United States of America - Submission to the UN Universal Periodic Review

Ninth Session of the UPR Working Group of the Human Rights Council
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1. The National Whistleblowers Center submits the following concerns that the United States of America has failed to fulfill its obligations to protect whistleblowers. These obligations arise under the following international documents, relevant portions of which are in Attachment 1:

1. Universal Declaration of Human Rights (Articles 2, 7, 8, 20(1), 23(1))
2. International Covenant on Civil and Political Rights (Articles 2, 17 (with respect to correspondence), 18, 19, 22, 25, 26)
3. The United Nations Convention Against Corruption (Article 32(1)).
4. 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) (Article 33-1).
5. International Covenant on Economic Social and Cultural Rights (Articles 2, 6, 7)

I. Executive Summary

2. This submission is made under Sections B, C, and D of the General Guidelines for the Preparation of Information under the Universal Periodic Review regarding failures of domestic legislation, policy, and practice, to appropriately and effectively protect whistleblower rights, and specifically the rights to protection from retaliation, adequate compensation and political asylum.

3. The United States fails to provide effective remedies for all whistleblowers under its customary law. It has failed to enact necessary legislation, and has taken regressive steps in violation of Article 2 of International Covenant on Economic Social and Cultural Rights. The United States has even selected whistleblowers for prosecution and imprisonment, including Jon Grand and Brad Birkenfeld. It has failed to provide effective protection of federal employee whistleblowers, private sector whistleblowers and whistleblowers from other countries.

II. Whistleblowers play a vital role in detecting corruption, and providing whistleblowers with adequate and effective remedies is necessary to encourage employees to report corruption.

4. Employees play an important role in protecting the public from dangers to the environment, nuclear and workplace safety, and the integrity of public and private institutions. They keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters employee efforts on behalf of public purposes.

5. A 2008 University of Chicago study determined that whistleblowers are the best tool for fighting corporate fraud. One unfortunate, but not surprising, finding was that of whistleblowers whose identity was revealed, 82% of them were either forced from their position or quit under duress. In 2009, the accounting firm of PriceWaterhouseCoopers issued its Global Economic Crime Survey.[1] It confirmed that the most effective way to detect corporate fraud is though whistleblowers. PWC concluded that fraud detection depends on protecting those whistleblowers and punishing those who commit fraud, "regardless of their position in the company." Attachment 2 has more information on whistleblower effectiveness. Adoption of best practices in establishing and enforcing whistleblower protections is the most effective way to route out corruption and protect the public.

III. The United States has unfairly selected whistleblowers for prosecution and imprisonment, including Bradley Birkenfeld, who remains in prison.

6. Bradley Birkenfeld entered federal prison on 8 January 2010 to begin a 40 month sentence. He is the most significant tax whistleblower in history who helped the U.S. Government recover over $20 billion in tax revenue. Information he provided broke the historic secrecy of Swiss banks, and

[1] Available at:
www.pwc.com/gx/en/economic-crime-survey/download-economic-crime-people-culture-controls.jhtml

revealed 14,700 taxpayers who evaded their obligations. His information caused UBS to be fined $780 million for helping customers evade taxes. US law provides for a reward for tax whistleblowers. Section 7623 of the Internal Revenue Code. The policy of encouraging whistleblowers to come forward is undercut by prosecuting the world's most prominent tax whistleblower. Birkenfeld recently filed a petition for clemency. Until it is granted, it would be appropriate to consider him a political prisoner, imprisoned in violation of international rights.

7. Jon Grand served as a witness in the 2000 race and sex discrimination trial of Dr. Marsha Coleman-Adebayo. She prevailed in her trial, proving that the U.S. Environmental Protection Agency (EPA) discriminated. The EPA then subjected Grand's wage and expense payments to close scrutiny, and commenced prosecution of him for errors he was unaware of. He was sentenced to four months in prison, which he served. Together, the Birkenfeld and Grand cases show that U.S. authorities need to refrain from prosecutions motivated by animus against whistleblowing.

IV. The United States fails to provide effective remedies for retaliation against federal employee whistleblowers, and has taken regressive steps depriving such whistleblowers of their customary rights.

8. The United States has failed to protect whistleblowers who are employees of its own federal government. The U.S. Supreme Court has recognized an individual right to sue the federal government for certain violations of constitutional rights. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). This right applied naturally to federal employee whistleblowers who were subjected to retaliation by their supervisors. For a short time, they had access to customary jury trials for their claims of retaliation, subject to defenses of qualified or absolute immunity. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), footnote 27; *Harlow v. Fitzgerald*, 457 U.S. 731 (1982).

9. In 1989, Congress enacted the Whistleblower Protection Act (WPA) and required federal employee whistleblowers to bring retaliation claims only to the Merit System Protection Board (MSPB). One effect of the WPA was that whistleblowers lost their right to direct court action under *Bivens*. All the members of the MSPB are appointed by the administration – typically the very administration about whom the whistleblower has reported corruption. Appeals from the MSPB are allowed only to a "Federal Circuit" Court of Appeals. The MSPB and Federal Circuit routes deprived whistleblowers of the customary remedies and procedures, specifically jury trials for "make whole" compensatory damages. The MSPB and the Federal Circuit have ruled against whistleblowers with such regularity that the remedy can no longer be considered "effective" as required by Article 32(1). Charlotte Yee recently posted [2] the official MSPB 2008 statistics for all its non-benefit cases. The results show a strong bias for federal employers. The MSPB judges ruled in favor of employees a total of 1.7% of the time out of 4,698 cases nationwide. On average, 16 whistleblowers a month lost initial MSPB decisions. Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the full MSPB. The Federal Circuit has consistently ruled against whistleblowers, with whistleblowers winning only three out of 209 cases since 1994. In Attachment 3, the Ethics Resource Center concludes that 90% of federal employees think their agencies have an ethics program that is less than strong. The WPA was a huge backward step for whistleblower rights. It was a deliberately regressive measure against realizing economic, social and cultural progress. It is thus a violation of the obligation of progressive realization under Article 2 of International Covenant on Economic Social and Cultural Rights. It also renders ineffective the remedies for whistleblowers, in violation of The United Nations Convention Against Corruption, Article 32(1).

10. Some representatives in Congress, of both major political parties, have proposed a Whistleblower Protection Enhancement Act (WPEA), HR 1507, that would fully remedy the

[2] http://www.civilservicechange.org/?p=2347

shortcomings of the current Whistleblower Protection Act. It would allow federal employee whistleblowers to bring their claims to U.S. District Courts and receive jury trials under customary law. The current administration and Senate allies, have proposed S. 372. It would not use customary legal procedures, and would continue the denial of effective remedies.[3] National security whistleblowers would be worse off. NWC calls on the United States to fulfill its obligation to provide effective remedies for its federal employee whistleblowers under its customary law.

V. The United States fails to provide effective remedies for retaliation against private sector whistleblowers.

11. Beyond the federal employee sector, protection of whistleblowers is uneven. In enacting the 2002 Sarbanes-Oxley Act, Congress was aware that private sector whistleblowers were vulnerable. The Senate Judiciary Committee found that whistleblower protections were dependent on a "patchwork and vagaries" of varying state statutes, even though most publicly traded companies do business internationally. It noted, "companies with a corporate culture that punishes whistleblowers for being 'disloyal' and 'litigation risks' often transcend state lines. As a result, most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law." Congress acted to protect employees who report securities violation that could harm investors. S. Rep. No. 107-146, 107 th Cong., 2d Session 19 (2002). Sarbanes-Oxley Act of 2002 (Title VIII), 18 U.S.C. §1514A ("Sarbanes-Oxley") enacted on July 30, 2002. Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002.

12. Many categories of whistleblowers have no effective remedies for retaliation in the United States. The First Amendment to the U.S. Constitution guarantees rights to speak, associate and petition for redress of grievances. Yet this guarantee has no force or effect on private sector employers. Only a few states have enacted legislation to protect all private sector employees when they blow the whistle on any type of corruption. See the New Jersey Conscientious Employee Protection Act (CEPA), NJSA 34:19, for a good example. Some states explicitly deny any protection for employees who suffer retaliation for raising concerns of public interest. *Taylor v. Foremost-McKesson, Inc*., 656 F.2d 1029 (1981) (Georgia gives no protection); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W. 2D 723 (1990) (Texas protects only refusing to obey illegal orders). Even state and local employees have no protection under the First Amendment for reporting corruption if making such reports is part of their regular job duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). It is ironic that the very public employees whose job it is to detect and report corruption are the very ones denied protection when they suffer retaliation for doing their jobs too well. Other entire industries have no law protecting employees who raise public safety concerns. For example, employees working in the food or pharmaceutical industries have no legal protection for reporting violations of the health and safety rules of the Food and Drug Administration.

13. NWC objects to the thirty (30) day statute of limitations for health, safety and environmental whistleblowers. Water Pollution Control Act (WPCA, commonly called the Clear Water Act or CWA), 33 U.S.C. 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Clear Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law"), 42 U.S.C. § 9610; 29 CFR § 24.103(d)(1); Occupational Safety and Health Act, 29 U.S.C. § 660(c) ("OSHA 11(c)"). Thirty days is unrealistic for newly unemployed people to recover from emergent needs, find legal counsel, follow a referral to one of the few attorneys in this limited area, negotiate representation, complete the initial stages of pre-filing investigation and file a complaint. Numerous whistleblowers have lost their cases solely because of this very short time limit. *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d

[3]NWC has listed 12 deficiencies with S. 372 at:
http://www.whistleblowers.org/index.php?option=com_content&task=view&id=955

Cir. 1981); *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991); *Lahoti v. Brown & Root*, 90-ERA-3 (Sec'y Oct. 26, 1992) (being unaware of the 30-day time limit does not excuse late filing); *Deveraux v. Wyoming Association of Rural Water*, 93-ERA-18 (Sec'y Oct. 1, 1993).

14. OSHA Section 11(c) is ineffective for another reason. The statute has no private right of action, and whistleblowers are completely at the mercy of the Occupational Safety and Health Administration (OSHA) to initiate enforcement action. Out of over 3,000 complaints OSHA receives each year, it takes enforcement action only in about twenty (20). The others have no rights at all under federal law. *Taylor v. Brighton Corp*., 616 F.2d 256 (6th Cir.1980). Also, several states will deny relief to health and safety whistleblowers under their customary law precisely because the state courts believe that Section 11(c) provides a remedy. *Walsh v. Consolidated Freightways*, 278 Or. 347, 563 P.2d 1205 (1977); *Grant v. Butler*, 590 So. 2d 254 (Ala. 1991); *Miles v. Martin Marietta Corp*., 861 F. Supp. 73 (D. Colo. 1994).

15. On January 27, 2009, the U.S. Government Accountability Office (GAO) issued its Report GAO-09-106, called, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency." The report says what many whistleblower practitioners have long known: the Department of Labor's whistleblower program needs more resources and better quality. Investigators do not have the equipment, training, legal counsel or oversight needed to assure quality investigations. The GAO discovered that OSHA does not have the systems in place to assure the accuracy of case statistics, the agency's processing time, reasons for screening out complaints, and the outcomes of settlements. GAO found that the Office of Administrative Law Judges (OALJ) did have reliable and verifiable case tracking data, and its average processing time for a whistleblower appeal was nine (9) months. The Administrative Review Board (ARB) considers appeals from ALJ decisions, and its processing time can range from thirty (30) days to five (5) years. GAO found that the ARB does not have reliable data of its docket flow and lacks oversight of its data quality. Overall, the GAO found that whistleblower caseloads are increasing, and the cases themselves are becoming more complex. GAO found that OSHA has not even established a minimum equipment list saying what investigators should have. Some, but not all, have laptop computers and portable printers to take written statements in the field. This equipment is necessary for investigators to make an accurate written record of a witness' first statement about a complaint. GAO found that OSHA's report of a 21 percent success rate for whistleblowers could be misleading. OSHA includes all settled cases in the "successful" category. As a result, "nearly all" of the successful cases were settlements, rather than OSHA decisions on the merits. In appeals to OALJ, whistleblowers win less than a third of the contested cases.

16. The U.S. Department of Labor made another regressive step in 2007 when it adopted 24 CFR 24.107(b) ("Administrative law judges have broad discretion to limit discovery in order to expedite the hearing."). It had previously allowed time for the completion of discovery. *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994) ("the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted."). Adequate time is necessary to accomplish customary discovery.

VI. The United States fails to protect whistleblowers from other countries.

17. The 1967 Protocol Relating to the Status of Refugees, Article 33-1, prohibits *refoulement* – the return of refugees to countries where their "life or freedom would be threatened." In the landmark case on this issue, *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000), a U.S. court held that, "Whistleblowing against one's supervisors at work is not, as a matter of law, always an exercise of political opinion. However, where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution…" Under the Protocol,

refugees can be returned only if they are a "danger to security" or if they have been convicted of a "particularly serious crime." Article 33-2. Yet the United States violates the prohibition on *refoulement* by imposing an arbitrary deadline for asylum applications and by failing to provide adequate due process protections to asylum seekers. In 1996, the United States enacted another regressive step by requiring asylum seekers to apply within one year of arriving in the country. 8 U.S.C. § 1158(a)(2). The particular hardships of escaping one's native country and resettling in a new land with a new language make the one-year time limit a significant impediment on immigrant whistleblowers. Failure to qualify for legal admission subjects millions of immigrants in the United States to a denial of permission to work. These immigrants, and the whistleblowers among them, are predominantly from racial and ethnic minorities. Immigrants are forced by economic necessity to work using another person's identity. If they make claims for retaliation, they are denied the customary remedies of back pay and reinstatement. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

18. Additionally, the U.S. Department of Labor has refused to provide protection for international employees of companies trading their securities here and subject to U.S. law. *Ede v. The Swatch Group*, ARB No. 05-053, ALJ Nos. 2004-SOX-068, -069 (ARB June 27, 2007); *Carnero v. Boston Scientific Corp*., 433 F.3d 1, 18 (1st Cir. 2006). This holding is contrary to our customary law of applying our securities laws throughout the world for companies that choose to avail themselves of stock exchanges within our borders. *Schoenbaum v. Firstbrook*. 405 F.2d 200 (2d Cir. 1968), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). It is ironic that the U.S. Congress would enact the SOX Act because of the way that Enron[4] abused overseas subsidiaries, and then have our courts deny protections for the whistleblowers there who report corruption that could lead to the next fiscal disaster.

VII. Actions needed for the United States fails to protect whistleblowers.

19. To comply with obligations under pertinent international instruments it is necessary for the United States to:

(1) Grant clemency to Bradley Birkenfeld and stop prosecuting whistleblowers.
(2) Enact the pending HR 1507 bill to ensure all federal employee whistleblowers have access to the customary legal procedures (jury trials) for their retaliation claims.
(3) Enact legislation that provides effective remedies against employer coercion and retaliation for private sector employees with a statute of limitations of at least 180 days.
(4) Provide the resources necessary for the Department of Labor to properly investigate and adjudicate whistleblower cases.
(5) Reform immigration laws that allow immigrants access to all labor laws and remedies, and permit all immigrants to submit applications for political asylum at any time.
(6) Enforce its laws consistent with its customary law to provide all whistleblowers with full "make whole" remedies and jury trials.

20. If there are ways that I or anyone at the National Whistleblowers Center can be helpful in consideration of the concerns raised in this submission, please feel free to call on me.

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[4]See House Committee Report, 107-414.

Attachment 1 to Submission of the National Whistleblowers Center to the UN Universal Periodic Review

1. Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. International Covenant of Civil and Political Rights

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. The United Nations Convention Against Corruption

Article 32. Protection of witnesses, experts and victims
1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

4. 1967 Protocol Relating to the Status of Refugees (Refugee Protocol)

Article I. General provision
1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

Convention Relating to the Status of Refugees
Article 31
refugees unlawfully in the country of refugee
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

5. International Covenant on Economic, Social, and Cultural Rights

Article 2
1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
(a) Remuneration which provides all workers, as a minimum, with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;
(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

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Proven Effectiveness of Whistleblowers

Three recent scientific studies objectively prove that whistleblowers are the most effective at detecting fraud:

1. **PricewaterhouseCoopers** – *Economic crime: people, culture and controls*[1]

In 2007, PricewaterhouseCoopers (PWC) published a study of over 5,400 companies in 40 countries, including interviews of the CEOs, CFOs and other responsible executives, that concluded that whistleblowers play a "decisive role" in uncovering fraud. PWC determined that "fraud remains one of the most problematic issues for business worldwide" and concluded that companies could not rely on fraud controls (ex. internal audits) alone to detect and deter economic crimes. In fact, the study found that whistleblowers were responsible for 43% of the fraud detection, while law enforcement officers were only responsible for 3% of the fraud detection and corporate controls were responsible for 34% of the detection.

PWC recommended that companies create "whistle-blowing systems" and listed "safeguard employees who report misconduct against any form of retaliation (i.e., threats, harassment and demotion)" as the first requirement for a whistleblower program. The study explained that "there is no substitute for the perceptiveness and acuity of the individual when it comes to discerning those patterns of odd behaviour, unlikely coincidences and atypical work methods that often signal the presence of economic crime."

2. **Association of Certified Fraud Examiners** – *2008 Report to the Nation on Occupational Fraud and Abuse*[2]

The Association of Certified Fraud Examiners' (ACFE) *2008 Report to the Nation on Occupational Fraud and Abuse* examined 959 cases of occupational fraud. They recognized that "one of the primary characteristics of fraud is that it is clandestine, or hidden; almost all fraud involves the attempted concealment of the crime." Consequently, insiders (i.e. whistleblowers) were viewed as essential for any effective anti-fraud program.

Like PWC, the ACFE concluded that "occupational frauds are much more likely to be detected by a tip then by audits, controls or any other means." Significantly, the ACFE found that 46.2% of all frauds were uncovered by tipsters, while only 3.2% was detected by law enforcement. These statistics are remarkably similar to the PWC findings.

The ACFE also recognized the contributions of whistleblowers and strongly endorsed

[1] http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf
[2] http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfefraudreport.pdf

corporate cultural changes designed to encourage whistleblowers. The study concluded that since over half of all fraud detection tips came from employees they "should be encouraged to report illegal or suspicious behavior, and they should be reassured that reports may be made confidentially and that the organization prohibits retaliation against whistleblowers."

3. **Ethics Resource Center** – *National Government Ethic Survey: An Inside View of Public Sector Ethics*[3]

A 2007 survey of 3,452 employees, including 774 government employees, conducted by the Ethics Resource Center (ERC) mirrors the findings of the PWC and ACFE studies. However, in relation to detecting government misconduct, some of the ERC's conclusions are very disturbing. The survey concluded that "government employees are increasingly working in environments that are conducive to misconduct" and that "signs point to a future rise in misconduct if deliberate action is not taken." The ERC survey also concluded that "many of those who reported the misconduct they observed were retaliated" against. Specifically the ERC survey made the following findings:

"52% of federal employees observe misconduct"

20% of "federal government employees work in environments conducive to misconduct"

"24% of federal government employees who observed misconduct but chose not to report it feared retaliation from management"

"16% of non-reporters within the federal government feared retaliation from their peers"

Of those who reported misconduct, 83% only reported it to their supervisor or higher management [conduct not protected under the current federal Whistleblower Protection Act]

Only 6% of federal employees who disclosed misconduct were willing to report that misconduct to a "hotline" or outside of their agency

Only 47% of government agencies have comprehensive ethics and compliance programs

Conclusion

The PWC, ACFE, and ERC studies confirm with reliable scientific data that strong laws and polices should exist to protect and encourage whistleblowers. There is no doubt that whistleblowers objectively help the corporations and the government agencies for which they

[3] http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/ethicsresourcecentersuvery.pdf

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work. The deep-seated cultural bias against whistleblowers exhibited in many agencies is not only archaic, but also counterproductive. If the government is truly serious about detecting and preventing fraud, waste and abuse, and ensuring that the public safety is protected, effective anti-retaliation laws must be enacted which encourage, reward and protect whistleblowers.

Key Quotes from Ethics Resource Center's
2007 National Government Ethics Survey

Poor perceptions of management increase the likelihood that employees will not report. The two primary reasons employees do not report misconduct are fear and futility. Fifty-eight percent of those who observed misconduct did not report because they doubted that appropriate corrective action would be taken by management if provided information. Similarly, three in ten employees did not report because they feared retaliation from management.

Many reporters are retaliated against. More than one in six (17 percent) employees who reported the misconduct they observed experienced retaliation as a result.

FEDERAL GOVERNMENT

The federal government seems to do better when it comes to workplace ethics. Nevertheless, more than half of federal employees observed misconduct, and twenty-five percent of employees still don't report.

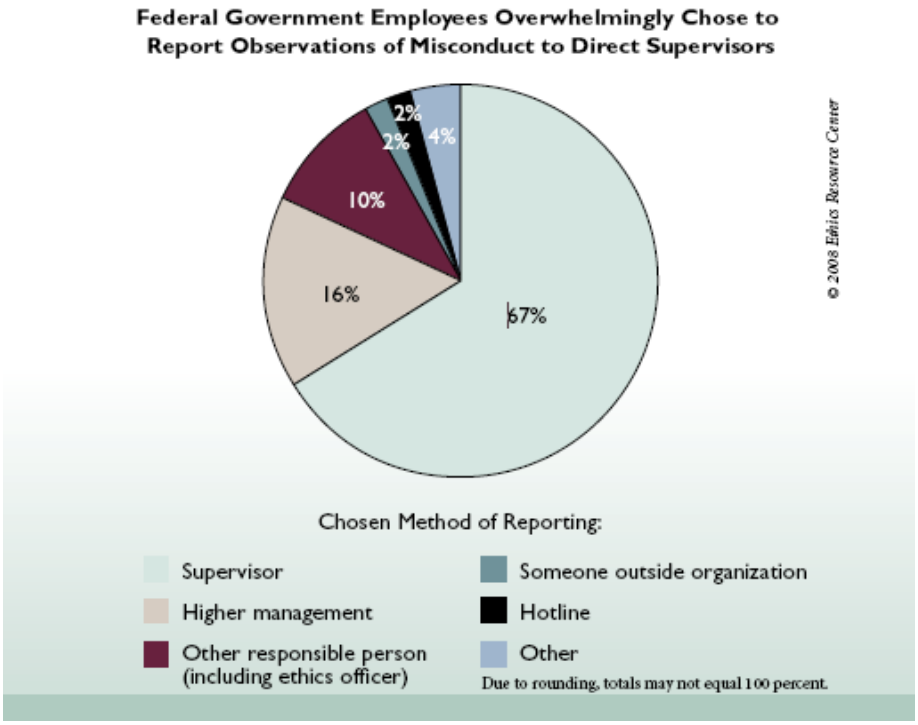
Just over half of federal employees observed misconduct in the past year. In the past twelve months, 52 percent of federal government employees observed at least one type of misconduct. Of this 52 percent of employees, 70 percent observed more than one type of misconduct.

The four types of misconduct observed most frequently by federal government employees are:

- *Abusive behavior — observed by 23 percent of federal government employees;*
- *Safety violations — observed by 21 percent of federal government employees;*
- *Lying to employees — observed by 20 percent of federal government employees; and*
- *Putting one's own interests ahead of the organization (conflicts of interest) — observed by 20 percent of federal government employees.*

Senior managers may be unaware of misconduct taking place. One in four federal government employees who observed misconduct did not report it. When they did report, federal employees were not likely to use established channels.

Only 2 percent of federal government employees made use of whistleblower hotlines to report their observations of misconduct; employees overwhelmingly reported to supervisors, who may or may not identify the situations described as misconduct and pass it along to top management.



93% of federal employees use internal whistleblowing

Two in ten federal government employees work in environments conducive to misconduct. In environments conducive to misconduct, employees are introduced to situations inviting wrongdoing and/or they feel pressured to cut corners to do their jobs. Further, employees may feel that work values conflict with personal values. In such contexts, employees are 63 percent more likely to observe misconduct.
Thirteen percent of federal government employees feel pressure to compromise the organization's standards.

Many of those who reported the misconduct they observed were retaliated against. This is troubling on two fronts: reporters are punished for their responsible, courageous decision at the same time that future reporting is discouraged.

- More than one out of ten (11 percent) of federal government employees who reported their observations of misconduct have experienced retaliation as a result of their reports.
- Almost a quarter (24 percent) of federal government employees who observed misconduct but chose not to report it feared retaliation from management.
- Also, 16 percent of non-reporters within the federal government feared retaliation from their peers.

Most federal employees recognize that their workplace has a full ethics and compliance program. Just under two out of three federal government employees identified existence of ethics and compliance program standards and resources in their organization.

Fewer federal employees are evaluated based on their ethical conduct in performance reviews, and this is the primary reason that more employees of the federal government do not acknowledge the presence of a comprehensive ethics and compliance program at work.

Only 30 percent of federal government employees say their agencies have well-implemented programs. Employees in agencies without wellimplemented programs are more likely to refrain from utilizing program resources, and they are more likely to express that they are illprepared to handle situations inviting misconduct.

At the federal level, three types of behavior fall into the **severe risk** category.

- *Abusive or intimidating behavior;*
- *Lying to employees; and*
- *Putting one's own interests ahead of the organization's.*

Several kinds of misconduct pose a **high risk** among federal government employees: *Safety violations; Misuse of the organization's confidential information; Internet abuse; Misreporting of hours worked; Improper hiring practices; Lying to stakeholders (customers, vendors, or the public); Sexual harassment; Discrimination; and Provision of low quality goods or services.*

10 Percent of Federal Workplaces Have a Strong Ethical Culture. Strong ethical cultures are essential to the reduction of ethics risk, and it is discouraging that so few federal government workplaces have a strong culture.

Importantly, more than one in four federal employees indicated that leadership and supervisors demonstrated a strong commitment to ethics — roughly 67 percent more than at state and local levels. Given the impact that strong ethical culture has on observed misconduct, this accounts for the lower levels of misconduct observed at the federal level.