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NATIONAL SECURITY WHISTLEBLOWING
A Gap in the Law

Many people presume that "whistleblowing" is a legal defense for government employees or contractors facing criminal charges for disclosing classified information. In fact, existing legal protections for whistleblowers are limited and generally do not extend to leaks of classified information.

Here is a brief summary of some key laws affecting whistleblowers.

Q: What is the Whistleblower Protection Act?

A: The Whistleblower Protection Act (WPA) provides that the government may not take adverse **personnel actions** against agency employees who engage in **protected disclosures** to **specified persons or entities.** The definitions of these terms follow:

- **Personnel actions** include measures like firing, demoting, cutting pay, etc. They do not include criminal prosecutions.
- **Protected disclosures** include the release of information that the employee reasonably believes demonstrates illegality, gross mismanagement, gross waste, abuse of authority, or a substantial and specific danger to public health or safety.
- **Specified persons or entities** differ depending on the classification status of the information.
  - If the information is not classified, the employee may disclose it to anyone.
  - If the information is classified or its disclosure is otherwise prohibited by law, the employee may disclose it to certain officials – including the Special Counsel (a government office established to protected federal employees from prohibited personnel practices) and the agency's Inspector General.

The WPA does not apply to persons in positions of a "confidential, policy-determining, policymaking, or policy-advocating character." Nor does it apply to anyone in the Federal Bureau of Investigations, the Central Intelligence Agency, the National Security Agency, or any other executive body that conducts primarily foreign intelligence or counter-intelligence activities.

Q: What is the Intelligence Community Whistleblower Protection Act (ICWPA)?

A: Intelligence Community (IC) employees are not covered by the WPA. Instead, the Intelligence Community Whistleblower Protection Act (ICWPA) permits IC employees to report an "urgent concern" (even if it involves classified information) to the agency's Inspector General and, ultimately, to the congressional intelligence committees. Remarkably, though, the ICWPA does not provide employees protection against retaliation if they make such disclosures.

Q: What is Presidential Policy Directive 19?

A: President Obama issued a directive in 2012 (Presidential Policy Directive 19, or PPD-19) requiring IC agencies[*] to provide employees with protection from retaliation if they disclose classified information that would meet the criteria for a "protected disclosure" under the WPA to a supervisor, their agency head, the relevant Inspector General, or the Director of National Intelligence. But the directive leaves several gaps:

- It does not apply in cases where the head of an agency determines that an employee should be fired for national security reasons.
- It does not apply to persons in positions of a "confidential, policy-determining, policymaking, or policy-advocating character," or to members of the Armed Forces.
- If disclosures through approved government channels prove unsuccessful, there is no provision for disclosure outside the agency or intelligence committees.

This last point is particularly important. The directive could facilitate transparency in instances where one employee is aware of another employee's rogue misconduct, but is unlikely to have much effect in cases where the agency itself is complicit in the wrongdoing and the intelligence committees are not willing to interfere.

Q: When Can a Whistleblower Be Prosecuted?

A: Contrary to popular belief, the fact that a person's disclosures might be protected under the WPA, ICWPA, or PPD-19 does not constitute a defense against criminal prosecution. It merely shields the employee from being fired or other forms of adverse personnel action.

Many of the more severe criminal penalties for disclosing national security information have historically required some level of intent to harm the United States, which is unlikely to be present in cases of whistleblowing. Unfortunately, recent judicial opinions have generated considerable uncertainty about this requirement.

Most notably, **the Espionage Act**, which was enacted to punish spies and traitors during World War I, prohibits disclosures of national defense information in cases where the person making the disclosure has "reason to believe" it could injure the national defense or give advantage to a foreign country. As recently as 2006, a federal judge interpreted this language to require the government to prove "bad faith" on the part of the defendant. The judges in the cases of John Kiriakou and Bradley Manning, however, disagreed, declaring that the defendant's subjective intent is irrelevant. Another judge recently threw the case law into even deeper confusion: She held that the government does not even need to demonstrate that the disclosure would be "potentially damaging to the United States or useful to an enemy of the United States." These rulings further open the door to criminal prosecutions against individuals who meet the statutory definition of whistleblowers.

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[*] The FBI has its own regulatory whistleblower system and thus is excluded from PPD-19's coverage. The FBI's system suffers from a number of flaws, as discussed here: http://www.whistleblowers.org/storage/whistleblowers/docs/BlogDocs/2013-02-04-memo-changestopart27.pdf.