, Chris, “House Lawmakers Spar Over Whistleblower Protections,” *Government Executive*, June 16, 2005. www.govexec.com/dailyfed/0605/061605c1.htm

Whistleblower Protection Act of 1989 thomas.loc.gov/cgi-bin/query/z?c101:5.20.

National Security Whistleblower Protections: The Unfinished Agenda, A Project On Government Oversight report www.pogo.org/p/government/go-050402-whistleblower.html

The Art of Anonymous Activism, a joint guide by the Project On Government Oversight, the Government Accountability Project, and Public Employees for Environmental Responsibility. www.pogo.org/p/government/ga-021101-whistleblower.html