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mary k ramirez

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BLOWING THE WHISTLE ON WHISTLEBLOWER PROTECTION:
A TALE OF REFORM VERSUS POWER

Mary Kreiner Ramirez
Associate Professor of Law
Washburn University School of Law
mary.ramirez@washburn.edu
(785) 670-1631
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I. Introduction

The ability of the law to curb the exercise of political and economic power is always suspect, and this is a point of agreement of voices on the right as well as the left.¹ The left suggests that the law is subservient to power, and the right suggests that powerful economic and political interests are able to easily overcome collective action challenges in order to pursue their special interests at the expense of the general welfare.² So it is with legal protections for whistleblowers.³ Whistleblowers threaten those with power.⁴ This article shows that the law’s protection today is illusory at best, but that durable reform may be possible if the law is restructured appropriately.⁵ Thus, this article seeks to use the law of whistleblower protections

¹ See RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS X-XI (2004). Business Professors Rajan and Zingales focus upon the power of economic and political incumbents to distort the political system (and thus law) in ways that undercut the proper functioning of markets. Id.

² Historian Gabriel Kolko demonstrated that in the end the Progressive Era reforms served the interests of powerful capitalists. See GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 3 (1963). Law and Economics scholars argue that regulation is self-defeating, as those economic interests subject to regulation exercise their economic power to dominate the regulatory process. See Ronald A. Cass, The Meaning of Liberty: Notes on Problems Within the Fraternity, 1 NOTRE DAME J.L. ETHICS & PUB. POLY 777, 790 (1985) (”Take almost any government program at random, and a ‘special interest’ counter-majoritarian explanation can be found that is more plausible than the public interest justification for it.”).

³ Whistleblowing as used in this article denotes conduct by an employee designed to reveal potential illegality or unlawful conduct undertaken by an organization. See DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 23 (2d ed. 2004). Whistleblower protection refers to laws designed to assure that whistleblowers do not suffer specified adverse consequences as a result of their disclosures.

⁴ In fact, the pressures against whistleblowing have powerful cultural roots. Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 VAND. L. REV. 26-28 (2003). Simons identifies historical criticism (such as Benedict Arnold), and religious criticism (such as Judas’ kiss leading the Roman soldiers to Jesus’ capture and death, and the Jewish “Talmudic prohibition against testifying against another Jew”), as examples of our cultural bias against those who betray the trust of confederates. Id. at 27, 30 n.140.

to demonstrate that law can more efficaciously curb the excessive exercise of power to serve the general welfare.\textsuperscript{6} In short, legal structure matters.

An excellent example of the power dynamics underlying whistleblowing law is the Sarbanes-Oxley Act of 2002, which offers whistleblower protection for those blowing the whistle on corporate and securities fraud.\textsuperscript{7} The Act became law during a compelling political context; indeed, the Act passed the U.S. Senate 99-0.\textsuperscript{8} Yet, when President Bush signed the measure, he issued an executive signing statement\textsuperscript{9} that narrowed whistleblower protection, out of literally hundreds of reform provisions.\textsuperscript{10} The executive signing statement effectively introduced confusion to a facially clear statute.\textsuperscript{11} Despite the protestations of key Senators, the

\footnotesize{\textsuperscript{6} For example, President Bush objected to the act approved by the House on the ground that it would compromise national security. \textit{Id.} In fact the bill, failed to include provisions like those urged herein, \textit{infra}, to address national security concerns. \textit{See H.R. BILL 985, 110\textsuperscript{th} CONG. (2007).}


\textsuperscript{8} \textsc{Henry N. Butler & Larry E. Ribstein, The Sarbanes-Oxley Debacle} 18 (2006).

\textsuperscript{9} Statement by President George W. Bush upon Signing H.R. 3763, 2002 U.S.C.C.A.N. 543, \textit{available} at 2002 WL 31046071 [hereinafter Signing Statement of President Bush] ("the legislative purpose of section 1514A . . . is to protect against company retaliation for lawful cooperation with investigations . . . not to define the scope of investigative authority," therefore, "the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.")

\textsuperscript{10} Indeed, Professors Butler and Ribstein identify many other provisions of the Sarbanes-Oxley Act that imposed costs that they estimate to total $1.1 trillion, that were not deemed worthy of targeting. \textsc{Butler & Ribstein, supra} note 8, at 3.

\textsuperscript{11} \textit{Compare} Statement by President George W. Bush upon Signing H.R. 3763, \textit{supra} note 9, ("the legislative purpose of section 1514A . . . is to protect against company retaliation for lawful cooperation with investigations . . . not to define the scope of investigative authority," therefore, "the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose."), \textit{with} Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, Title VIII, § 806(a), 116 Stat. 802, codified at 18 U.S.C. § 1514A(a)(1)(B) (providing protection for employees against discrimination in retaliation for providing or assisting in providing information “when the information is provided to or the investigation is conducted by . . . (B) any Member of Congress or any committee of Congress").}
whistleblower provision was thus diluted before the ink of the President’s signature was dry. Those contending that law is essentially a manifestation of power and interest group politics, would have predicted this very outcome.

The goal to better protect whistleblowers from retaliation is not a new one. The issue has international interest as nations struggle to protect those employees who seek to protect the public interest. Whistleblowing is crucial to effective law enforcement efforts and in the


13 See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 24 (2001) (“But after the celebration dies down, the great victory is quietly cut back by narrow interpretation, administrative obstruction, or delay.”). Critical race theorists have demonstrated that racial reform occurs when it coincides with the needs of those with economic and political power. Derrick Bell, Brown v. Board of Education and the Interest Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (Brown was the “subordination of law to interest group politics”). Bell’s assessment was vindicated when archival research revealed that when the Department of Justice intervened on the side of the NAACP, the administration “was responding to a flood of secret cables and memos outlining the United States’ interest in improving its image in the eyes of the Third World.” DELGADO & STEFANCIC, supra, at 19-20; Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61, 66, 82-84 (1988) (examining extensive materials in the U.S. Department of State and the U.S. Department of Justice files, including foreign press reports, letters from U.S. ambassadors abroad, and DOJ amicus briefs, confirming Bell’s thesis).


business sector serves to enhance the transparency and integrity of financial markets. Still even weak and ineffective reforms have been legislatively stalled in the past. The widespread extent of retaliation by employers in response to legitimate whistleblowing by employees suggests a need to identify a means by which broader protection can be extended to employees in order to enhance law enforcement mechanisms. This article argues that it is no accident that whistleblowing is hazardous and costly to the ordinary citizen.

By definition, whistleblowers threaten those with power, as an employee rarely needs protection from blowing the whistle on an underling. This article seeks to light the way for

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17 See, e.g., Kohn, *supra* note 14, at 378 (“In 1990 the Senate Committee on Labor and Human Resources approved, by a one vote margin, the Employee Health and Safety Whistleblower Protection Act . . . which did not even close the loopholes in existing legislation [and] was extremely complex and unworkable. . . . It was never debated [n]or voted upon by the Senate and, since 1990, has not been seriously reintroduced.”).


19 Among the numerous tactics of retaliation that are used against whistleblowers, employers have launched investigations of the whistleblowing employees to focus attention on the person and not the alleged misconduct of the employer, or have sought prosecution of the whistleblowers for “unauthorized” disclosures or “stealing” the evidence used to prove the employer’s wrongdoing. See Tom Devine, *Courage Without Marytrdom: The Whistleblower’s Survival Guide* 28-32, 35-36 (1997).
durable reform, notwithstanding the power dynamics (and the cultural mores) at stake. Those seeking enhanced whistleblower protections must be prepared to exploit opportune times when a political coalition in favor of more effective law enforcement against those with power may emerge.21 Such a reform moment could give rise to an omnibus whistleblower statute that can operate to secure the policy foundations of whistleblowing.22 A unified and integrated legal approach to retaliation against the whistleblower would offer certainty for employers and employees and assist law enforcement’s efforts to detect crime, as well as serve society’s interests in assuring legal compliance.23 Such a statute could also prove remarkably durable, as reactionary forces may find unassailable political opposition in favor of whistleblowing

20 See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQUITY AND DEVELOPMENT 10 (2005) (“Policy reforms that result in losses for a particular group will be resisted by that group. If the group is powerful, it will usually subvert the reform.”). Economists predict that high economic inequality is associated with legal outcomes that systematically favor the rich. Id. at 8-9; Edward Glaeser, Jose Scheinkman & Andrei Shleifer, The Injustice of Inequality, 50 J. MON. ECON. 199 (2003). One study reveals that the income share of the top decile in United States increased substantially over last 25 years, garnering between 40-45% of overall U.S. income. Thomas Piketty and Emmanuel Saez, The Evolution of Top Incomes: A Historical and International Perspective, 96 AEA Papers & Proceedings 200, 201 (2006), at http://elsa.berkeley.edu/~saez/piketty-saezAEAPP06.pdf (last visited Sept. 14, 2006). The increase is attributed to “the very large increases in top wages (especially top executive compensation).” Id. at 204. The Economic Policy Institute supports this analysis, reporting that from 1965 to 2005, the ratio of chief executive officers’ annual compensation as compared to minimum wage workers increased from $51:$1 to $821:$1. Lawrence Mishel, CEO Pay-to-Minimum Wage Ratio Soars, Economic Policy Institute, June 27, 2006, at http://www.epinet.org/content.cfm/webfeatures_snapshots_20060627 (forthcoming in The State of Working America 2006/2007, Cornell University Press). Consequently, an “average CEO earns more before lunchtime on the first day of work in the year than a minimum wage worker earns all year.” Id.

21 Such a reform moment occurred when Congress passed the Sarbanes-Oxley Act of 2002. See supra notes 7 and 8.

22 Whistleblowers are crucial to effective white collar crime enforcement because unlike much street crime white collar crimes are usually undertaken in the privacy of the executive suite with only minimal underlings present. See, e.g., H. REP. 110-82, Part I, at 3 (“A key component of government accountability is whistleblower protection. Federal employees are on the inside. They can see when taxpayer dollars are wasted and are often the first to see the signals of corrupt or incompetent management.”). This same rationale applies to the private sector.

23 See infra part IV.B.
generally. Theories of legal reform suggest that disruptions to the status quo provide opportunities for reform; this article attempts to articulate a vision of whistleblower protection that can be implemented in response to the next reform opportunity.

In Part II, this Article highlights that the current framework is an inadequate net, not a secure blanket. Both federal and state legislation intended to encourage whistleblowing and to protect whistleblowers from retaliation, instead require the retention of legal counsel and thus operate to chill not encourage whistleblowing. The most recent federal foray, the Sarbanes-Oxley Act of 2002 (“SOX”), underscores this point. Congress enacted SOX to address a crisis in confidence in our financial markets brought on by multi-layered accounting and

24 For example, President George W. Bush did not resist the enhanced Sarbanes-Oxley whistleblower protections directly; instead he undercut those protections indirectly through a little-publicized executive signing statement. See Signing Statement of President Bush, supra note 9.

25 See Richard Delgado, Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race, 82 Tex. L. Rev. 121, 138 (2003) (observing that interest convergence is “useful both in explaining the course of history and in determining when the time may be right to strike for change”); see also Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 YALE L.J. 1521, 1524 (2005) (successful law reform often emerges from ideas advanced in policy circles by taking advantage of “policy windows” that open when shifts in the national mood, change in elected officials, and “focusing events” coincide); Dani Rodrik, Understanding Economic Policy Reform, 34 J. Econ. Lit. 9, 31-38 (1996) (summarizing theory of economic reform which identifies economic crises as one factor leading to reform). Although there is not a general theory of legal reform, voices on both the left and the right agree that elite influence is essential to all reform. See RAGURHAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS x-xi (2003) (stating that both conservative and left-leaning voices agree that “the market system gets distorted by politically powerful elites.”). Power held by elected officials also accounts for legal system distortion. Edward J. McCaffery & Linda R. Cohen, Shakedown at Gucci Gulch: The New Logic of Collective Action, 84 N.C. L. Rev. 1159, 1233 (2006) (finding that Congress often engages in ex ante rent extraction as much as legislative activity is a function of collective action theory).


securities frauds perpetrated by some of the largest corporations in the United States. Yet, SOX does little to change the hazardous path whistleblowers must tread.

Part III identifies current issues of concern in whistleblower protection while examining SOX’s approach to these issues, and proposes the means to address the issues through omnibus legislation. Part III argues that more certainty and clarity could operate to broaden protections and encourage more whistleblowing. The SOX whistleblowing provision accomplishes neither of these goals. Thus, this part suggests that SOX, like other efforts to secure whistleblowers from retaliation, misses the mark.

Finally, Part IV considers the competing interests at stake, and suggests that interests can align to provide blanket protection for whistleblowers that respect employers’ rights to manage employees, investors’ rights to honest businesses, society’s right to safety, and government’s responsibility to protect its citizens through legal compliance. Central to this analysis are the benefits of an omnibus statute, in terms of protecting the whistleblower in whatever capacity or industry we may find him or her, as well as in political terms.

This article concludes that omnibus legislation can be enacted in response to an


30 Leonard M. Baynes, Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act, 76 St. John’s L. Rev. 875, 883-88, 896 (2002) (examining the fiduciary obligations of corporate insiders who want to blow the whistle and the conflict presented by the duties of care and loyalty in the whistleblowing context, and concluding that SOX does not eliminate the challenges facing whistleblowers).

31 See Lawrence A. Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and it Just Might Work), 35 Conn. L. Rev. 915, 987 (2003) (comparing the reactive reforms in SOX to military planning based upon the last war rather than anticipating the next war).
appropriate reform moment and during a time of a favorable governing coalition, providing the best opportunity to replace the net of unpredictable and unreliable protections with a blanket of protection that is politically unassailable.

II. The Net of Whistleblower Protection

Whistleblower protection has evolved in response to specific breakdowns in law enforcement over time. The evolution has yielded a porous net of protections that is complex and non-intuitive, not a secure blanket; meaning that being a whistleblower requires bearing costs and risks. Two key considerations tend to arise for the employee faced with this decision of stepping forward: First, will coming forward with the information change the status quo and fix the problem; and second, will he or she be protected from a destroyed career, financial ruin, and perhaps, physical threat. Given the stakes, the only sound course of action for a

32 Cora Daniels, It’s a Living Hell, FORTUNE, April 2002 (“About half of all whistleblowers get fired, half of those fired will lose their homes, and most of those will then lose their families too”).


34 Sandra Blakeslee, For Los Alamos, a New Puzzle: The Case of the Battered Whistle-Blower, N.Y. TIMES, June 9, 2005, at A24 (reporting that an auditor who accused Los Alamos nuclear laboratory’s management of accounting irregularities (and was subsequently removed from his auditing duties) was severely beaten and warned by his attackers to “keep his mouth shut,” having been lured to a topless bar to meet a laboratory auditor with “important new information about fraud”); Eisler, supra note 26.

35 See C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 109-10 (2001) (observing that even in the rare instances when a whistleblower wins a claim, the victory may take years to materialize because of administrative and appeals processes; and the victory may be hollow because the legal cost of pursuing the claim and the time out of work is borne by the individual, whereas lengthy processes favor the organization).
putative whistleblower is to get a lawyer.  As Justice Souter has noted, the protections available to whistleblowers amount to a legal “patchwork.” The questions of whether or which law covers specific retaliatory conduct, and where and when to file such a claim, demands the services of a lawyer. Thus, the whistleblower faces financial, legal, and physical risks, with no assurance that blowing the whistle will effectively stem the misconduct at issue.

In addition to these formidable risks, is the issue of social and cultural risk. The celebrated “heroism” of whistleblowers Sherron Watkins of Enron fame, Cynthia Cooper at WorldCom, and Colleen Rowley from the FBI, Time Magazine’s 2002 Persons of the Year, ignores the fact that on playgrounds across America a different social value is communicated to

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36 RICHARD L. RASHKE, THE KILLING OF KAREN SILKWOOD: THE STORY BEHIND THE KERR-MCGEE PLUTONIUM CASE (2d. edition 2000) (recalling the death of Karen Silkwood, an employee of Kerr McGee’s Oklahoma plutonium facility, who was killed when her car was forced off the road while she was on her way to meet with a reporter about misconduct at the facility).

37 TOM DEVINE, COURAGE WITHOUT MARYTRDOM: THE WHISTLEBLOWER’S SURVIVAL GUIDE 105 (1997). Devine advises that not only is it wise to consult a lawyer before blowing the whistle, but he advocates choosing the attorney carefully, providing a list of 20 tips on choosing the lawyer, including confirming the lawyer does not have a conflict of interest. Id. at 107-12.

38 Justice Souter has observed that “the combined variants of statutory whistle-blower protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief”:

Some state statues protect all government workers, including the employees of municipalities and other subdivisions; others stop at state employees, some limit protection to employees who tell their bosses before they speak out; others forbid bosses from imposing any requirement to warn. As for the federal Whistleblower Protection Act of 1989, 5 U.S.C. § 1213 et seq., current case law requires an employee complaining of retaliation to show “irrefragable proof” that the person criticized was not acting in good faith and in compliance with the law. And federal employees have been held to have no protection for disclosures made to immediate supervisors, or for statements of facts publicly known already. Garcetti v. Ceballos, 126 S. Ct. 1951, 1970-71 (2006) (5-4) (Souter, J., dissenting) (internal citations omitted) (refuting majority opinion statement that public employees are protected from vindictive bosses by “a comprehensive complement of state and national statutes”).

39 In fact, the state where the whistleblowing occurs could well determine whether protection is available. See Michael Delikat & Jill L. Rosenberg, Defending Whistleblower Claims Under the Sarbanes-Oxley Act, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY 37 (2005).

our children: Nobody likes a tattletale. These cultural mores help explain why the number and scope of laws protecting whistleblowers from retaliation continues to grow, but real protection remains elusive.

The sheer number of anti-retaliation laws illustrate that whistleblowers are a critical component to effective law enforcement in a complex society as insiders often furnish invaluable assistance in the investigation and prosecution of public corruption and corporate fraud. Well

41 Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 VAND. L. REV. 26-28 (2003). In addition to playground justice, Simons also identifies historical criticism (such as Benedict Arnold), and religious criticism (such as Judas’ kiss leading the Roman soldiers to Jesus’ capture and death, and the Jewish “Talmudic prohibition against testifying against another Jew”), as examples of our cultural bias against those who betray the trust of confederates. Id. at 27, 30 n.140.

42 One author aptly describes the “intensely personal” decision about whether to blow the whistle as a “choice between conflicting social values”:

Our society honors “team players” and doesn’t like cynical troublemakers and naysayers. But we also admire rugged individualists and have contempt for bureaucratic “sheep.” We look down on busybodies, squealers and tattletales. But we condemn just as strongly those who “don’t want to get involved,” claim to “see nothing” or look the other way. And while we believe in the right to privacy, we simultaneously fight for the public’s right to know.

DEVINE, supra note 19, at 4.

43 See Delikat & Rosenberg, supra note 39, at 61-64, 67-86 (apps. A and B charting federal and state whistleblower protection provisions, respectively, and summarizing the prohibited employer action and the employee protected conduct under each provision listed). The difficulty in tracking the various laws is evident from websites such as Whistleblowerlaws.com, which lists about 58 federal laws providing whistleblower protection, but notes that the list remains incomplete. See WhistleblowerLaws.com at http://www.whistleblowerlaws.com/statutes.htm (last visited Mar. 13, 2007). In addition to whistleblower protection, a private individual may bring a qui tam action under the False Claims Act on behalf of the government to pursue fraudulent conduct against the government. False Claims Act, 31 U.S.C. §§ 3730 et seq. Other statutes also encourage the disclosure of information within the corporation. See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (requiring the Securities and Exchange Commission (“SEC”) to issue regulations “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive office of the company” and, if remedial measures are not forthcoming, “to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors.”); 17 C.F.R. §§ 205.1-205.7 (2005) (regulations in response to the § 307 mandate); 15 U.S.C. § 78f(m)(4), (publicly-traded corporations must establish audit committees that administer procedures for internal receipt and investigation of employee complaints concerning “questionable accounting or auditing matters.”).

44 In the United States, whistleblowers have disclosed or assisted in exposing acts that threatened the environment with radioactive leaks from nuclear waste disposal sites, that threatened national security and armed forces with the use of faulty parts for military equipment that failed during tests but were still sold to the government, and that resulted in billions of dollars in government contract fraud. Devine Testimony, supra note 14.
over fifty federal statutes exist to protect whistleblowers. Nearly all states have some whistleblower protection, be it statutory or common law, but the contours of protection vary considerably from state to state. Yet, legal protection remains illusory, largely because of the piecemeal evolution of whistleblower protection.

Most of the development in whistleblower protection has occurred over the last thirty years, but the legal cornerstone was set during the U.S. Civil War. Congress enacted the 1863 False Claims Act to encourage private citizens to sue on behalf of the United States to address fraudulent practices of companies supplying the federal government with deficient goods during

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See **HENRY SCAMMELL, GIANTKILLERS** at 7-11, 14-17 (2004) (describing the experiences of a whistleblower at Teledyne who refused to falsify reports regarding failed quality assurance tests of electronic relays, an automatic electronic current switching device sold to the government for military projects).


47 One example of the legal risk facing whistleblowers is a False Claims Act (“FCA”) claim against Custer Battles LLC, alleging the company had submitted tens of millions of dollars in false claims to the Coalition Provisional Authority (CPA); the CPA is the organization formed in 2003 to administer the transition to a democratic society and rebuild Iraq. United States v. Custer Battles, LLC, 376 F. Supp. 2d 617, 618 (E.D. Va. 2005). One whistleblower, Robert Isakson, alleged that when he objected to Custer Battles practices, “he was held at gunpoint by company employees along with his 14-year-old son, and then he and his son were kicked off the [Baghdad] airport base” and left to find their own way home. T. Christian Miller, *Contractor Accused of Fraud in Iraq*, SEATTLE TIMES, Oct. 9, 2004, [available at](http://seattletimes.nwsource.com/html/nationworld/2002058470_contract09.html). After a jury trial finding in favor of the relators (the whistleblowers), the district granted in part defendants motion seeking judgment as a matter of law, finding that the FCA did not apply because the CPA is not an officer or employee of the United States government under the FCA despite jury findings that Custer Battles had knowingly presented false claims valued at $3 million dollars. United States v. Custer Battles, LLC, __ F. Supp. 2d ___, 2006 WL 2388790 at *2 (E.D. Va. 2006). The district court found that the CPA was “created by the United States, United Kingdom, and its Coalition Partners acting under existing command and control arrangements through the Commander of Coalition Forces,” and thus could not be considered an instrumentality of the United States even though it was “staffed, in large part, by employees of the United States government, [it was] led by a CPA Administrator appointed by and subject to the President, [and it] received a substantial part of its operating budget (approximately $1 billion) from Congress.” United States v. Custer Battles, LLC, __ F. Supp. 2d ___, 2006 WL 2388790 at *8-9.

48 **WESTMAN & MODESTITT, supra** note 3, at 4-12 (recounting the historical development leading to whistleblower protection laws).


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the Civil War. The formation of labor unions and the civil unrest that accompanied the labor movement spurred anti-retaliation legislation. Both the Railway Labor Act (also known as the “NLRA”) included provisions barring retaliation against union organizers. The disruptive labor strikes and civil unrest associated with the labor movement had led to “burdening [and] obstructing commerce.” Workers’ had an interest in “freedom of association, self organization, and designation of [employment] representatives of their own choosing” and retaliation against union organizers impeded this interest. The preamble of the NLRA recognized the importance of union organizing by favoring collective bargaining as a means of “safeguard[ing] commerce from injury, impairment, or interruption, and promot[ing]

50 See Westman & Modesitt, supra note 3, at 3, 4; Scammell, supra note 44, at 36-39 (2004) (“[C]orrupt profiteering was epidemic. Gunpowder was frequently adulterated with sawdust. Rifles didn’t fire. At the start of the Civil War, Union uniforms exposed to rain would often dissolve and fall from the wearer in clots of sodden fiber.”). The False Claims Act (FCA) was amended in 1986 to protect employees of federal contractors who proceed under the FCA. Westman & Modesitt, supra note 3, at 4.

51 The passage of the Clayton Act, restricted management from resorting to federal antitrust laws or civil remedies to restrain peaceful union activity, but it did not prevent employers from firing or failing to hire persons who engaged in organizing activities; section 6 of the Clayton Act exempts labor unions from the federal antitrust laws, and thereby “prohibit[ed] federal courts from issuing injunctions restraining labor unions from peaceful picketing, or from ‘peacefully persuading any person to work or to abstain from working . . . .’” Westman & Modesitt, supra note 3, at 4; see 15 U.S.C. § 17. The Norris-LaGuardia Act in 1932, reaffirmed the prohibition of injunctions to resolve labor disputes. 29 U.S.C. §§ 101-115 (1988); see Westman & Modesitt, supra note 3, at 6.

52 The 1926 Railway Labor Act is now codified at 45 U.S.C. §§ 151-188 (2003). The law was enforceable by any district attorney of the United States and made it a misdemeanor for any common carrier “to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.” See 45 U.S.C. 152 (2003); Westman & Modesitt, supra note 3, at 6 & n.13.

53 29 U.S.C. 151 et seq.; Westman & Modesitt, supra note 3, at 6. The NLRA demonstrated that the national policy in favor of collective bargaining of employees may limit employers’ right to discharge employees, prohibiting “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or to discourage membership in any labor organization,” and deeming it an unfair labor practice for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.” 29 U.S.C. 158(a)(3) & (4) (2003), Westman & Modesitt, supra note 3, at 7.


55 Id.
the flow of commerce by removing certain recognized sources of industrial strife and unrest.”

Thus by 1940, the federal labor laws established that Congress could restrict the right of employers to discharge at-will employees in order to facilitate industrial peace, and protect employees who participated in labor union activity.

In the 1960s & 1970s, national attention shifted from economic concerns to concern for civil rights, and public health and safety. Consequently, expansive federal regulation of businesses to promote these “national interests” solidified government involvement in the private sector workplace, and offered protection to those employees aiding the enforcement of these laws by restricting employers’ ability to discharge such employees at will and shifting retaliation issues from government enforced administrative actions to the civil courts. The proliferation of whistleblower protections did not end there.

Protecting the public fisc provided the catalyst for the Civil Service Reform Act of 1978 (“CSRA”), encouraging federal employees to report waste, fraud, or corruption within the

56 Id.

57 WESTMAN & MODESITT, supra note 3, at 7.


60 WESTMAN & MODESITT, supra note 3, at 8-9. The protection within the statutes vary from narrow provisions that only protect employees who participate in hearings regarding employer misconduct, to prohibiting retaliation by employers against employees who oppose improper conduct. Id. See also Cavico, supra note 46, at 553-83 (comparing the variety of protections offered in whistleblower protection provisions).

federal government by establishing statutory protection for them from retaliation. The Whistleblower Protection Act of 1989 ("WPA"), addressed criticisms of the CSRA by procedurally enhancing protections for whistleblowers on the "front line . . . in the battle to save the taxpayers’ money."

Deregulation in the 1980s and 1990s led to a whistleblower protection movement; state statutory protections for private sector whistleblowers and state judicial exceptions to the

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62 WESTMAN & MODESITT, supra note 3 at 12. The legislative history provides this rationale for the statute: “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. . . . What is needed is a means to assure [employees] that they will not suffer if they help uncover and correct administrative abuses.” S. REP. NO. 95-969, reprinted in 1978 U.S.C.C.A.N. 2723, 2730. The CSRA provides that employees should proceed first through internal procedures to report wrongdoing. S. REP. NO. 95-969, reprinted in 1978 U.S.C.C.A.N. 2723, 2757. “[O]nly disclosures of public health or safety dangers which are both substantial and specific” are protected. S. REP. NO. 95-969, reprinted in 1978 U.S.C.C.A.N. 2723, 2743.


64 Procedural modifications included protecting the identity of whistleblowers, permitting whistleblowers to obtain orders of protection, granting prevailing whistleblowers all relief awarded to them during the pendency of any appellate review, requiring losing agencies to pay attorney’s fees and costs of prevailing whistleblowers, and substantively adding a provision allowing preferential transfers of whistleblowers seeking to leave the agency because of fear of retaliation. WESTMAN & MODESITT, supra note 3, at 62-63. An amendment to the WPA in 1994 added two ways to appeal retaliatory actions: by filing directly with the Merit Systems Protection Board (MSPB) or filing an Independent Right of Action (IRA) with the Office of Special Counsel (OSC). 15 USC 1214(a)(3)(B); WESTMAN & MODESITT, supra note 3, at 63. In 2002, Congress enacted the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002 (“NOFEAR”), making federal agencies responsible for paying judgments and settlements out of the agency budget in whistleblower retaliation cases. See also WESTMAN & MODESITT, supra at 11 (suggesting that a need for private assistance in the form of whistleblower protection arose in response to perceived government inability to solve social ills).
common law at-will rule followed federal expansion of employee protections. By 2004, 45 state jurisdictions in the United States had recognized causes of action for wrongful termination in violation of public policy, and many states have statutory protection for whistleblowers in at least limited circumstances. Common to each step toward more expansive whistleblower protection, was the alignment of interests between those with power and those seeking broader protection: business and social movements found common ground leading to limited protection – enough to keep the economy moving and pacify the populace.

Whistleblower protection advanced in response to a political and economic context favoring reform and supported by key political and economic interests. This is a common element to many shifts of power pursuant to law. Public choice theory, interest convergence

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67 Westman & Modesitt, supra note 3, at 11; see also Delikat & Rosenberg, supra note 39, at 67-86 (app. B charting the whistleblower provisions available in each state summarizing the prohibited employer action and the employee protected conduct under each provision listed); Westman & Modesitt, supra note 3 at 77, and app. B (since the 1980s, Arizona, California, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Rhode Island, and Tennessee have enacted statutes that protect private sector employees from whistleblower retaliation).

68 Westman & Modesitt, supra note 3, at x. The five “holdouts” are Alabama, id. at 335; Georgia, id. at 343; Maine, id. at 349; New York has consistently declined to accept a cause of action, id. 357-58; and Rhode Island has indicated willingness to extend although has not clearly done so, id. at 364.

69 See Westman & Modesitt, supra note 3, at 335-72. Connecticut now has statutory protection as its exclusive remedy, id. at 340; Florida statutes broadly protect both public and private employees, id. at 342; and Montana has statutory protection, id. at 353-54. Even in states such as Alabama where no public policy exception to the at-will doctrine has been recognized, the legislature has enacted a statute making it illegal to fire an employee for seeking workers’ compensation benefits. See Ala. Code § 25-5-11.1 (2003). Westman & Modesitt, supra note 3, at 335-36.

70 See generally Steven A. Ramirez, Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What To Do About It, 61 Wash. & Lee L. Rev. 1583, 1604-06 (2004) (considering interest convergence theory in a variety of contexts, including the passage of the Sarbanes-Oxley Act of 2002). For instance, the New Deal legislation evolving from the stock market crash in 1929 and the Great Depression, provided security to the U.S. financial markets and to its citizens. The legislation gained support as the financial interests in the United States realized that government needed to take action and business interests were key in formulating the resulting legislation. See Colin Gordon, New Deals: Business, Labor and Politics in America 1920-1935, 4 (1994) (study supporting view stressing “the primacy of business interests in the formulation of U.S. public policy and the essential conservatism of the New Deal.”).
theory, and economic theories of reform each are based upon the need for those with power to bargain for reform.\textsuperscript{71} Applying that approach here, labor laws came about as employees bartered with employers and politicians representing the moneyed interests: Employees offered peace and the flow of commerce in exchange for the right to form trade unions and bargain collectively, and thereby improve working conditions for the masses.

In late 2001, an extraordinary event occurred in the United States: the collapse of Enron, one of the fastest growing US corporations of the 1990s.\textsuperscript{72} This was followed by a series of corporate corruption revelations culminating in the bankruptcy of WorldCom in mid-2002.\textsuperscript{73} A cavalcade of civil and criminal fraud cases followed in the wake of these massive corporate corruption scandals.\textsuperscript{74} The crush of corporate fraud cases led investors to conclude that U.S.

\textsuperscript{71} Supra notes 1, 2, 13 and 20. As such, these theories of reform arguably go back to Adam Smith’s observation regarding the appeal to self-interest over 230 years ago:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.\textsuperscript{75}

\textbf{ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS} 7 (Encyclopaedia Britannica, Inc. 1952) (1776).

\textsuperscript{72} REBECCA SMITH & JOHN R. EMSHWILLER, 24 DAYS 4 (2004).

\textsuperscript{73} STEPHEN M. ROSOFF ET AL., \textit{PROFIT WITHOUT HONOR, WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA} 279-311 (2004) (describing the discovery of various corporate crimes and fraudulent schemes at Enron, Arthur Andersen, WorldCom, Global Crossing, Qwest Communications, Xerox, Adelphia, Tyco, Rite Aid, Halliburton, and Coca-Cola from 2001 to 2004).

\textsuperscript{74} Numerous criminal and civil lawsuits resulted from Enron’s collapse alone. See, e.g., John E. Black, Jr., and David T. Burrowes, \textit{D&O Litigation Trends in 2006}, 139 IRMI Update, June, 21, 2006 at \texttt{http://www.IRMI.com} (select “Free Newsletters” hyperlink; then follow “2006 Archives” hyperlink; then follow “IRMI Update - #139, June 21, 2006” hyperlink; then follow “D&O Litigation Trends in 2006” hyperlink) (Enron paid $7.165 billion to resolve shareholder and bond claims, the largest securities claim settlement in history); \textit{Merrill Lynch Settles Suit with Enron}, L.A. Times, July 7, 2006, at B3, available at 2006 WLNR 11722287 (Westlaw) (reporting on the multi-million dollar settlements of various banks and securities firms in the so-called “MegaClaims” lawsuit filed against banks accused of failing to prevent Enron’s collapse, multi-billion dollar settlements in a class-action lawsuit filed by Enron investors, and referring to several criminal convictions related to the Enron debacle). The Houston Chronicle maintains “The Fall of Enron” webpage with a prosecution scorecard on its website, reporting 16 guilty pleas, 5 jury convictions, 2 acquittals, 2 convictions overturned, 1 case dropped, and 8 others charged; the website also provides links to stories on each individual listed on the scorecard. \textit{The Fall of Enron}, Chron.com, at \texttt{http://www.chron.com/news/specials/enron/} (last visited Mar. 15, 2007) (on file with author).
corporations were not safe from corporate plunderers. Foreign capital fled the nation. Publicized congressional hearings and stern rebukes from the President of the United States would not salve the situation. By summer of 2002, the political and economic context as well as political and economic interests demanded action. The Sarbanes-Oxley Act of 2002 ("SOX") reflected the intense political and economic pressure generated by the corporate scandals and eroding financial markets for reform.

Among others, the Act led to many changes in corporate accountability, expanded criminal jurisdiction and penalties, and directed the Securities and Exchange Commission

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75 Two weeks before passage of the Sarbanes-Oxley Act, Federal Reserve Chairman Alan Greenspan testified that in response to the recent reports of corporate malefiscence and the potential for further bad news, “investor skepticism about earnings reports has not only depressed the valuation of equity shares, but it also has been reportedly a factor in . . . elevating the cost of capital.” Federal Reserve Board’s Semiannual Monetary Policy Report to the Congress: Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong. (July 16, 2002) (testimony of Alan Greenspan), at 4, available at http://www.federalreserve.gov/boarddocs/hh/2002/July/testimony.htm (last visited Mar. 15, 2007).

76 Edmund L. Andrews, Turmoil at WorldCom: The Overseas Reaction; U.S. Businesses Dim as Model for Foreigners, N.Y. TIMES, June 27, at A1 (reporting that foreign investors were withdrawing from U.S. markets after the news of WorldCom’s admission of losses and falsely reported profits), available at LEXIS, News Library, The New York Times file.

77 See Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty, 47 ARIZ. L. REV. 933, 956 nn.128-130 and accompanying text, 960 n.146 (2005) (recounting the political maneuvers leading to passage of SOX ).


81 E.g., SOX § 302 (providing that the CEO and CFO of every public company required to file financial statements with the SEC must certify that the statements “fairly present, in all material respects, the financial condition and results of operations of the issuer”); 17 C.F.R. pts. 228, 229, 249 (2005) (requiring publicly traded companies to either adopt a code of ethics or to report and explain the decision not to adopt such a code).

82 SOX, Pub. L. No. 107-204 § 905. In response to this directive, the guidelines were amended to increase
(“SEC”) to set forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission.\textsuperscript{83} Central to the SOX legislation was the Senate Judiciary Committee’s view that a corporate culture existed that failed to promote honest business practices and discouraged employees from reporting dishonest practices.\textsuperscript{84} To address these concerns, SOX provides a civil cause of action for whistleblowers employed by publicly traded companies, protecting employees of publicly traded companies from retaliation by employers through discharge, disciplinary action, or harassment in response to the employee-supplied information or cooperation to a federal agent or employee-instigated internal company investigation regarding company violations of mail fraud,\textsuperscript{85} wire fraud \textsuperscript{86} bank fraud,\textsuperscript{87} securities fraud,\textsuperscript{88} federal securities regulations, or other federal laws relating to shareholder fraud.\textsuperscript{89}

Remedies include compensatory damages and reinstatement, and the cause of action is

\textsuperscript{83} Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 307. The SEC issued rule 205, effective August 5, 2003, requiring attorneys to report evidence of a possible securities fraud or a similar violation to an issuer’s senior management. 17 C.F.R. § 205.3(b)(1)(2004) and 205(b)(3) (requiring counsel to report to the audit committee or to the board if it does not have a separate audit committee).


commenced by filing a complaint with the Department of Labor ("DOL"). The provision’s purpose is providing uniform protection of corporate whistleblowers, previously subject to varying state laws only, so as "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." Thus, by any measure the reform effort was a significant reconfiguration of federal regulation of corporate governance generally, and criminal law and whistleblower protections in particular.

SOX illustrates again a common theme to the evolution of whistleblower protection law: nearly all protective statutes are the result of an accommodation between the holders of power and those in favor of reform, and the accommodation is usually precipitated by some crisis or new political movement that disrupts the preexisting status quo.

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90 18 U.S.C. § 1514A(b) (2004). If the DOL fails to issue a final order within 180 days of an administrative complaint then the complaint may be pursued in federal court. 18 U.S.C. § 1514A(b)(1) (2004).

91 S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report), available at 2002 WL 863249 (Leg. Hist.) *19. The Senate Report described the lack of whistleblower protection as "a significant deficiency because often, in complex fraud prosecutions, these insiders are the only first hand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions not only in the Enron matter but in all complex securities fraud investigations." S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report), available at 2002 WL 863249 (Leg. Hist.) *10. In addition to civil remedies, the amended obstruction of justice statute prohibits retaliation against employee whistleblowers pursuant to SOX § 1107. 18 U.S.C. § 1513(e). Section 1513(e) provides the following:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Notably, unlike the civil provision in SOX, this provision is not limited to reports of corporate fraud. The provision is limited, however, in that it requires that information be provided to a law enforcement officer, and must related to a "Federal offense." Because this is a criminal statute, a prosecutor holds the discretion to assess whether an individual should be charged, and in making that assessment must recognize that a much higher burden of proof is required; the prosecution must prove all elements of the crime beyond a reasonable doubt, including that the actor’s conduct was done knowingly, with a specific intent to retaliate.

92 See Romano, supra note 25, at 1527-28 (the substantive mandates imposed on corporations in the Sarbanes-Oxley Act are unique and distinct from "conventional regulatory apparatus" that has typically limited federal oversight of corporations to mandatory disclosures); Kohn, supra note 84, at xi ("The [Sarbanes-Oxley] Act was one of the most comprehensive reforms of Wall Street investment practices ever passed by Congress.").
III. The Interpretation and Administration of SOX’s Civil Whistleblower Protection

This part of this article will review how the SOX whistleblower regime functions. Specifically it will show that claims for whistleblower protection under SOX seem unlikely to succeed. Thus, SOX in the end will fail to encourage whistleblowing.

Many of the SOX procedural regulations are modeled on other federal whistleblower laws. Like other regimes, the regulations governing the SOX whistleblower protective regime seek to balance the due process rights of the named persons and Congress’s desire for an expedited administrative complaint process, prior to filing any civil claim for whistleblower protection. Despite its purpose to encourage and protect corporate whistleblowers, SOX administrative claims have had limited success. The number of SOX complaints before the


94 The administrative procedure for filing a claim, its investigation, findings, review, and administrative appeal are set forth at 29 C.F.R. § 1980. Under the regulations, OSHA has 60 days to complete the investigation and issue written findings as to whether there is “reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act,” 29 C.F.R. § 1980.105. If OSHA determines the employee was subjected to retaliation, the Assistant Secretary may order immediate reinstatement, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.105. Parties are notified of the Preliminary Order and have 30 days from receipt of the notice to file objections to the findings and preliminary order before the findings and preliminary order are deemed effective for all remedies awarded by the order. 29 C.F.R. § 1980.105(b) and (c). If a party files timely objections seeking review, all provisions of the preliminary order are stayed except for reinstatement. 19 C.F.R. § 1980.106(b)(1). If no timely objections are filed, the findings or preliminary order become the final decision of the Secretary, not subject to judicial review. Id. A timely objection is considered a request for a hearing. Id. Hearings are conducted de novo by an Administrative Law Judge (ALJ). 29 C.F.R. § 1980.107. The ALJ decision is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board (ARB). 69 Fed. Reg. 52,111; 29 C.F.R. § 1980.110(a). The ARB has 30 days to decide whether to accept review; if not accepted, the decision of the ALJ will become the final order for purposes of appeal. Id. If accepted, the ARB must issue a decision within 120 days of the conclusion of the hearing. Id. By November 2, 2004, 333 complaints had been filed with the Department of Labor (DOL).

95 Early results of the success of SOX were mixed. The DOL released statistics on the use of SOX’s civil whistleblowing provision 27 months after it became law. See Delikt & Rosenberg, supra note 39, at 87-90 (app. C, graphing statistics from July 30, 2002 to November 2, 2004, obtained from the DOL). Over 95% of the DOL determinations during that period, 186 cases, were dismissed by the agency, determined to lack merit; whereas only 9 cases were determined by DOL to have merit. Id. Of course, the statistics alone cannot identify the basis for distinguishing a meritorious claim from a failed claim, because many claims settle and others may be pursued in federal court if there is no final order from the DOL within 180 days.
U.S. Department of Labor (“DOL”) that are dismissed dwarfs the number of settled by the agency on the merits. 96 This limited success for complainants suggests that many employees expecting protection by SOX are not actually enjoying such coverage.

As with any whistleblower protection and anti-retaliation provisions within its purview, the DOL interprets the statutory and regulatory provisions to determine the scope of protection, forum availability, application of the rules, relief afforded, and timing.97 Below, the focus is on the interpretations of SOX that narrow coverage and the potential to broaden coverage under an omnibus provision that would extend beyond financial frauds, to better effect the purposes of encouraging and protecting whistleblowers. Omnibus legislation referred to below would offer a blanket of protection to the whistleblowing employee, to replace the net that our federal and state laws presently offer.98 Such legislation could cover public and private employers, and protect employees who hold a reasonable belief that the conduct reported is wrongful in that it is illegal, intentionally tortious, or unethical, and who exhibit the courage to step forward with such information.99

96 Statistics obtained from Department of Labor, Office of Investigative Assistance, OSHA, by e-mail inquiry to Nilgun Tolek, OSHA, Office of Investigative Assistance. See e-mail addressed to thomas.hitchcock@washburn.edu from Tolek.Nilgun@dol.gov dated Monday, June 12, 2006 (copy of e-mail forwarded to author on June 19, 2006) (on file with author). As of May 31, 2006, the total number of SOX complaint determinations was 702; of that number, 499 complaints had been dismissed, 93 were settled, 15 more were decided on the merits, and 95 complaints were withdrawn. Id. Thus, only 3% of cases decided by DOL were decided on the merits; if settled cases are added to those addressed on the merits (assuming that settled cases have some merit), then less than 1 out of 5 complaints (18%) avoid dismissal. Id.


98 See, e.g., WESTMAN & MODESITT, supra note 3, at 24; KOHN, supra note 14, at 377-78; see also supra note 5.

99 Extending the scope of protection to public and private employers would be limited only insofar as falling outside Congress’ plenary authority to regulate interstate commerce under the Commerce Clause of the U.S. Constitution. U.S. CONST. art. 1, § 8.
A. **Scope of Coverage**

SOX prohibits retaliation in response to the employee’s act of providing information or cooperation externally to a federal agent, a Member of Congress, a congressional committee, or in a criminal fraud or securities regulatory proceeding. SOX also prohibits retaliation in response to the employee’s act of providing information or cooperation internally to a supervisor or another with “authority to investigate, discover, or terminate misconduct.” Thus, SOX protects whistleblowers in only in some specified instances.

SOX limits whistleblower protection by specifically identifying those categories of persons who receive the information from the whistleblower. Thus, information provided to state or local authorities, co-workers who are not supervisors nor charged with authority to investigate the misconduct, and the press is not protected. Unless an employee has taken the unusual precaution of reviewing the statutory language, the employee is unlikely realize the

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The commerce power has served as the basis for Federal action on such national policies as the regulation of agricultural production; requirement of collective bargaining; prohibition of industrial monopolies and unfair trade practices; regulation of the sale of stocks, bonds, and other securities; establishment of hydroelectric, flood control and navigation projects; and an attack upon such crimes as white slavery, kidnapping, trade in narcotics, theft of automobiles, and shipments of gambling devices and lottery tickets. S. REP. NO. 88-872 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2368 (Senate Judiciary Committee report assessing Congressional authority to end discrimination in places of private accommodation under the Civil Rights Act of 1964). To aid in assessing whether interstate commerce is affected, the term could borrow language, in part, from Title VII’s definition of “employer”: “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e (b).

100 18 U.S.C. § 1514A(1)(A) and (B), and (2).


102 See Trodden v. Overnite Transportation Col, 2004-SOX-64 (ALJ Mar. 29, 2005) (employee refusal to follow what he believes is illegal company practice is not protected under SOX).

103 SOX concerns private employers that are publicly held. The issue of whether a public employee enjoys First Amendment protection for matters expressed as a result of employment that raise a public concern was recently addressed in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960-61 (2006). See infra nn.199-205 and accompanying text.
limits of its protection.

Providing for both internal and external whistleblowing is a response to the tension between affording employers an opportunity to address wrongdoing and protecting the institution. Presumably, most employees would prefer an opportunity to address wrongdoing in-house rather than go to regulators or law enforcement, given that the foremost reason given for failure to report wrongdoing is the belief that nothing will be done. Nonetheless, sometimes limiting reporting to internal sources exposes the employee to great risk of retaliation. In an omnibus statute addressing broader forms of whistleblowing rather than merely financial fraud by publicly traded companies, the protected activity would need to cover disclosures made to a “public body” that included federal, state, or local authorities in the executive, legislative or judicial branch of the government, as well as its agencies, boards,

104 See Cavico, supra note 46, at 570-71 (recognizing that for the employee to be protected, most state statutes require whistleblowing employees provide notice to the employer of wrongdoing, and some states require notice in writing, so that the employer has the opportunity to correct the wrongdoing and preserve its reputation). Some state statutes further require that the employer must have an opportunity to remedy the wrong, and may even require an “oath or affirmation” if external notice is permitted. Id. at 572, 574. Other federal statutory whistleblower protections vary with respect to whom the employee notifies so that some statues limit protection to complaints made to government agencies. WESTMAN & MODESITT, supra note 3, at 92 (assessing the limits on the substantive coverage afforded whistleblower complainants in provisions enforced by the Department of Labor).

105 See MSPB 1993 Report, supra note 33.

106 Sherron Watkins, the Enron employee who blew the whistle internally, first e-mailed Ken Lay, the CEO, and identified accounting problems she had discovered, suggesting they might be able to fix them quietly, if the probability of getting caught was low, or alternatively, they could disclose after putting a public relations team in place, if the probability of getting caught was high. See FERC Public Database of Enron Emails, at http://www.ferc.gov/industries/electric/indus-act/wem/03-26-03-release.asp. Employees may have a practical reason for wishing to report internally. Watkins she also mentions in her e-mails to Lay that if Enron tanks, her “eight years of Enron work history will be worth nothing on my resume.” Id. However, she also indicated that she did not report the wrongdoing sooner (she waited for weeks to work up the nerve to write her first letter to Lay) because she thought she would be fired by then CEO Jeffrey Skilling, because one of her friends, then company treasurer Jeff McMahon, had been transferred when he “complained mightily” to Skilling about the “veil of secrecy” surrounding the outside deals. Duffy, supra note 18. Watkins’s concerns were well-founded. She testified before Congress that after she talked to Ken Lay, CFO Andrew Fastow wanted her fired and her computer seized. Ackman, supra note 18.
committees or other government offices.\(^{107}\)

Although many employees may be affected by the misconduct of a corporation, SOX limits civil protection against employment discrimination for lawful whistleblower actions to employees of publicly traded companies, and “employee” is defined by the statute as “any officer, employee, contractor, subcontractor, or agent of such company.”\(^{108}\) Litigation over the SOX anti-retaliation provision is sufficiently recent that there are few reported federal cases; nonetheless, the administrative cases involving disputes over the term “employee” are illustrative. For instance, the question of whether the statute applies to subsidiaries has resulted in conflicting decisions.\(^{109}\) Likewise, a federal circuit court, applying statutory canons of construction, has found that § 1514A does not apply to employees outside of the United States absent specific language in statute or clear legislative intent to the contrary.\(^{110}\) Thus, despite the

\(^{107}\) See Kohn, supra note 14, at 379-80, 392-93 (discussing and proposing elements for a uniform national whistleblower protection law, including Model Whistleblower Protection Act).


\(^{109}\) See Morefield v. Exelon Services, Inc., 2004-SOX-00002 (ALJ Jan. 8, 2004) (ruling that publicly-traded holding company of non-publicly traded subsidiary is an employer subject to SOX provision); see also Platone v. Atlantic Coast Airlines, 2003-SOX-00027 (ALJ Apr. 30, 2004) (same). But see Bothwell v. American Income Life, 2005-SOX-57 (ALJ Sept. 19, 2005) (rejecting complaint against non-publicly traded subsidiary of publicly-traded company, finding no support in the statutory language to include the subsidiary). The Bothwell judge also rejected attempts to add the publicly traded parent company as a named respondent as untimely and unable to meet the “relation back” standard of the Federal Rules of Civil Procedure 15(c). Bothwell, 2005-SOX-57; see also Klopenstein v. PCC Flow Technologies Holdings, Inc., 2004-SOX-00011 (ALJ July 6, 2004) (ruling that the statute does not apply to a subsidiary of a publicly-traded company when the subsidiary is not a publicly-traded company and the publicly-traded company parent is not named in the complaint); Powers v. Pinnacle Airlines, Inc., 2003-AIR-00018 (ALJ March 5, 2003) (ruling SOX does not cover non-publicly traded subsidiary when publicly traded parent not named in complaint, and also suggesting that there must be allegation that publicly-traded parent company had some relationship to the retaliatory conduct).

intent of Congress that SOX “protect those who report fraudulent activity that can damage innocent investors in publicly traded companies,” SOX has been interpreted to permit the complexity of corporate organizational structures (such as those with international manufacturing and assembly plants) to shield corporations from the statutory provisions.\footnote{S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report), available at 2002 WL 863249 (Leg. Hist.).} An omnibus provision should provide specific language providing a forum in the United States to protect those would-be whistleblowers employed by employers with operations in the United States, whether the employee is stationed in the United States or outside of its borders, whether the employee is working for a subsidiary or for the parent company, and whether the employer is a private or a government entity.\footnote{Certainly issues of international comity must be attended to; for example, in 2005 the French Commission Nationale de l’Informatique et des Libertes (“CNIL”) issued guidelines summarizing its position on whistleblower protections that clarify the distinctions between protections under U.S. laws and French laws, and confirms that target employees retain the benefit of rights provided by the French personal data protection law. See Nicolas Grabar, Cleary Gottlieb Memorandum: French Regulator’s Guidelines on the Implementation of Whistleblower Procedures, Paris, November 21, 2005, 1544 PLI/Corp 339, 353, 355, and see id., at 363 (providing an unofficial English translation of the French guidelines). The CNIL guidelines were created in response to CNIL’s May 2005 rulings prohibiting French affiliates of McDonald’s Corporation and Exide Technologies from implementing SOX whistleblower procedures, in particular, establishing an employee hotline. Grabar at 355, 364. The French guidelines recognize the risk for malicious reporting and expresses concern that reporting requirements not be mandatory. Id. at 366-67. It is beyond the scope of this article to articulate a comprehensive framework for transnational whistleblowing law.}

Public confidence in corporations depends in large part upon the oversight of the corporation by others with professional duties and responsibilities, yet these professionals may
not protected by SOX. Some categories of “gatekeepers” may not fall within SOX civil whistleblower protections because independent professionals arguably are not “officer[s], employee[s], contractor[s], subcontractor[s], or agent[s] of such compan[ies].” Thus, whistleblowing by the independent professional, risks harming the relationship with the client (or even loss of the client) without any avenue of civil protection. For the young professional working on a senior partner’s account, interfering with the partner’s client relationship can have detrimental consequences to his or her career. With uncertain legal protection, the choice to whistleblow becomes less likely.

Even within the public corporation, a question arises as to whether in-house corporate counsel, who is required by SOX to report wrongdoing to the directors’ audit committee, is

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113 Lawyers, securities analysts, public accountants, securities brokers, and bankers are some of the professionals who provide services to public corporations, and also serve the public. These “gatekeepers” have been criticized for their failure to alert those dependent upon the professionals’ assessments in the corporate frauds that spawned the SOX. S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report), available at 2002 WL 863249 (Leg. Hist.) *2, 5; see, e.g., John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. REV. 301, 318-31 (2004) (hypothesizing about the reasons for gatekeeper failure in detecting the accounting irregularities of Enron and others in 2001-2002).


115 Had SOX been in effect in the 1990s, it would not have protected the accountants at Arthur Andersen who observed questionable accounting practices at Enron. Although many Andersen employees have since admitted they were uneasy with the financial structuring, none came forward until the collapse of Enron was inevitable. See SMITH & EMSHWILLER, supra note 72, at 288-90 (describing the close relationship between Enron and Arthur Andersen: “Carl Bass, an Andersen accountant . . . had witnessed how the rules were often bent and didn’t like what he saw. These concerns became especially sharp once he began working on Enron accounting issues.”; “[Enron] officials wouldn’t let up until they had found a way to get the accountants to sign off, recalled Andersen partner Mike Jones, who described the Enron assignment as a ‘very stressful’ assignment.”); S. REP. NO. 107-146 (2002) (Senate Judiciary Committee Report), available at 2002 WL 863249 (Leg. Hist.) *5 (recounting the experiences of a financial advisor who was fired and an Andersen accountant who was removed from the account when they expressed reservations about Enron’s stability and accounting practices).
protected. Although in-house counsel should fit within the definition of “employee” under SOX, some courts have shown a reluctance to invade the attorney-client privilege or permit the introduction of confidential information by the complainant as support for a claim of retaliation. Thus, SOX whistleblower protection for in-house counsel is uncertain.

Additionally, the release of sensitive information by any employee in the name of whistleblowing could be viewed as breaching the employee’s duty owed to the employer; the breach then either refutes the employee’s case and meets the employer’s burden of proof by further supporting employment termination, or alternatively, providing an independent reason for termination. Unquestionably, precluding the employee from raising significant concerns

116 The SEC promulgated regulations, as directed by SOX, “requiring an attorney to report evidence of material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company” and if remedial measures are not forthcoming, “to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors. SOX, Pub. L. No. 107-204, § 307, 116 Stat. 784, codified at 15 U.S.C. § 7245; see 17 C.F.R. §§ 205.1 through 205.7 (2003).

117 Traditionally, state and federal courts have been reluctant to allow retaliation claims by in-house corporate counsel against employers, but some courts have rejected the traditional approach and allowed retaliatory discharge public policy claims in limited circumstances. WESTMAN & MODESITT, supra note 3, at 146-50; see also Willy v. Administrative Review Board, 423 F.3d 483, 500, 501 (5th Cir. 2005) (applying breach of duty exception to the employer’s claim of attorney-client privilege and finding no “per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel’s retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ”).

118 See Baynes, supra note 30, at 884-86 (observing that a corporate whistleblower might convert corporate proprietary information by providing corporate records to law enforcement and exposing the corporation to civil or criminal liability, or possibly, bad publicity).

119 One example of this is the case of Sibel Edmonds, a contract linguist hired by the FBI. See U.S. Dep’t of Justice, Office of the Inspector General, Office of Oversight and Review, A Review of the FBI’s Actions in Connection With Allegations Raised by Contract Linguist Sibel Edmonds, Unclassified Summary (January 2005) (“OIG Edmonds Review”). When Ms. Edmonds complained about potential espionage and security breaches by a co-worker, Edmonds’s supervisor instructed her to prepare a memo outlining her allegations. Id. at 12-13. Concerned about documents that had been removed from her work computer, Edmonds obtained permission from her supervisor to prepare the memo at home. Id. Two days after providing her supervisor with the memo, the supervisor gave the memo to the Office of Inspector General to review both the concerns in the memo that Edmonds had been threatened by the co-worker and Edmonds’s security violation of using her home computer to prepare memoranda that included classified information. Id. at 13-14. Edmonds’s home computer was seized and a second
because of related confidential or sensitive information ignores critical opportunities to gain information to protect against serious criminal acts or threats to public health or safety. An omnibus statute would need to provide for an in camera review to assess whether the employee took measures to limit or protect disclosure; such a review would evaluate any attempts to act internally to alert appropriate supervisors regarding the related misconduct, any reasons why alternative routes were accessed, and whether the extent of the disclosure was necessary.

Under SOX, an employer may not “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” in response to the lawful act of an employee covered by the statute. Issues also arise in whistleblower claims of retaliation as to failure to promote or in decisions to transfer. The language in SOX, “in any other manner discriminate,” should provide broad coverage as to what conduct is prohibited, in light of the Supreme Court’s most recent interpretation, in Burlington Northern v. Santa Fe, regarding adverse actions held to be retaliatory discrimination. Yet, in the hands of an administrative law judge, limits may be imposed. Any omnibus provision

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See Burlington No. & Sante Fe R. v. White, 126 S. Ct. 2405 (2006) (finding that an employer could be held liable for retaliatory discrimination under Title VII for any “materially adverse change in the terms of employment,” including an inconvenient reassignment, or for any adverse treatment that was “reasonably likely to deter” the plaintiff from engaging in protected activity).

See id.

See Bechtel v. Competitive Technologies, Inc., 2005-SOX-33 (ALJ Oct. 5, 2005) (finding must prove tangible job consequence to establish adverse action, and that neither removing complainant’s status as an officer of
would need to be at least as broad as the formulation used in Burlington Northern.

Finally, a whistleblowing employee under SOX must “reasonably believe” the reported conduct constitutes a violation of specific federal fraud statutes, or any rule or regulation of the Securities and Exchange Commission (“SEC”). The “reasonably believe” language has also been the subject of litigation, including whether the employee must allege the specific regulation or law that was reasonably believed to be violated. Another closely related issue is whether

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124 18 U.S.C. § 1514A(a)(1). Legislative history suggests that the “reasonably believes” language “is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts.” See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy), available at 2002 WL 32054527. “The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.” Id.

125 Some state statutes will not protect a whistleblower if the information provided by the whistleblower is erroneous. Cavico, supra note 46, at 569. Most state statutes also apply a reasonable belief standard. Id. at 567.

126 See Collins v. Beazer Home USA, Inc., 334 F. Supp. 2d 1365, 1376-77 (N.D. Ga. 2004) (finding plaintiff’s disclosures raised genuine issue of material fact as to whether she engaged in protected activity based upon a reasonable belief, and observing that plaintiff need not allege the specific regulation or law that was violated when disclosures to supervisors clearly raised concerns internally that criminal violations, or violation of the company’s standards of corporate conduct, even if those allegations prove to be incorrect: “[T]he mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her.”); Halloum v. Intel Corp., 2003-SOX-7, at 15 (ALJ Mar. 4, 2004) (finding that an employee who reasonably believed shareholders were being defrauded is protected under SOX even if it is later established that no fraud occurred). But see Marshall v. Northrup Gruman Synoptics, 2005-SOX-8 (ALJ June 22, 2005) (finding whistleblower’s complaints about a
the complained acts actually violate the law, or are simply a private, internal, management or policy dispute. Finally, because SOX is limited to violation of particular statutes, employees of publicly traded companies are not covered if they report on violations of law that fall outside the specified financial fraud provisions. Thus, the statute is narrowly drawn and interpreted to limit protection to whistleblowers.

Requiring that an employee identify the specific statute believed to be violated presumes that employees enjoy facility with all relevant statutes and possess the ability to predict whether a court would find a violation. An omnibus provision would need to clarify that the employee must reasonably believe, based upon the employee’s experience, that the reported action violates the law or threatens the public health, safety or fisc, but not require more than can be reasonably expected of such employee. Clearly, the reasonable belief standard affords the employer the opportunity to investigate the concern and either determine no misconduct exists or rectify the action. Providing protection to employees who report such concerns does no disservice to the violation of a company ethics policy and about internal accounting practices that could not be explained by generally accepted accounting principles was not protected activity under SOX where the complainant could not identify a specific law or regulation that was violated); Lerbs v. Buca di Beppo, Inc., 2004-SOX-8 (ALJ June 15, 2004) (rejecting employee claim of retaliation because employee later learned that accounting practice was within generally accepted accounting principles even though he actually and reasonably believed otherwise at the time he questions the accounting practice, and because his inquiries were too “general”).

127 See Grant v. Dominion East Ohio, 2004-SOX-63 (ALJ Mar. 10, 2005) (“raising questions and lodging complaints [about an accounting error] without reference to or suspicion of fraud against the shareholders is not protected activity.”). See also Cavico, supra note 46, at 564 (state laws and judicial decisions typically cover reported acts that violate public policy, such as threatening the public safety or health of its citizens).

employer and encourages interaction between employees and employers to detect and defuse misconduct at an early stage.

The limited scope of protection that SOX affords is not unusual in that it targets specific misconduct, reported by specific workers to specific recipients.\textsuperscript{129} Indeed, like most whistleblower protection statutes, the advice of counsel is crucial to assure protection before the whistle is blown.\textsuperscript{130} Limiting the scope of protection makes the job of the whistleblower unnecessarily risky and costly.\textsuperscript{131}

**B. Forum**

Another area that prompts criticism in whistleblower protection provisions is the identified forum in which a claim may be raised.\textsuperscript{132} Congress delegated the administration of SOX civil whistleblower claims to the DOL.\textsuperscript{133} In addition to administering SOX administrative claims, the DOL is also responsible for administering twenty-five other whistleblower or anti-retaliation provisions, and DOL has further delegated to the Assistant Secretary for OSHA responsibility for receiving and investigating claims for fourteen of those provisions, including

\begin{itemize}
  \item \textsuperscript{129} See Delikat & Rosenberg, \textit{supra} note 39, at 61-64 (app. A charting federal whistleblower protection provisions and summarizing the prohibited employer action and the employ protected conduct under each provision listed).
  \item \textsuperscript{130} \textit{Supra} notes 19, 37 and 38.
  \item \textsuperscript{131} See \textit{supra} note 26, 32, 34 and 36.
  \item \textsuperscript{132} See Devine Testimony, \textit{supra} note 14, at 4-7 (providing Checklist for Effective Whistleblower Protection Laws with 21 points; number 11 is a right to a jury trial); Miriam A. Cherry, \textit{Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law}, 79 WASH. L. REV. 1029, 1075-83 (2004) (asserting that enforcing arbitration provisions undermines the procedures provided for in SOX).
  \item \textsuperscript{133} 18 U.S.C. § 1514A(b)(2)(A).
\end{itemize}
SOX. The speed with which a claim moves through the administrative or legal process impacts the protection afforded a litigant. If language is interpreted narrowly, and if cases languish in the administrative process whether intentionally or through bureaucratic delay, the purpose of legislation may be undermined. SOX is an improvement upon complaints as to forum, but for several reasons discussed below, it does not go far enough.

SOX provides that administrative review and a final decision must be completed within 180 days of filing the claim, or after that time, the complainant may file the claim in a U.S. federal district court for *de novo* review. The 180 day deadline is unique to SOX.

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135 The DOL is an agency that falls within the Executive Branch of the federal government, and consequently, that branch exercises oversight of the administrative process. See Signing Statement of President Bush, *supra* note 9, (“Several provisions of the Act require careful construction by the executive branch as it faithfully executes the [Sarbanes-Oxley] act.”).

136 A person alleging retaliatory discrimination or discharge for whistleblowing must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within 90 days after the date on which the violation occurs.
whistleblower protection.\textsuperscript{137} Because the ability to escape the administrative process after 180 days and move on to a federal court guarantees either a relatively quick resolution of the administrative claim or an alternative in federal court, whistleblower protection groups have sought to have a similar provision available to federal employees.\textsuperscript{138} The move to extend the 180 day limit on the administrative process to other whistleblower protection provisions has some Congressional support.\textsuperscript{139} Because the provision is unique to SOX, OSHA is unaccustomed to moving cases through system within 180 days; consequently, complainants are seeking relief in federal district court.\textsuperscript{140} An omnibus statute should include the option to move to a federal district court after 180 days to encourage speedy resolutions or afford jury trials.

For cases proceeding on to federal courts, several issues arise. First, hope of a timely

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\item U.S.C. § 1514A(b)(2)(D) (statute of limitations). If a final decision is not issued within 180 days of the filing of the complaint, the complainant may bring a civil action at law or in equity for de novo review in federal district court without waiting for claim to be resolved by the DOL. 18 U.S.C. § 1514A(b)(1)(B). This provision is unique to SOX as compared to relief under other federal whistleblower statutes administered by the Department of Labor. See Kohn, supra note 84, at 53. See generally Delikat & Rosenberg, supra note 39, at 61-64, 67-86 (app. A: identifying those federal whistleblowers statutes that are administered by the DOL). Twenty-six statutes are administered by the DOL, with fourteen of those statutes administered by the DOL through the delegated authority from OSHA. Id.
\item Kohn, supra note 84, at 53.
\item See, e.g., Stephen Barr, Whistle-Blowers Urge Congress to Get Tougher on Retaliation, WASH. POST B2 (April 29, 2005) (the National Security Whistleblowers Coalition (“NSWC”), a group of whistleblowers formed by former federal employees, seeks tougher federal employee whistleblower protections similar to those provided in SOX, in particular, the right to take their cases to federal court if the DOL fails to act within 180 days); National Security Whistleblowers Coalition, NSWBC Action Alert Re: HR 1713 (HR 3097), Sept. 26, 2005, at www.nswbc.org/action_alert.htm.
\item See Stephen Barr, Senate Committee Acts to Restore Protection to Whistle-Blowers, WASH. POST D4 (June 26, 2006) (reporting that the U.S. Senate has passed an amendment to the 2007 defense authorization bill that would enhance the protection to federal employee whistleblowers including the ability to take a claim to federal court after 180 days).
\item See Tight Time Limits, New Subject Area Pose Challenges for Labor Department, 3 Corp. Accountability Rep. (BNA) No. 9, at 278 (Mar. 21, 2003); Two Sarbanes-Oxley Whistleblower Claims Sent to Federal Court on Procedural Grounds, 1 Corp. Accountability Rep. (BNA) No. 28, at 761 (Aug. 1, 2003) (reporting that the Labor Department’s administrative review board failed to issue a decision within the 180 day time limit under SOX in Stone v. Duke Energy Corp., W.D.N.C. No. 3:03-CV-256 (June 10, 2003), and Willy v. Ameritron Properties, Inc., DOL ALJ No. 2003-SOX-0009 (June 27, 2003)).
\end{itemize}
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resolution may evaporate with the move to federal court because the federal courts exercise *de novo* review, and the median time to move a civil case through a federal district court was 8.3 months in 2006.\textsuperscript{141} Second, resources spent on the administrative process are effectively “wasted” because review is *de novo*.\textsuperscript{142} Third, no single court is likely to develop expertise on the subject because cases have the potential to be scattered throughout the United States. Consequently, the potential for disparate results is great.

With its 14 statutes to administer, even at the administrative level OSHA may not be an adequate forum for the variety and multitude of claims that come before it. Each anti-retaliation provision is linked to a particular statute\textsuperscript{143} thereby requiring OSHA investigators to become

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\item[\textsuperscript{141}] See U.S. Courts, Federal Court Management Statistics 2006, U.S. District Court – Judicial Caseload Profile, available at http://www.uscourts.gov/ (select “Library” tab; then follow “Statistical Reports” hyperlink; then follow “Federal Court Management Statistics” hyperlink; then follow “District Courts” hyperlink) (last visited Mar. 15, 2007). From filing to trial, the median time was 23.2 months. *Id.*
\item[\textsuperscript{142}] Irvin B. Nathan & Yue-Han Chow, *Interpretations and Implementation of the Whistleblower Provisions of the Sarbanes-Oxley Law*, ALI-ABA Sarbanes-Oxley Institute: Corporate Governance, Financial Disclosure, Auditing, and Other Issues (Oct. 6-7, 2005), available at SL027 ALI-ABA 527 (taking the position that the 180 day administrative process is “a very short and improbable amount of time” to reach a final order and that the provision is “in urgent need of revision by Congress); More Legal Confusion on Whistleblowers Than When Sarbanes-Oxley Enacted in 2002, 3 Corp. Accountability Rep. (BNA) No. 4, at 80 (Jan. 28, 2005) (acknowledging that the parameters of SOX may be shaped by federal courts rather than administrative law judges as is usually the case in administrative law areas because the cases are moving too slowly through the administrative process so that cases are being refiled in federal courts and that such federal court cases may undermine the deference usually afforded ALJs, especially if circuit splits develop).
\item[\textsuperscript{143}] OSHA is charged with the broad protection of civil servants disclosing information regarding a violation of a law, rule or regulation, or gross mismanagement, waste, abuse of authority, or substantial and specific danger to public health or safety under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.) and the Whistleblower Protection Act of 1989, 5 U.S.C. § 1213 *et seq.*, and the protection of any employee relating to violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623; at the same time OSHA must protect employees in the public and/or private sector in discreet areas of law such as disclosing information relating to a substantial violation of the law related to a government defense contract (Defense Contractor Employees, 10 U.S.C. § 2409), commencing or participating in proceedings regarding the Toxic Substances Control Act (Toxic Substances Control Act, 15 U.S.C. § 2622), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293, the Federal Water Pollution Control Act, 33 U.S.C. § 1367, the Emergency Health Care Act, 42 U.S.C. § 1395dd, the Energy Reorganization Act, 42 U.S.C. § 5851; the Nuclear Whistleblower Protection Act, 42 U.S.C. § 5851, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Airline Safety Act, 49 U.S.C.
familiar with the strictures of each statute, the procedural requirements, and the relative burdens of proof. Practitioners observe that both the investigators and supervisors lack disposition, training, and experience to adequately assess SOX claims because they are outside their area of competence. Of course, if one defines the area of required competence as employment law, then OSHA possesses the appropriate training and experience. Creating an omnibus statute would eliminate requiring expertise in discreet areas of law, and would permit OSHA (or some other agency) to concentrate its investigation and analysis on the issue of retaliation. Likewise, even if the administrative process is retained, when claims moved to federal courts, those courts would be more likely to develop a unified approach over time to retaliation claims based upon whistleblower actions.

Affording the right to a jury trial promises the whistleblower an opportunity to be judged

§ 42121, to name a few of the many federal statutes affording some measure of whistleblower protection against retaliation. Delikat & Rosenberg, supra note 39, at 61-65 (app. A)

144 See supra note 143, listing the federal statutes with anti-retaliation provisions administered by OSHA.

145 See Nathan & Chow, supra note 142 (highlighting that “OSHA investigators have been trained in health and safety issues” and that OSHA “has not increased its staff of investigators to include those with a finance background”); see also D. Bruce Shine, A View from the Whistleblower’s Attorney, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW TWO YEARS AFTER SARBANES-OXLEY, 351, 353 (2005) (reminding practitioners that the “Proof Goal” for SOX complaints is to show the employee “reasonably believed” laws were violated).

146 If expertise was the only concern, then use of OSHA might be favored as an approach for an omnibus statute; however, presently OSHA’s responsibilities create a conflict of interest. OSHA itself has been subject to whistleblower claims. See Cindy Skrzycki, OSHA Slow to Act on Beryllium Exposure, Critic Says, WASH. POST E1 (Feb. 1, 2005) (reporting that Adam M. Finkel, a top administrator at DOL’s OSHA became a whistleblower in 2002 when he realized the agency was not going to protect its inspectors from Beryllium exposure despite known risks). Perhaps too much is expected to believe OSHA can protect, police, and adjudicate whistleblower and retaliation claims. Nevertheless, it is beyond the scope of this article to address the particular administrative structure best suited to administering whistleblower protections; instead, this article is focused upon explaining the shortcomings in present whistleblower protections, demonstrating how appropriate protection could be legislated, and explaining how present power dynamics do not favor an optimized whistleblower protection.
by the citizens the whistleblower sought to protect. SOX offers the promise of a district court adjudication and, potentially, a jury trial if the matter is not resolved 180 days from the date of filing the claim with OSHA. Yet, where a mandatory arbitration agreement exists, its mandate will likely prevail over the right to a jury trial. Although considered, SOX did not affirmatively exempt itself from the presumption of arbitration. In the first district court case to address the question of mandatory arbitration agreements in the SOX context, the court held that mandatory arbitration agreements are binding. SOX’s failure to specifically preclude

147 See Devine Testimony, supra note 14 (checklist for whistleblower protection laws).


149 See Cherry, supra note 132, at 1075-83 (criticizing the use of mandatory arbitration in employment litigation and analyzing the likelihood that SOX cases will go to mandatory arbitration); Alliance Bernstein Investment Research and Management, Inc. v. Schaffran, 445 F.3d 121(2d Cir. 2006) (dismissing declaratory judgment action brought by employer seeking to avoid arbitration, and finding the issue of arbitrability of employee’s claim was subject to arbitration); Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y 2003) (ruling in favor of mandatory arbitration because SOX does not preclude arbitration and arbitration does not inherently conflict with the statute’s purposes). See also 9 U.S.C. § 9; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (establishing a general presumption in favor of mandatory arbitration); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (applying a presumption in favor of arbitration where Congress does not specifically address arbitration in the statute).

150 An earlier draft of SOX exempted SOX whistleblowers from mandatory arbitration agreements: “No employee may be compelled to adjudicate his or her rights under this section pursuant to an arbitration agreement.” S. 2010, 107th Cong. at 7 (2002); HR. 4098, 107th Cong. at 8 (2002). The language did not appear in the final version of the bill. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 806, 116 Stat. 745, 802-04 (codified at 18 U.S.C.A. 1514A (West Supp. 2003); see S.Rep. No. 107-146 at 22 (2002) (the report of the Senate Judiciary Committee accompanying the revised version of the Senate bill references the removal of the provision dealing with arbitration agreements); see also Cherry, supra note 132, at 1080 (observing that the provision that banned mandatory arbitration was excised in committee without explanation); DANIEL P. WESTMAN & MODESITT, supra note 3, at 177.

151 In Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y 2003), Boss’s agreement with Salomon Smith Barney, titled “Terms of Employment” and “Principles of Employment,” incorporated the terms of Salomon’s Employee Handbook, providing for mandatory arbitration and “resolution of all employment disputes based on legally protected rights . . . including without limitation claims demands or actions under . . . any . . .
mandatory arbitration is a “serious weakness in the Act” because employers can avoid the civil whistleblower provisions of SOX, prospectively, simply by including a provision for mandatory arbitration within employment agreements.\textsuperscript{152} Permitting the presumptive effect of mandatory arbitration clauses would appear to undermine the stated intent of SOX whistleblower provisions “to prevent recurrences of the Enron debacle and similar threats to the nation’s financial markets.”\textsuperscript{153} Given that many arbitration agreements are a condition of employment, those individuals most likely involved in the corporate fraud would be the same corporate leaders who would possess power in choosing the arbitrator.\textsuperscript{154}

Providing the option for alternative dispute resolution before an arbitrator, however, may operate as an efficient means to avoid the potential duplicity, discussed above, of an administrative investigation followed by a federal district court \textit{de novo} review. Recognizing this potential benefit, an omnibus statute might include an arbitration alternative to a jury trial, but only if it is specifically limited, by for example, providing that the arbitrator be selected by

\footnotesize{\textsuperscript{152} Cherry, \textit{supra} note 132, at 1075-83 (analyzing the likelihood that SOX cases will go to mandatory arbitration (based upon US Supreme Court cases recognizing a presumption in favor of arbitration, and the legislative history of SOX) thereby avoiding the administrative and judicial forums available under the Act).}

\footnotesize{\textsuperscript{153} 148 Cong. Rec. S7419 (daily ed. July 26, 2002).}

\footnotesize{\textsuperscript{154} See \textit{supra} note 18, discussing Sherron Watkins’ experience at Enron.}
mutual consent to avoid placing the choice solely with the employer.155

In creating an omnibus statute, multiple opportunities exist to improve upon existing forum options: any administrative option must consider issues of expertise; if arbitration is not precluded, it must be limited; and ideally, a right to relief from retaliation should be expeditiously adjudicated.

C. **Burden of Proof**

The burden of proof to prevail in a whistleblower retaliation claim under an omnibus statute would track the language adopted in SOX regulations, providing that the whistleblower must prove by a preponderance of evidence that protected conduct was a “contributing factor” to the retaliatory action.156 The same burden of proof applies at the administrative review and before the district court.157 The “contributing factor” language contrasts favorably with earlier anti-retaliation provisions that required the claimant prove the protected conduct was “a substantial, motivating or predominant factor in the personnel action,”158 and has proven to be a

155 See Devine Testimony, supra note 14 (checklist for whistleblower protection laws).

156 See 18 U.S.C. § 1514A(b)(2)(C); 29 C.F.R. § 1980.104(b)(2). Since the enactment of the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1), the same burden of proof to prevail has been adopted consistently in federal laws. Enacted to protect most federal employee whistleblowers, the evidentiary framework is different from that of the general body of employment discrimination law. Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1374 n.11 (N.D. Ga. 2004). Plaintiff/employee must prove by a preponderance of evidence that:
   a. Plaintiff engaged in a protected activity under the statute;
   b. The employer knew of the protected activity;
   c. The employee suffered an unfavorable personnel action; and
   d. The discriminatory act was a “contributing factor” in the adverse action taken by the employer against the employee.

*Id.* at 1375-76.


watershed for whistleblower claims; the annual rate of whistleblower claims prevailing on the merits increased from less than 10% prior to the adoption of the language up to 25-33% by the late 1990s.\textsuperscript{159} This shift in the level of proof recognizes that an employer can often identify other reasons for unfavorable employment actions against an employee. If proven, then the burden shifts to the employer to prove by clear and convincing evidence that it would have taken same action for independent, legitimate reasons in absence of the protected activity.\textsuperscript{160} The ultimate burden of proof rests with the complainant to prove by a preponderance of the evidence that the unfavorable employment action was taken in retaliation for whistleblowing.\textsuperscript{161} Any omnibus provision would benefit from this balanced approach.

D. Relief for the Whistleblower

An omnibus statute would adopt the relief provided in SOX, but would extend it further. SOX established both a legal and equitable remedy providing for “make-whole” relief.\textsuperscript{162} The

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\item \textsuperscript{159} DEVINE, \textit{supra} note 19, at 116.
\item \textsuperscript{160} Once proved, the burden shifts to the employer to prove by “clear and convincing evidence” that it would have taken the same adverse action even if the employee did not blow the whistle. Collins, 334 F. Supp. 2d at 1376 (applying the standard articulated in 49 U.S.C. § 42121); 29 C.F.R. § 1980.104(c).
\item \textsuperscript{161} \textit{See} WESTMAN & MODESITT, \textit{supra} note 3, at 232 n.28.
\item \textsuperscript{162} 18 U.S.C. § 1514A(c); 29 C.F.R. § 1980.103(a)(1). The interim relief under SOX belies the notion of “make-whole relief” because it is limited to reinstatement and does not include backpay. Because the administrative process may continue up to 180 days, and the possibility of years of litigation arises if the case is filed in federal district court, the employee will have suffered, in a case of retaliatory termination, from the loss of pay during the period from termination to reinstatement. Even with interim reinstatement, the employee will have lost several months wages. Although final relief includes backpay with interest, for many employees, the delay of months or even years will mean financial hardship. Under omnibus whistleblower relief, interim backpay could be ordered concurrent with reinstatement, with conditional repayment to the employer should the decision be overturned. With reinstatement, the employer gets the benefit of the employee’s labor even if the decision is overturned. The problem with an interim backpay provision is that once interim backpay has been paid, recovery of those funds may be near to impossible if the reinstatement decision is overturned, given that the employee would presumably now be unemployed and short on funds. On the other hand, employers may be less likely to terminate employment if interim backpay is available to employees. Finally, hearing officers may be hesitant to order interim
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remedies available include reinstatement with the same seniority status that the employee would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees, and reasonable attorney’s fees.\textsuperscript{163} Additionally, SOX provides for immediate reinstatement of the employee in cases where OSHA determines in its initial 60-day review that the employee was subjected to retaliation.\textsuperscript{164} The employer may obtain a stay of reinstatement only in exceptional cases by meeting criteria for equitable injunctive relief.\textsuperscript{165} Two additional remedies should be offered in appropriate circumstances under an omnibus provision. First, where the employer organizational structure is large enough, it should afford the prevailing employee transfer preference upon reinstatement, minimizing the employee’s exposure to lingering hostility by managers or co-workers who may feel defeated or betrayed.\textsuperscript{166} Second, individuals who engaged in the retaliatory actions should

\textsuperscript{163} 69 Fed. Reg. 52101, 52104 (August 24, 2004) (Summary of Statutory Procedures); see 18 U.S.C. § 1514A(c)(2). At least one court has found that the relief provided does not include punitive damages. Murray v. TXU Corp, 2005 WL 1356444 (N.D. Tex. June 7, 2005) (finding the omission of punitive damages in the statutory language “clear and unequivocal”). However, a Florida court held that “a successful Sarbanes-Oxley applicant cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff’s future earnings capacity.” Hanna v. WCI Communities, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004)

\textsuperscript{164} Once a complaint is filed, OSHA has 60 days to complete the investigation and issue written findings as to whether there is “reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act,” 29 C.F.R. § 1980.105(a). If the complainant demonstrates a \textit{prima facie} case, the named person has 20 days to meet with representatives of OSHA and present clear and convincing evidence that it would have taken the same personnel action in the absence of the employee’s protected activity. 29 C.F.R. § 1980.104(c). If OSHA determines the employee was subjected to retaliation, it may order immediate reinstatement, which is generally effective immediately upon receipt of findings. 29 C.F.R. § 1980.106.

\textsuperscript{165} The employer must demonstrate irreparable injury, likelihood of success on the merits, and the balancing of possible harms to the parties and the public. 29 C.F.R. § 1980.106(b)(1).

\textsuperscript{166} See Devine Testimony, \textit{supra} note 14, Checklist for Effective Whistleblower Protection Laws, part IV, par. 18 & 19.
be held personally accountable.\textsuperscript{167} Several options are available: at a minimum, the actor would be disciplined for the wrongful conduct; the actor could be fined; or the actor could be held jointly liable for punitive damages to deter employees from merely acting at the behest of superiors without risking repercussion.\textsuperscript{168} Finally, the omnibus statute should explicitly state that any remedy available for retaliation should be in addition to claims and remedies for constitutional or common law rights, and therefore does not pre-empt existing rights or remedies.\textsuperscript{169} This provision would most likely conflict with some state common law approaches where claims are only available if there is no adequate alternative remedy.\textsuperscript{170}

\textbf{E. Timing Issues}

An omnibus provision would standardize the time in which a claim may be filed. The variance in limitations periods for filing anti-retaliation provisions and the time frames for investigating claims administered by OSHA are evident in the Whistleblower Investigation Manual issued by OSHA that provides guidance to investigators and claimants for those fourteen provisions.\textsuperscript{171} OSHA must contend with differing statutes providing filing limitations of 30 days

\begin{itemize}
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} See, e.g., 18 U.S.C. § 1514A(d) (“Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.”). An omnibus statute should clarify that constitutional claims and common law claims are not preempted.
\item \textsuperscript{170} Some states may preclude recovery under state law when the federal statute can provides an adequate alternative remedy. See, e.g., Flenker v. Willamette Indus., Inc., 266 Kan. 198, 202-03, 209, 967 P.2d 295, 299-300 (1998) (finding remedy under OSHA is inadequate alternative remedy to Kansas common law tort action for whistleblowing because Secretary of Labor has sole discretion to investigate and file suit).
\item \textsuperscript{171} See Occupational Safety and Health Administration, Whistleblower Investigation Manual 2-4, 2-5 (2003); Compliance Directive from OSHA Amends Whistleblower Investigation Manual, 1 Corp. Accountability
\end{itemize}

42
up to 180 days. Further, investigational time frames vary from 30 days, to 60 days, to 90 days, depending upon the statute. Consistent time frames for filing and investigating claims would aid investigators in tracking cases as they move through the administrative system, and aid informing whistleblowers about exercising legal rights. Indeed, providing consistency across the current statutory schemes (in the event omnibus legislation is not pursued) would benefit the investigator and whistleblower alike.

In selecting an appropriate statute of limitations for an omnibus statute, tension exists between the interests of the employee and the employer. An employer may prefer a shorter time period, such as the 90-day period, because it protects the general “at-will” nature of the


174 For example, a person alleging retaliatory discrimination or discharge for whistleblowing under SOX must file a complaint with the Secretary of Labor, 18 U.S.C. § 1514A(b)(1)(A), within 90 days after the date on which the violation occurs. 18 U.S.C. § 1514A(b)(2)(D). Failure to file within 90 days may result in dismissal. See Walker v. Aramark Corp., 2003-SOX, D&O of ALJ (August 26, 2003) (dismissal based upon filing 105 days after alleged discriminatory action). Commencement of 90 days begins when an employee has “final and unequivocal notice” that a decision has been made to take adverse action, and not on the date the decision is implemented. See Delaware State College v. Ricks, 449 U.S. 250, 2589-59 (1980); Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001) (limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision), cited at 69 Fed. Reg. 52106; Belt v. United States Enrichment Corp., 01-ERA-00019, D&O of ARB, at 5 (February 26, 2004); KOHN, supra note 84, at 15.
employer-employee relationship, and it permits a claim to be investigated while the actions prompting the claims are still fresh in the minds of the witnesses. Yet, for the employee, 90 days may not be enough time to realize that an adverse employment action is based upon the whistleblowing activity of the employee.\textsuperscript{175} The employer and employee may also share common interests in the limitations period: because coworkers and supervisors often react negatively to the whistleblower due to a loss of trust in the perceived breach of loyalty, the whistleblower activity disrupts the working environment and may take some time to settle down.\textsuperscript{176} An employee may prefer to wait to file a claim, recognizing that filing will likely further disruption and loss of trust, and time may resolve the tension in the workplace. If faced with the prospect of losing the right to file the claim for retaliation, however, the employee may file precipitously. Thus, in addition to providing for consistent limitations periods in whistleblower claims,\textsuperscript{177} an omnibus statute should provide for a realistic limitations periods. Presently, claims delegated to the DOL and investigated by OSHA have statute of limitations ranging from 30-180 days.\textsuperscript{178} Other provisions administered by DOL but not further delegated to OSHA may contain similar administrative limitations periods, but enjoy limitations periods of up

\textsuperscript{175} Unambiguous termination commences the 90 day filing period even if the employee does not recognize the relationship between his protected activity and employer’s decision to terminate him. Roulett v. American Capital Access, DOL ALJ, No 2004-SOX-00078, Dec. 22, 2004 (rejecting argument that employee did not realize termination was in response to protected activity until other employees were later terminated, and finding “statute of limitations begins to run when the employee is made aware of the employer’s decision to terminate him.”). Moreover, the time period is not tolled for settlement or arbitration. KOHN, supra note 84, at 15-17; cf. Collier v. Farmers Insurance Co., Inc., 1992 WL 221 604 (D. Kan. 1992) (administrative charge of discrimination for filing workers compensation claim does not toll the statute of limitations period for state retaliatory discharge claim).

\textsuperscript{176} See, e.g., SCAMMELL, supra note 44, at 35, 135, 146-47.

\textsuperscript{177} See supra text accompanying notes 171-174.

\textsuperscript{178} See supra note 172.
to 3 years for cases permitted to be filed directly in court.\textsuperscript{179}

A compromised time frame for an omnibus statute would be a limitations period of one year for all retaliation claims, with equitable tolling up to three years in cases where the employee could not discover through reasonable investigation that the retaliatory act was based upon protected activity of the employee.\textsuperscript{180} One year would provide sufficient time for the employee to recognize the retaliation and a long enough time so that the employee should not be fooled into believing things will work out. Likewise, one year assures the employer that witnesses will likely still be available and limit the extended threat of potential retaliation claims.\textsuperscript{181} Tolling up to three years discourages willful conduct that would prevent the employee from discovering the true nature for the adverse employment action. Uniformity of forum and statute of limitations period provided by a single omnibus whistleblower statute would streamline the litigation process and afford a fair hearing for all parties.

Although SOX is a step forward in whistleblower protection, it feeds into the chaos of whistleblower protection developed in response to crisis. Moreover, through careful drafting of statutory language and narrow interpretation, the statute retains limitations similar to other recent whistleblower protections that hobble its effectiveness. The omnibus provisions proposed would

\textsuperscript{179} See, e.g., Commercial Motor Vehicles Program, 49 U.S.C. § 31105 (180 days); Employee Polygraph Protection Act, 29 U.S.C. § 2002, 29 C.F.R. § 801 et seq., esp. §§ 801-40 (3 years); Equal Pay Act, 29 U.S.C. § 206(d) (2 years, 3 years if willful violation); Fair Labor Standards Act (wage & hour, child labor, minimum wage, overtime), 29 U.S.C. § 215(a)(3), 29 C.F.R. § 783 (2 years, 3 years if willful); Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2615, 2617 (2 years, 3 years if willful); Federal Mine Health and Safety Act, 30 U.S.C. § 815(c)) (60 days); Longshoreman’s and Harbor Worker’s Compensation Act, 33 U.S.C. § 948(a); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1854, 1855 (180 days).

\textsuperscript{180} See supra note 179.

\textsuperscript{181} The 90 day limitation period in SOX claims was adopted to balance the due process rights of the named persons and Congress’s desire for an expedited administrative complaint process. 69 Fed. Reg. at 52105.
improve the protections in that such legislation would eliminate the narrow application of protection and clarify the law. Moreover, unifying the forces that seek greater protection would promote its effectiveness.

IV. Replacing the Net with a Blanket of Protection

SOX is but the most recent formulation of whistleblower protection, reflecting years of legal development. As shown above, its protections are uneven and difficult to predict, to say the least. As such, it is unlikely to encourage employees of public companies to blow the whistle on wrongful conduct. In fact, it has failed to encourage anyone to blow the whistle on even wide scale fraud.182 Specifically, during the summer of 2006, a new scandal erupted in corporate America.183 Many CEOs boosted their compensation pursuant to incentive compensation plans by backdating option grants to take advantage of lower historical prices.184 Despite the fact that such backdating conduct has triggered criminal charges at two public companies and that over 100 companies are under DOJ, SEC, or IRS investigation,185 not a single internal whistleblower

182 See Stephanie Saul, Study Finds Backdating of Options Widespread, NY TIMES, July 17, 2006, at C1 (“More than 2,000 companies appear to have used backdated options to sweeten their top executives’ pay packages, according to a new study that suggests the practice is far more widespread than previously disclosed.”). 183 Much of the manipulation of options grants took place after the enactment of SOX. Id. 184 “We . . . estimate that 29.2% of firms at some point engaged in manipulation of grants to top executives between 1996 and 2005.” Randall A Heron & Erik Lie, What Fraction of Stock Option Grants to Top Executive have been Backdated or Manipulated?, at 23 (July 14, 2006) (unpublished working paper, on file with author) available at http://www.biz.uiowa.edu/faculty/elie/research.asp (last visited Mar. 15, 2007). 185 See The Wall Street Journal Online, Perfect Payday, Options Scorecard, at http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html (online scorecard listing corporations investigated by the SEC, the DOJ, or conducting internal investigations into options backdating); Marcy Gordon, IRS Plans Its Own Inquiry, WASH. POST, July 29, 2006, at B2.
emerged. Federal legislators continue to debate improvements to the Whistleblower Protection Act for federal employees and contractors. Yet, it appears uncontestable that SOX has failed to enlist public company employees to blow the whistle.

While agreement on the need to protect whistleblowers may be widespread, the desire to provide true protection clashes with the reality of business interests and their influence on legislation. A variety of business interests are raised: agency duties of employees to their employers; the risk of false or bad faith disclosures; added tension in the work environment; and bureaucratic intrusion on employment decisionmaking. Competing with these interests are societal interests of which there are many as well: the direct and indirect financial costs of crime; psychological costs; free speech concerns; and privacy concerns. Finally, overarching

186 Instead the SEC’s attention “apparently was piqued by academic research that found unusual patterns of stock activity around the time of options grants.” Charles Forelle & James Bandler, Matter of Timing: Five More Companies Show Questionable Options Pattern, WALL ST. J., May 22, 2006, at A1. Another external source was a senior auditor for the IRS who discovered the agency had agreed to forgive the outstanding tax liability on the backdated options; she was pressured to sign off on the file to close the audit without having viewed the tax returns – an act that would be contrary to a directive from the IRS commissioner for large and medium-size businesses. David Cay Johnston, Tech Company Settled Tax Case Without an Audit, NY Times, Aug. 10, 2004, at C1. The auditor took her concerns up the chain of command without relief before contacting the FBI and Sen. Charles E. Grassley’s staff. Id. After obtaining the tax returns through a routine request to the recordkeeping department, she concluded that for the three years she reviewed, the company owed $51 million. Id. The auditor’s decision to go public with her experience placed her position with the IRS in jeopardy because IRS audits are confidential. Id.

187 See Barr, supra note 139, at D4 (reporting that the U.S. Senate has passed an amendment to the defense authorization bill that would enhance the protection to federal employee whistleblowers, but recognized that the House of Representatives version does not include the protection and therefore the amendment will be addressed in the House-Senate conference committee); S.2285, 109th Cong. (2d Sess.) (2006) (introducing the Whistleblower Empowerment, Security, and Taxpayer Protection Act of 2006 (“WESTPac”)); Paul Revere Freedom to Warn Act, H.R. 4925, 109th Cong. (2d Sess.) (2006) (introduced by Rep. Edward J. Markey (D-MA) (a senior member of the Energy and Commerce and Homeland Security Committees) & Carolyn B. Maloney (D-NY) (a member of the Government Reform Committee) proposing comprehensive bill to provide protections to government and private sector employees who are retaliated against for reporting flaws in national or homeland security, public health and safety, or waste, fraud and mismanagement of public funds); Barr, supra note 138, at B2. Rep. Edward J. Markey had proposed a similar provision to extend SOX-type protections to federal employees and contractors as an amendment to the fiscal 2006 authorization bill for the Department of Homeland Security, but it was rejected in committee on a party-line vote. Id. See also supra note 5.
considerations in legislating against retaliatory conduct are the governmental interests of federal versus state oversight, and the efficiency in the administration of justice.

A. **The Case for Limited Legislation: Business Interests**

Providing protection for whistleblowers in a broad variety of situations, rather than in the limited industry by industry legal structure presently existing undercuts long-valued expectations of the employee’s duties of obedience, loyalty, and confidentiality to the employer. Thus, as an agent of an employer, an employee has an implicit duty to obey an employer’s reasonable instructions. Moreover, “[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency” and in so doing, to not take unfair advantage of position, to not act or speak disloyally in connection with employment, to not compete with the employer, and to not sabotage the employer. Finally, the duty of loyalty implies a duty of confidentiality because the employer must often reveal confidential business information to the employee related to his or her duties.

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188 See Westman & Modesitt, *supra* note 3, at 2, citing Restatement (Second) of Agency §§ 385 (Duty to Obey), 387 (Duty of Loyalty), and 395 (Duty of Confidentiality) (1958).

189 Restatement (Second) of Agency § 385(1) comment a (1958); Westman & Modesitt, *supra* note 3, at 28.

190 Restatement (Second) of Agency § 387, and 387 comment b; Westman & Modesitt, *supra* note 3, at 29.

191 Restatement (Second) of Agency § 395 (1958); Westman & Modesitt, *supra* note 3, at 29.

192 The confidential information may include “unique business methods, trade secrets, customer lists, or other strategic information.” Westman & Modesitt, *supra* note 3, at 29. The government has opposed whistleblower claims on the basis that disclosing the information relevant to the whistleblowing incident would threaten national security. Federal whistleblower protection legislation proposed in the Senate and in the House of Representatives addresses the “State Secrets” privilege. The Senate version creates procedures to limit the
Of course, even where the employee owes a duty, that duty is qualified. The duty of obedience does not require the employee follow instructions when doing so would be a crime, be unethical, or would endanger the employee or another.\textsuperscript{193} And, the employee is not held to the duty of confidentiality if the employer has committed or is about to commit a crime.\textsuperscript{194} Under agency principles, however, the employee is not necessarily permitted to report unethical conduct.\textsuperscript{195} There is a fine line between criminal acts and unethical conduct, a line that may not be recognizable by the employee who does not possess expert knowledge of the law. Providing a blanket of protection to employees who whistleblow would thus, be largely consistent with agency principles, while at the same time confronting employees with difficult assessments of whether an employer’s act is criminal or will certainly endanger others.

To the degree an omnibus statute threatens intrusion on long-held agency principles, the statute should protect confidential information through providing for internal reporting procedures or oversight boards.\textsuperscript{196} Employers could thereby be pivotal in keeping information confidential by acting responsively to employee-raised concerns and keeping employees.

\textsuperscript{193} \textsc{Restatement (Second) of Agency} § 385(1) comment a (1958); \textit{Westman & Modesitt, supra} note 3, at 28, 29.

\textsuperscript{194} \textsc{Restatement (Second) of Agency} § 395 comment f (1958); \textit{Westman & Modesitt, supra} note 3, at 29.

\textsuperscript{195} \textit{Westman & Modesitt, supra} note 3, at 29.

\textsuperscript{196} The audit committees established under SOX are a start, although they fail to provide for adequate feedback to the complaining employee. See 15 U.S.C. § 78f(m)(4); see \textit{Cherry, supra} note 132, at 1070-75 (observing that SOX does not require companies to do anything with the complaints it receives).
informed as to the actions taken by the employer to address the concerns.

Financially, honest employers should welcome information regarding criminal or dangerous conduct in the organization, so that such conduct can be remedied or deterred. Consequently, if the employer chooses instead to punish whistleblowers through retaliatory acts or ignore the warnings of its employees, then perhaps that employer assumes the risk of release of confidential information.¹⁹⁷ Employers should not be shielded by piece-meal and limited whistleblower statutes while the employees who are dedicated enough to the employers, or responsible enough to the public are punished for their courage in stepping forward; indeed, many employees who speak up believe they are being loyal to their employers.¹⁹⁸ Thus, concerns of confidentiality, while sometimes legitimate, should be viewed with skepticism.

For the public sector employee, issues of free speech under the First Amendment, the supervisory authority of managers, and potential negative publicity must be reconciled. The courts have played a key role in balancing the public employee’s right to free expression against the public employer’s interest in managing the workplace.¹⁹⁹ In applying this balancing test, the Supreme Court recognized the need to assess whether the statement at issue addressed matters of public concern.²⁰⁰ In Garcetti v. Cabellos,²⁰¹ the Court recently narrowed protection to an

¹⁹⁷ See supra note 18, discussing Sherron Watkins’ experience at Enron. Much retaliation no doubt is part of an effort to conceal wrongdoing.

¹⁹⁸ In one survey of federal employees, of those employees who reported wrongdoing at their agency, 36% reported wrongdoing to their immediate supervisors whereas less than 10% went outside of the agency when reporting wrongdoing. See MSPB 1993 Report, supra note 33 (ch. 3, fig. 7).


²⁰⁰ Pickering, 391 U.S. at 574 (1968); Connick, 461 U.S. at 147 (1983).
employee under the First Amendment to statements made as a public citizen.\footnote{202}{See Garcetti, 126 S. Ct. at 1960 (2006) (holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”). The Court’s concern for the public employer’s interests is manifest: “[E]mployees retain the prospect of constitutional protection for their contributions to the civic discourse [but this protection] does not invest them with a right to perform their jobs however they see fit.” \textit{Id}.} This may be a hardship for a public employee choosing to first express a matter of public concern internally with the expectation that the matter can be resolved.\footnote{203}{See, e.g., Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) (holding that a public employee who arranged to communicate her concerns privately with her employer about allegedly racially discriminatory policies would be afforded First Amendment protection).} After Garcetti, such internal statements delivered during one’s employment may be characterized as a part of one’s official duties, even though the same observation could have been made as a public citizen, due in part to information obtained as a citizen.\footnote{204}{See \textit{Garcetti}, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting) (suggesting that the government employer might in response to the Court’s decision define job responsibilities expansively to shield the administration from the critical remarks of its employees). \textit{But see} Garcetti, 126 S. Ct. at 1961 (rejecting Justice Souter’s suggestion and observing that determination of job duties is a “practical” inquiry).} Thus, the Garcetti decision has eviscerated First Amendment constitutional whistleblower protection in the public sector.\footnote{205}{See Garcetti, 126 S. Ct. at 1962 (Stevens, J., dissenting), at 1974 (Breyer, J., dissenting)} An omnibus statute could reinstate the primacy of the question of whether the matter was of public concern, and shift the balance back toward the center. Additionally, the same standard could apply to private sector employees to prevent employers from unduly restricting employees from sharing matters of public concern, as public citizens, unless doing so would breach confidentiality duties.

Changing societal views may be undermining employment relationships in the United States. Both employers and employees may perceive that less duty is owed to the other;
employers lay off workers to export jobs to foreign countries\textsuperscript{206} and decrease job benefits to remain competitive in the global market,\textsuperscript{207} and employees change jobs more frequently.\textsuperscript{208} Employers might argue that as more restraints are placed on their control of the workplace, they will become less competitive in the global market, burdened by employment disputes and bad press from poorly informed employees. An omnibus provision, however, would only protect claimants who held a “reasonable belief” of wrongdoing or public threat.\textsuperscript{209} Of course, there can be too many whistles blowing. An employee may lodge a false complaint or engage in bad faith disclosures to protect his or her job and thereby prevent the supervisor from taking legitimate adverse actions against employees; alternatively, employees may not understand that conduct that appears to the employee to be inappropriate is in fact legal.\textsuperscript{210} The employer holds the power to minimize this concern through meaningfully educating employees as to the “kinds of problems about which they should share information,

\textsuperscript{206} See, e.g., Ian Austen, \textit{Nortel to Cut 1,100 Jobs as it Tries for Comeback}, N.Y. Times C6 (June 28, 2006) (reporting that Nortel Networks announced plans to address aggression market competition by cutting 1,900 jobs across the company, creating 800 jobs in lower cost locations of Mexico and Turkey, and implementing changes in employee pension and health benefit programs); LOU DOBBS, \textit{EXPORTING AMERICA: WHY CORPORATE GREED IS SHIPPING AMERICAN JOBS OVERSEAS} 34 (2004) (estimating that by 2015, “$151.2 billion in wages will be shifted from the United States to lower-wage countries,” including about 3.4 million white-collar service jobs).

\textsuperscript{207} See, e.g., Martin Zimmerman, \textit{Earnings Suggest GM Recovery is on Course}, L.A. Times B1 (July 27, 2006) (reporting that GM’s financial restructuring to meet aggressive competition includes savings from reducing employee pension and healthcare costs).

\textsuperscript{208} See, e.g., WESTMAN & MODESTITT, supra note 3, at 30.

\textsuperscript{209} See supra notes 124-127.

\textsuperscript{210} See MSPB 1993 Report, supra note 33 (Ch. 5, \textit{What Guidance or Training Did Agencies Provide on Reporting Fraud, Waste, and Abuse}) (reporting that agencies may be reluctant to provide information to employees on how to report fraud, waste, or abuse because employees might use the process as a shield against non-retaliatory adverse employment actions)
how the information will be handled, and what the safeguards are against reprisals.”211 In other words, employers should manage the risk of inappropriate employee misconduct.212 Moreover, under the proposed omnibus statute the employee bears the burden of proving the prima facie case by a preponderance of the evidence that the whistleblowing activity was a contributing factor to the adverse action; even if that burden is met, it can be overcome by the employer establishing by clear and convincing evidence that it would have taken same action for independent, legitimate reasons in absence of the protected activity.213 Thus, the risk of too much whistleblowing seems overblown.214 An omnibus statute can ameliorate this concern further by encouraging internal whistleblowing, and mandating appropriate training of employees.

Social conditioning discourages whistleblowing and casts out the individuals who breach the “trust” of the group even when those individuals are truthful, as co-workers may view

211 In fact, when surveyed, government employees stated that they would only consider whistleblowing in the face of serious misconduct. See MSPB 1993 Report, supra note 33 (ch.7, Summary and Recommendations); see also Nathan & Chow, supra note 142, at 544-45 (suggesting key features for a SOX complaints/whistleblower protection program that includes the following: providing more than one avenue for employees to confidentially report concerns: explaining what constitutes a valid complaint and how such complaint will be treated; updating employees as to actions taken; and educating managers, supervisors, subsidiaries, contractors and agents regarding SOX compliance and whistleblower policies).


213 See, e.g. 29 C.F.R. § 1980.104(c); 49 U.S.C. § 42121; Kohn, supra note 84, at 62-63. Where motives for termination are mixed, the “contributing factor” standard of proof will favor the employee. See Cavico, supra note 46, at 563 (2004).

214 MSPB 1993 Report, supra note 33 (Ch. 3, fig. 2).
whistleblowing as a witch-hunt.\footnote{See Simons, supra note 4, at 26-27 (asserting that betrayal or disloyalty is at the root of social condemnation); Keri A. Gould, Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crime: Do the Federal Sentencing Guidelines Promote Respect for the Law?, 10 N.Y.L. SCH. J. HUM. RTS. 835, 868-69 (1993) (asserting that the federal sentencing guidelines’ incentives for cooperation by individuals charged with narcotics related crimes potentially promotes disrespect for the law by forcing the defendant to betray moral loyalties for personal gain). Professor C. Fred Alford suggests that while society may not tolerate whistleblowing, it is the organization that mobilizes forces against the whistleblower, “expos[ing] and sacrifice[ing the whistleblower] so that others might see what it costs to be an individual in this benighted world.” ALFORD, supra note 35, at 3.}

Employers can minimize this fear by creating workplace conditions that train management to appreciate the benefits of at least internal whistleblowing\footnote{Management must be prepared to trade a “don’t rock the boat” attitude for an “everyone grab a paddle and row” approach. See MSPB 1993 Report, supra note 33 (Ch. 3).} and the cost-savings from employee input.\footnote{See infra text accompanying notes 243-249.} SOX requires audit committees of publicly-held companies to establish procedures for receiving, investigating and processing whistleblower complaints.\footnote{See Sarbanes-Oxley Act of 2002 § 301, codified at 15 U.S.C. § 78j-l(m)(4); see also Nathan & Chow, supra note 142, at 13-14 (suggesting that whistleblower protection programs include educating managers, supervisors, subsidiaries, contractors, subcontractors, and agents of the company about compliance policies, how to handle complaints, and keeping whistleblowers informed, and educating employees about company whistleblower policies, what constitutes a violation of SOX, and how the company processes complaints); Steve Priest & Jeff Kaplan, Caremark, Sarbanes-Oxley, and the New Role of Corporate Audit Committees in Effective Whistleblower Protection, 3 Corp. Accountability Report (BNA) No. 2, at 65 (Jan. 31, 2003) (addressing the challenge of creating effective whistleblower protection). But see Cherry, supra notes 132, at 211.} Although not all businesses will necessarily be large enough to require committees to establish procedures, many businesses may be able to establish a hotline to collect anonymous concerns with a means of responding or making further inquiries.\footnote{New businesses have formed to provide this service to organizations. Institute of Internal Auditors, A Call for Character and Integrity, TONE AT THE TOP, Issue 26 (June 2005) available at www.theiia.org/periodicals/newsletters (follow “tone-at-the-top” hyperlink; then follow “June 2005 — Ac Call for Character and Integrity” hyperlink) (on file with author) (last visited Mar. 15, 2007); see, e.g., InTouch, at http://www.getintouch.com/compliance_hotline.html (offering SOX compliance hotlines with automated and live operators) (on file with author) (last visited Mar. 15, 2007); Silent Whistle, at http://www.allegiance.com/silentwhistle (offering a range of anonymous feedback solutions from a “simple whistleblower hotline” to “a comprehensive feedback system”) (on file with author) (last visited Mar. 15, 2007).}

Studies suggest
that employees follow management leadership on ethical issues. Management can avert most of the fear by demonstrating honest behavior in its leadership, and conveying that expectation to employees through meaningful training, rewarding ethical conduct and appropriate whistleblowing activity, responding to whistleblower complaints with action on the issue and feedback to the whistleblower, and disciplining those who commit wrongdoing or retaliate against those who report it. Eliminating the two primary reasons employees choose to remain silent in the face of wrongdoing (belief that nothing will be done and fear of reprisal) will likely eliminate the fear of the witch-hunt.

Another objection that business leaders may raise in opposing omnibus whistleblower protection is the cost. The costs are difficult to quantify because adopting an effective program in response to anti-retaliation legislation may include the cost of time for training, and perhaps establishing hotlines, potential arbitration, or even litigation. But without the legislation, businesses bear costs of mismanagement, potential litigation, and costs of crime, whether it is

220 See Ethics Resource Center, 2003 National Business Ethics Survey, Executive Summary (on file with author) [hereinafter Ethics Resource Center, 2003 Survey] (where employees perceive good business ethics to be incorporated into the business through modeling by top management, observed ethical misconduct has decreased and reporting of unethical conduct has increased); Linda Klebe Trevino et al., Managing Ethics and Legal Compliance: What Works and What Hurts, 41 CAL. MGMT. REV. 131, 142 (1999) (concluding that leadership is one of the most important factors in explaining the ethical conduct of organizations); Gary R. Weaver et al., Corporate Ethics Programs as Control Systems: Influences of Executives Commitment and Environmental Factors, 42 ACAD. MGMT. J. 41, 53 (1999) (top management’s commitment to ethics “has a stronger influence on the control orientation of ethics programs” than environmental variables).

221 MSPB 1993 Report, supra note 33 (Ch. 3, figs. 2 & 4; Ch. 7).

222 See Shaheen Pasha, Corporate Compliance Rules Challenged, CNNMoney.com, Mar. 22, 2006 (reporting that “Sarbanes-Oxley opponents are gaining steam” in their challenges to the restrictive rules of SOX); Sarbanes-Oxley Implementation: Law Professors Decry Sarbanes-Oxley as “Debacle,” Call for “Re-Examination”, 4 Corp. Accountability Rep. (BNA) No. 11, at 276 (Mar. 17, 2006) (reporting on critics of the Sarbanes-Oxley Act that describe SOX as “panic legislation” without consideration for the burdensome costs to corporations and shareholders and with no measurable gain; critics recommend limiting or eliminating individual civil and criminal liability provided by SOX).
fraud, theft, or human life.  

Business leaders that develop appropriate feedback systems and employee training should recognize that the costs of implementing or maintaining strong communication channels should not undermine the functioning of the workplace, and the benefits in less fraud and theft should outweigh the burdens.

B. **The Case for Omnibus Legislation: Economic & Social Costs**

In conventional crimes, the victim is obvious and the perpetrator is a particular person. In white collar crime, the victim may realize a crime has occurred and the perpetrator may be the collective acts or omissions of numerous people. Conventional measures can be taken to minimize conventional crimes such as better lighting on dark streets or more law enforcement officers patrolling neighborhoods. In white collar crimes, conventional measures are ineffective. The only witnesses to the crimes are often participants or are working for the business perpetrating the crime. Consequently, legislation is needed to encourage those witnesses to come forward, and one thing that the government can provide is legal protection from retaliation.

The direct costs on conventional crimes (such as robbery and burglary) are estimated at $4 billion annually.  In contrast, the direct costs of white collar crime are estimated to range from as low as $40 billion to as high as $1 trillion annually. In 1986, the False Claims Act

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223 See infra part IV.B.


225 Id. This is 10 to 50 times the cost of conventional crime. Id. Economists estimate that the current options backdating scandal risks costs of $500 million to the shareholders for every $600,000 gained per year to the executives. Eric Dash, Report Estimate the Costs of a Stock Options Scandal, NY TIMES (Sept. 6, 2006), at C4; see also supra notes 194-198. As demonstrated by Enron, the direct costs from a single criminal organization can be staggering. See supra note 74.
was strengthened to increase recovery under the Act “by raising the financial incentive for private citizens to sue on behalf of the government, and by providing protection for employees who fear reprisals if they take steps to report abuses.” Subsequently, between the fiscal years from 1988 through 2003, the total amount recovered under the FCA when there was an associated *qui tam* case has been $7.9 billion. The FCA is only one statute in an arsenal of federal and state statutes offering protection in exchange for information. Yet, the whistleblower protective net has sizeable holes through which many cases fall. Blanket protection could be expected to afford even more cost savings.

Indirect costs are also associated with white collar crime: higher taxes, increased cost of goods and services, higher insurance rates, screening and surveillance equipment to monitor employees, greater costs of prosecution on a per crime basis as compared to conventional crime because of the cost to detect, investigate, and prosecute complex criminal conduct, and cost of capital to honest businesses due to loss of investor confidence in the U.S. financial and business markets. Environmental crimes and work-related diseases generate related costs of medical treatment and consequential absenteeism from work, increased health care costs to businesses providing insurance for employees, and costs of clean-up. Other less quantifiable costs


227 SCAMMELL, *supra* note 44, at 304-05. Under the FCA, a private citizen, called a *relator* is permitted to file a civil action for a violation of 31 USC 3729, on behalf of the United States. 31 U.S.C. 3730. Violators of the FCA are liable for up to treble damages and the relator is entitled to a percentage of the damages, between 10-25% if the Attorney General elects to intervene and proceed with the case, and between 25-30% if the Attorney General declines to take over the case. 31 USC 3730(d).

228 See FRIEDRICH, *supra* note 224, at 48-49; *supra* notes 76, 77.

229 FRIEDRICH, *supra* note 224, at 48-49.
include the psychological trauma of victimization, and “[a]lienation, delegitimation, and cynicism” because it erodes trust in the government and the institutions it promotes.230

Omnibus whistleblower protection would extend beyond white collar crimes to consolidate federal protection from retaliation into a single statute to eliminate the confusion and conflict from the multitude of federal statutes. The scope of the single statute would be broad, covering claims of retaliation for reporting or filing a claim of racial or sexual discrimination, financial fraud, and public health and safety threats, for example. Congress acknowledged that violation of civil rights laws warrant protection from retaliation231 just as violation of criminal laws warrants retaliation. In short, there are powerful interests in favor of whistleblower protection as a means of enhancing law enforcement efforts with respect to a broad array of laws.

The U.S. government already intrudes on public and private at-will employment decision-making through a myriad of statutes.232 In addition to regulatory obligations such as the number of hours and the age of workers, statutes protect the health and safety of employees, require the equal treatment of employees, and provide some protection against retaliation for those employees that seek the benefit of those statutory provisions. The existence of these many laws supports the conclusion that society desires government’s presence in the employment arena and recognizes the benefits of whistleblowers to public health, safety, financial security,

230 Id. at 49.

231 See Equal Employment Opportunity Act, (Title VII), 42 U.S.C. § 2000e-3(a) (prohibiting retaliation for opposing unlawful practices, including making a charge, testifying, participating, or assisting in enforcement proceedings).

232 See Delikat & Rosenberg, supra note 39.
and equal protection principles.\textsuperscript{233}

Consolidating the complex web of protections into a single omnibus statute that addresses the issues of scope of coverage, forum, burdens of proof, relief and timing for those retaliated against for whistleblowing would presumably lower litigation costs because employees and employers could look to a single set of rules for federal protection or direction.\textsuperscript{234} Moreover, more complete protection would in time encourage those employees fearful of reprisals or lack of legal protection to come forward to report wrongdoing. This increased participation by workers in monitoring and protecting health, welfare and safety would lower the direct and indirect costs to all.

As recognized above, federal omnibus legislation would not preempt state protections for whistleblowers,\textsuperscript{235} but would provide a single set of federal rules so that litigants could more readily compare federal law with state law. Ideally over time, federal omnibus legislation might influence states to opt as well for a single state rule providing broad protection rather than multiple rules providing threads of protection.\textsuperscript{236}

Thus, there are powerful reasons for broader whistleblower protection and the legitimate concerns of business and government units can be addressed in the context of a specific omnibus

\textsuperscript{233} See, e.g., Lacayo & Ripley, supra note 40.

\textsuperscript{234} See supra part III.

\textsuperscript{235} See supra text accompanying note 169-170.

\textsuperscript{236} Much like federal statutory protections, some states that have promulgated whistleblower protection statutes have enacted separate statutes for public sector employees and private sector employees. See Westman & Modesitt, supra note 3, at 77-78, 281-307 (app. A listing state statutes protecting public sector employees), & 309-17 (app. B listing state statutes protecting private sector employees).
C. **The Interests of Senior Managers**

Given the overall benefits to offering blanket protection for whistleblowers and the complexity of the current statutory protections, it appears odd that more comprehensive protection is not already in place. This article posits that the key element to current whistleblower insecurity is the interests of senior managers in the US.

Virtually all theories of legal reform focus on the role of those holding economic and political power to use the political process to get laws and regulations enacted that serve their interests. For example, economists have shown that increased economic inequality in a society leads to a legal system that fundamentally tilts in favor of the wealthy.\textsuperscript{237} Scholars from the Law and Economics movement further suggest that regulation will be hijacked predictably in favor of those with the greatest economic stakes in the regulatory process—usually the very business sectors subject to regulation.\textsuperscript{238} Mancur Olson in particular has focused upon collective action challenges to suggest that small groups with concentrated economic resources will invariably achieve more favorable legal outcomes than widely dispersed groups.\textsuperscript{239} More recently, legal scholars have recognized that Congress itself may court organized groups with economic

\textsuperscript{237} Edward Glaeser, Jose Scheinkman & Andrei Shleifer, *The Injustice of Inequality*, 50 J. MON. ECON. 199 (2003) (using the US during the gilded age and post communist Russia to demonstrate how increased inequality leads to legal outcome that fundamentally favor the wealthy).

\textsuperscript{238} See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 19.13 & 19.14 (6th ed. 2003) (the electoral process “creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money or votes.”).

\textsuperscript{239} MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2, 11, 165 (REV. ED. 1971) (stating that very large groups will not pursue organizations to influence public goods like law because rational actors will instead assume that they can free ride on the efforts of others).
resources to bargain for legal indulgences. As other commentators have recognized, these reform theories would predict that CEOs and senior managers as captains over vast pools of corporate wealth and operating within relatively concentrated groups would hold disproportionate sway over the legal system.

There is reason to think that the political sway of senior managers is the underlying reason blowing the whistle is so hazardous and uncertain. By definition a whistleblower is a person who otherwise lacks power to stop the enterprise, through its normal governance channels (which always lead ultimately to the CEO and senior managers), from engaging in wrongful conduct. In other words, whistleblowers are a check on management prerogatives. During the post-Enron reform era, management interest have bridled against other reform initiatives that would have impinged upon management autonomy—particularly provisions that would have required attorneys for public corporations to report corporate wrongdoing outside the corporation and provisions that would have limited management’s ability to hand pick their nominal supervisors, the board of directors. In other words, managers have not been reticent to oppose measures that threaten their autonomy.

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240 Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. Rev. 1159, 1233 (2006) (finding that Congress often engages in *ex ante* rent extraction as much as legislative activity is a function of collective action theory and demonstrating how this dynamic has played out in connection with extended legislative debate over the estate tax).

241 Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 Del. J. Corp. L. __,___(2007) (arguing that CEOs have used their political advantages to achieve a CEO primacy model of corporate governance).

242 Supra note 3.

243 Id.

The Sarbanes-Oxley experience is telling. The business community was essentially split regarding SOX. Nevertheless, the overwhelming political support behind the Act ultimately imposed numerous new obligations on public companies, including the managers of such entities. The one provision that President Bush narrowed immediately upon signing the Act through a Presidential signing statement was the whistleblower provision. Commentators have noted that special interest influence can be difficult to track because bargains struck often leave no footprints. Nevertheless, it is clear that the most organized and powerful segment with the greatest stakes in Sarbanes-Oxley was management. They are most likely the political force behind the President’s effort to dilute whistleblower protection.

The United States does not want another Enron. It does not want military equipment failing in battle because of mechanical failures, water supplies polluted by chemical waste, or subway tunnels that collapse in earthquakes. Fundamentally, there is broad political

245 BUTLER & RIBSTEIN, supra note 8, at 12.
246 Id. at 13-14.
247 Supra note 9.
248 McCaffery & Cohen, supra note 25, at 1233.
249 BUTLER & RIBSTEIN, supra note 8, at 12.
250 See, e.g., SCAMMELL, supra note 44, at 16.
251 See, e.g., ALFORD, supra note 35, at 75 (relating the story of a state environmental protection agency employee who was fired for calling a state senator to report the agency’s failure to test well water in neighborhoods near hazardous waste sites; the agency was forced to rehire the employee who was then given no work and an office in a former janitor’s closet).
252 See id. at 51 (describing the experience of an engineer who was fired from his position with a construction management company because he exposed defects in the construction of subway tunnels in Los Angeles).
support for whistleblowing protection generally, which is why so many provisions have been legislated. There is little doubt that our elected leaders have a high degree of group cohesion with many elite groups within our society. Moreover, our leaders themselves (as well as our government) are often threatened by whistleblowers. Indeed, the term “whistleblower” continues to perpetuate the social stigma. Whistleblowing will always be countercultural.

All of these factors suggest that whistleblower reform will be difficult.

253 See supra notes 5, 44, 45, and 46; Stephen Barr, Armor for the Whistle-Blowers, WASH. POST, Aug. 10, 2006, at D4 (reporting that U.S. Representatives wrote a letter urging ranking members of the House Armed Services Committee to support broader protections of federal employees and to eliminate loopholes in protection, and stating that “whistle blowers can be America's first line of defense against threats from outside, as well as from bureaucratic breakdowns within the government that can be equally dangerous”).

254 See JEFF FAUX, THE GLOBAL CLASS WAR 70-75 (2006) (asserting that those persons in the top economic echelons share loyalty and solidarity with others in their class even when such loyalty may be detrimental to the businesses they manage or the industries in which they operate).

255 See, e.g., Christopher Lee, Dispute at Whistle-Blower Office, WASH. POST, Feb. 24, 2005, at A19 (reporting that the head of the U.S. Office of Special Counsel, the department charged with protecting federal employee whistleblowers from prohibited personnel practices under the federal merit system, is accused of retaliating against 12 career employees for whistleblowing).

256 For example, the U.S. Department of Justice announced the largest government fraud settlement in history in a health care fraud probe that involved HCA, the largest for-profit hospital chain in the United States. Press Release CRM/CIV #696, U.S. Dep’t of Justice, HCA—The Health Care Company & Subsidiaries to Pay $840 Million in Criminal Fines and Civil Damages and Penalties (Dec. 14, 2000), available at http://www.usdoj.gov/opa/pr/2000/December/696civcrm.htm. The five year investigation was prompted by lawsuits under the False Claims Act filed by whistleblowers, and the settlement addressed wrongdoing for numerous activities including illegal charges and fraudulent claims. HCA was founded by U.S. Senator Bill Frist’s father and brother, Thomas Frist, Sr. and Thomas Frist, Jr., and reportedly “formed a significant source of [the senator’s] wealth” at least prior to his sale of the stock in July 2005. R. Jeffrey Smith & Jeffrey H. Birnbaum, Frist Stock Sale Raises Questions on Timing, Wash. Post, Sept. 22, 2005, at A10. His run for the U.S. Senate in 1994 was funded in part by a loan secured by the HCA stock. Id. In 2002, the Justice Department announced a tentative agreement with HCA to resolve the remaining civil claims with a settlement of $781 million, bringing the total civil and criminal recovery amount from HCA to approximately $1.7 billion. Press Release #731, U.S. Dep’t of Justice, Press Statement Re: HCA (Dec. 18, 2002), available at http://www.usdoj.gov/opa/pr/2002/December/02_civ_731.htm.

257 MSPB 1993 Report, supra note 33 (Ch. 7, Summary & Recommendations).

258 See James Fanto, Whistleblowing and the Public Director: Countering Corporate Inner Circles, 83 OR. L. REV. 435, 461-67 (2004) (positing that because human beings are social and “derive much of their identity from membership in groups, . . . group members become uniform in their views and see only the positive, not the negative, about group attitudes and behavior”).
On the other hand, whistleblowers are lionized in our society precisely because it takes so much courage to be so countercultural.\textsuperscript{259} Honest business leaders will value information that improves product safety, protects financial integrity, or reduces diminished output due to workplace hostility and can thus be convinced of the benefits for any protection to prevail.\textsuperscript{260} Given that whistleblower protection dates to the Civil War, and that each passing crisis or successful political movement seems to spur greater whistleblower protection, there is little doubt that there are strong political forces in favor of whistleblowing.\textsuperscript{261} Thus, whistleblowing protection seems to be a permanent feature of our legal system.\textsuperscript{262} This means that any omnibus statute would likely not be subject to the same kind of special interest limitations that are patent in the current regime.\textsuperscript{263} An omnibus statute would eliminate the patchwork of protections, and to the same extent eliminate opportunities to amend whistleblower protection by stealth.\textsuperscript{264}

Legal structure matters.\textsuperscript{265} The current structure diffuses attention to whistleblower

\textsuperscript{259} See supra note 40. See, e.g., Adam Zagorin & Timothy J. Burger, Beyond the Call of Duty, TIME, Nov. 1, 2004, at 64 (reporting on Army contract specialist Bannatine Greenhouse’s experience when she questioned no-bid long-term Iraqi supply contract with Halliburton’s subsidiary, Kellogg, Brown and Root; during discussions with senior officials from the office of the Defense Secretary, several Halliburton representatives attended the meeting and left only after Greenhouse’s strong urging to the presiding general that they not be privy to internal discussions).

\textsuperscript{260} See MSPB 1993 Report, supra note 33 (Ch. 7, Summary & Recommendations).

\textsuperscript{261} Supra notes 48 and 49.

\textsuperscript{262} The fact that the most recent federal effort to enhance whistleblower protection passed the House by a vote of 331-94 demonstrates the political support in favor of expanded protections. See supra note 5.

\textsuperscript{263} For example, it is clear that President is not in favor of whistleblower protection. Supra notes 5 and 9. Nevertheless, the administration has not proposed abolishing all whistleblower protections, presumably because it recognizes the political costs of doing so. See supra note 5.

\textsuperscript{264} Supra note 9.

\textsuperscript{265} President Franklin Roosevelt understood this fact intuitively. He knew that his Social Security Act would engender resistance within more conservative business circles. He also knew that over time this political force could seek to undo Social Security. This is the reason that he funded Social Security through payroll taxes.
protection among a plethora of provisions. A single unified omnibus statute convokes support and thus, is far more likely to secure adequate whistleblower protection than the current porous net. It is far more likely to resist special interest attack or limitation because such an attack would be on whistleblower protection generally rather than just specified threads of protection. Thus, as the next step in whistleblower protection, reformers should urge the consolidation of the entire patchwork of whistleblower into one omnibus provision in accordance with the vision articulated in this article. Such an approach is the most likely means of optimizing whistleblower protection within the context of our political system.

V. Conclusion

The United States has repeatedly recognized the need to rely upon its citizens in combating crime and in protecting the health, welfare, and safety of the citizenry. With each newly identified threat, Congress has reacted time and again to the disaster with strands of legislation intended to stem the danger and protect those who step forward to aid the battle. This article looks at the most recent response to a threat, financial and accounting fraud, and examines the goal articulated as compared to the resulting legislation’s limited effectiveness through its narrowly defined scope, rules on forum selection, procedure rules, and remedies. From this example, the contours of omnibus legislation can be envisioned that would eliminate the piecemeal strand by strand net that has evolved for whistleblowers and replace it with a blanket of protection against retaliation.

To the extent participants paid into the plan, they would have a vested interest in the continuation of the program and the payout of benefits over generations. PATRICK J. MANEY, THE ROOSEVELT PRESENCE 67 (1998).
An omnibus whistleblower statute would operate to give anti-retaliation protection the maximum extent of protection from special interest limitations. A unified omnibus provision would require a frontal assault on whistleblower protection generally and limit the ability of special interests to mount stealth attacks on particular strands of whistleblower protection. Thus, when the elite business leaders and political leaders recognize and are prepared to seize the opportunity for economic savings and social benefit, those who seek protection for whistleblowers must be ready to step forward to fight crime and promote health and welfare through omnibus protection. When the next reform moment arises, reformers must be ready to strike.