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Appearing before the

**House Committee on Oversight and
Government Reform**

**“The Whistleblower Protection Enhancement Act of
2009”**

May 14, 2009

Mr. Chairman, I appreciate the opportunity to testify on H.R. 1507, “The Whistleblower Protection Enhancement Act of 2009.” To fulfill its constitutional duties to legislate and monitor the executive branch, Congress must have access to agency information that reveals inefficiency, waste, corruption, and illegality. Access is needed to both domestic and national security information. The President and agency heads have a responsibility to uncover improper and illegal activities and correct them, but the experience of more than two centuries demonstrates that executive officials are often unreliable in policing themselves and will often taken steps to deliberately conceal not merely waste but legal and constitutional violations. There is thus a need for Congress to strengthen national security whistleblower rights.

Members of Congress and their committees have a duty to learn of agency deficiencies and abuses. Only by doing so can lawmakers protect their institutional prerogatives and safeguard the interests of citizens, aliens, and taxpayers. An important source of information over the years has been government employees who tell Congress about agency misconduct. As noted in a March 2009 study by the House Committee on the Judiciary, federal employees “are often the first, and perhaps the only, people to see signs of corruption, government misinformation, and political manipulation.”¹

Denied this kind of agency information, Congress is unable to carry out its core constitutional responsibilities in such areas as the budget and national defense. It cannot assure the integrity of federal programs. Access is blocked when agencies retaliate against employees and punish them for sharing information with Congress. Legislation is necessary to assure the disclosure of agency information and to protect government employees who decide to tell Congress about agency wrongdoing.

There has been a misconception for many years about agency whistleblowing. The executive branch has argued that this type of activity is generally permissible for domestic programs but not for national security. It is said that the President has special and exclusive authorities to protect national security information. As my statement explains, this claim is without merit. Congress has coequal duties and responsibilities for the whole of government, domestic and foreign. In previous years the Justice Department has consistently opposed legislation for national security whistleblowers. Lawmakers should read with care what the Justice Department says, but it is positioned to protect executive, not legislative, interests. Congress needs to make independent judgments to protect not only its institutional prerogatives but the rights of citizens and the system of checks and balances.

¹ “Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush,” House Committee on the Judiciary Majority Staff, Final Report to Chairman John Conyers, Jr. (March 2009), at 273.

The Roosevelt-Taft “Gag Orders”

There is little disagreement about the need to uncover agency misconduct and correct it. The problem is putting that principle into practice. The Code of Ethics adopted by Congress in 1958 directs all government employees to “expose corruption wherever discovered.”² Over the years, many agency employees have received credit for revealing problems about defense cost overruns, unsafe nuclear power plant conditions, questionable drugs approved for marketing, contract illegalities and improprieties, and regulatory corruption.³ However, agency employees who exposed corruption were often fired, transferred, reprimanded, denied promotion, or harassed. In 1978, a Senate panel found that the fear of reprisal “renders intra-agency communications a sham, and compromises not only the employee, management, and the Code of Ethics, but also the Constitutional function of congressional oversight itself.”⁴

The executive and legislative branches have long been in conflict about the disclosure of agency information to Congress. Presidents Theodore Roosevelt and William Howard Taft threatened to fire agency employees who attempted to contact Congress. Employees were directed to communicate only through the head of their agency.⁵ Congress responded in 1912 with the Lloyd-LaFollette Act, nullifying the Roosevelt-Taft “gag orders” by authorizing agency employees to contact lawmakers, committees, and legislative staff.

Congressional debate on Lloyd-LaFollette explains why lawmakers did not want to be restricted to what they were told by the President or Cabinet heads. They needed to hear from agency rank-and-file members. Some Members of Congress rejected the idea of placing the welfare of citizens “in the hands and at the mercy of the whims of a single individual, whether he is a Cabinet officer or anyone else.”⁶ Legislative language was drafted to assure that agency employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.⁷

During House debate, some lawmakers objected to the Roosevelt and Taft orders as efforts by Presidents to prevent Congress “from learning the actual conditions that surrounded the employees of the service.”⁸ If agency employees were required to speak

² 72 Stat. B12 (1958) (H. Con. Res. 175).

³ “The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption,” prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess. 1 (Comm. Print, Feb. 1978).

⁴ *Id.* at 49.

⁵ 48 Cong. Rec. 4513 (1912).

⁶ *Id.* at 4657 (statement of Rep. Reilly).

⁷ *Id.* at 5201 (statement of Rep. Prouty).

⁸ *Id.* at 5235 (statement of Rep. Buchanan).

only through the heads of the departments, Congress would be at the mercy of officials who could decide to “withhold information and suppress the truth.”⁹

Similar objections were raised during Senate debate. One Senator said “it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States.”¹⁰ The Lloyd-LaFollette Act sought to protect agency employees from arbitrary dismissals when they attempted to communicate with Congress: “The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”¹¹

A History of Mixed Signals

The Lloyd-LaFollette language, carried forward and supplemented by the Civil Service Reform Act of 1978, is codified as permanent law. 5 U.S.C. § 7211 (2006). The conference report on the 1978 statute explains why Congress depends on agency employees to disclose information directly to the legislative branch. The Civil Service Reform Act placed limitations on the kinds of information an employee may publicly disclose without suffering reprisal, but the conference report states that there was “no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress.” Nothing in the statute was to be construed “as limiting in any way the rights of employees to communicate with or testify before Congress.”¹²

The Civil Service Reform Act established procedural protections for agency whistleblowers but the protections were weak. First, the statute did not cover the area of national security. Second, the creation of new institutions, particularly the Merits Systems Protection Board (MSPB) and the Office of Special Counsel (OSC), did little to protect whistleblowers. Congress acknowledged the deficiencies of the 1978 statute by enacting the Whistleblower Protection Act of 1989 and the CIA Whistleblower Act of 1998. Those steps, however, fall short of assuring Congress the information it needs from agency employees who see misconduct and want to report it.

When the Senate Committee on Governmental Affairs reported the Civil Service Reform Act, it remarked: “Often, the whistle blower’s reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter

⁹ Id. at 5634 (statement of Rep. Lloyd).

¹⁰ Id. at 10674 (statement of Sen. Reed).

¹¹ 37 Stat. 555, § 6 (1912).

¹² S. Rept. No. 95-1272, 95th Cong., 2d Sess. 132 (1978).

severe damage to their careers and substantial loss.” The committee said that protecting agency employees who disclose government illegality, waste, and corruption “is a major step toward a more effective civil service. . . . What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses.”¹³ A report by the House Committee on Post Office and Civil Service said that the bill “prohibits reprisals against employees who divulge information to the press or the public (generally known as ‘whistleblowers’) regarding violations of law, agency mismanagement, or dangers to the public’s health and safety.”¹⁴ In supplemental views in this report, Rep. Pat Schroeder understood that whistleblower protection was an important contribution to legislative oversight: “If we in Congress are going to act as effective checks on excesses in the executive branch, we have to hear about such matters.”¹⁵ As enacted, the Civil Service Reform Act included a subsection on prohibited personnel practices, stating that the legislation “shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”¹⁶

In supporting the legislation, President Jimmy Carter proposed an Office of Special Counsel “to investigate merit violations and to protect the so-called whistleblowers who expose gross management errors and abuses.”¹⁷ At a news conference, he looked to the Special Counsel to protect “those who are legitimate whistleblowers and who do point out violations of ethics, or those who through serious error hurt out country.”¹⁸ In signing the bill, President Carter said that “it prevents discouraging or punishing [federal employees] for the wrong reasons, for whistleblowing or for personal whim in violation of basic employee rights.”¹⁹

Implementing Whistleblower Rights

The Special Counsel never functioned in the manner anticipated by Congress or President Carter. Agency whistleblowers continued to be subject to reprisals and punishment. Part of the reason lay in the conflicting values placed in the 1978 statute. Although it expressly stated its intention to protect whistleblowers, a dominant motivation for the statute was to make it easier to fire and discipline federal employees. Under this system of incentives, whistleblowers became more vulnerable to abusive

¹³ S. Rept. No. 96-969, 95th Cong., 2d Sess. 8 (1978).

¹⁴ H. Rept. No. 95-1403, 95th Cong., 2d Sess. 4 (1978).

¹⁵ *Id.* at 387.

¹⁶ 92 Stat. 1117 (1978).

¹⁷ *Public Papers of the Presidents, 1978, I, at 437.*

¹⁸ *Id.* at 441.

¹⁹ *Id.* at 1761.

managers and agencies possessed a new tool to prevent embarrassing information from reaching Congress and the public.

In his first year in office, President Ronald Reagan urged agency whistleblowers to disclose misconduct: “Federal employees or private citizens who wish to report incidents of illegal or wasteful activities are not only encouraged to do so but will be guaranteed confidentiality and protected against reprisals.” The “vital element” in fighting fraud and waste, he said, “is the willingness of employees to come forward when they see this sort of activity.” Agency employees “must be assured that when they ‘blow the whistle’ they will be protected and their information properly investigated.” He wanted to make it clear that “this administration is providing that assurance to every potential whistleblower in the Federal Government.”²⁰ Yet whistleblowers remained vulnerable to agency retaliation and reprisal, as they had been in the Carter administration. During hearings in 1985, Rep. Schroeder remarked on the lack of protection for whistleblowers: “We urge them to come forward, we hail them as the salvation of our budget trauma, and we promise them their place in heaven. But we let them be eaten alive.”²¹ In a newspaper article published on July 17, 1984, Special Counsel K. William O’Connor was asked what advice he would give, as a private attorney, to a potential whistleblower. His reply: “I’d say that unless you’re in a position to retire or are independently wealthy, don’t do it. Don’t put your head up, because it will get blown off.”²²

Recognizing that existing procedures were inadequate to protect agency whistleblowers, Congress held hearings and reported new legislation in 1986. The House Subcommittee on Civil Service said it had been “unable to find a single individual who has gone to the Office of Special Counsel since 1981 who has been satisfied with the investigation of his or her case.”²³ A study by Dr. Donald R. Soeken concluded that “most whistleblowers were not protected, and in fact, they suffered cruel and disastrous retaliation for their efforts. . . . It seems to me that the protection has also been a cruel hoax.”²⁴ A Senate report in 1988 described the results of a 1984 report prepared by the MSPB. It estimated that 69-70 percent of federal employees knew of fraud, waste and abuse but chose not to report it. The percentage of employees who did not report agency wrongdoing because of fear of reprisal rose from an estimated 20 percent in 1980 to 37 percent in 1983.²⁵

²⁰ Public Papers of the Presidents, 1981, at 360.

²¹ “Whistleblower Protection,” hearings before the House Committee on Post Office and Civil Service, 99th Cong., 1st Sess. 237 (1985).

²² Howard Kurtz, “Whistlin’ the Blues,” Washington Post, July 17, 1984, at A17.

²³ H. Rept. No. 99-859, 99th Cong., 2d Sess. 19 (1986).

²⁴ H. Rept. No. 100-274, 100th Cong., 1st Sess. 19 (1987).

²⁵ S. Rept. No. 100-413, 100th Cong., 2d Sess. 5 (1988).

Congress passed the Whistleblower Protection Act of 1988, intending to give additional protection to agency employees who reported on wrongdoing and illegality. President Reagan pocket vetoed the bill, explaining that reporting of “mismanagement and violations of the law, often called whistleblowing, contributes to efficient use of taxpayers’ dollars and effective government. Such reporting is to be encouraged, and those who make the reports must be protected.” However, he said it was necessary to ensure that agency heads “can manage their personnel effectively. He was concerned that “employees who are not genuine whistleblowers could manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions.”²⁶

The vetoed whistleblower bill was modified in 1989 and passed the Senate by a vote of 97 to zero.²⁷ The House passed the bill under suspension of the rules.²⁸ The Whistleblower Protection Agency (WPA) of 1989 found that federal employees who make protected disclosures “serve the public interest by assisting in the elimination of fraud, waste, and unnecessary Government expenditures.”²⁹ Congress found that protecting employees “who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service.” The WPA stated that Congress, in passing the Civil Service Reform Act of 1978, “established the Office of Special Counsel to protect whistleblowers” who make protected disclosures.³⁰ In signing the bill, President George H. W. Bush said that “a true whistleblower is a public servant of the highest order. . . . [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment.”³¹

Five years later, Congress found itself working on amendments to the WPA, expressing concern “about the extent to which OSC is aggressively acting to protect whistleblowers from prohibited personnel practices.”³² A House report stated that while the WPA “is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them.”³³ The House report found fault with the

²⁶ Public Papers of the Presidents, 1988-89, II, at 1391-92.

²⁷ 135 Cong. Rec. 4535 (1989).

²⁸ Id. at 5040.

²⁹ 103 Stat. 16, § 2(a)(1) (1989).

³⁰ Id. at § 2(a)(2) and (3).

³¹ Public Papers of the Presidents, 1989, I, at 391.

³² S. Rept. No. 103-358, 103d Cong., 2d Sess. 3 (1994).

³³ H. Rept. No. 103-769, 103d Cong., 2d Sess. 12 (1994).

performances of the MSPB and the Federal Circuit of Appeals, as did a report by the General Accounting Office.³⁴

Military Whistleblower Protection Act

Whistleblower legislation enacted in 1978, 1989, and 1994 did not cover federal employees who wanted to disclose information to Congress that is classified or prohibited by statute from disclosure. Such disclosures could be made to certain agencies within the executive branch. 5 U.S.C. § 2302(8)(B) (2006). However, Members of Congress have frequently expressed a need for information from agencies involved in national security. During debate in 1989, Rep. Barbara Boxer referred to the Military Whistleblower Protection Act and said that lawmakers learned that “without whistleblowers, frankly, we really could not do our job, because . . . we need information and we need a free flow of information from federal employees, be they military or civilian.”³⁵

The Military Whistleblower Protection Act (10 U.S.C. § 1034) is not a single statute but rather an accumulation of several. The first mention of Section 1034 was in 1956, with the codification of Title 10. Section 1034 provided: “No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.”³⁶ Congress adopted this language after a tense confrontation with the Eisenhower Administration over access to agency information. In 1954 President Eisenhower, in a letter to Secretary of Defense Charles E. Wilson, prohibited testimony concerning certain conversations and communications between employees in the executive branch.³⁷

Attorney General Herbert Brownell, Jr. released a legal memorandum stating that the courts had “uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest.”³⁸ The Justice Department prepared a 102-page report concluding that Congress “cannot, under the Constitution, compel heads of departments to make public what the President desires to keep secret in the public interest.”³⁹ This report misrepresented the issue. Congress never contemplated forcing a President to make secret or classified information available to the public. Congress wanted information made available to Members and

³⁴ Id. at 13, 17; S. Rept. No. 103-358, 103d Cong., 2d Sess. 3 (1994); General Accounting Office, “Reasons for Whistleblower Complainants’ Dissatisfaction Need to be Explored,” Nov. 1993, GAO/GGD-94-21. For the 1994 amendments, see 108 Stat. 4361 (1995).

³⁵ 135 Cong. Rec. 5037 (1989).

³⁶ 70A Stat. 80 (1956).

³⁷ CQ Almanac, 1956, at 737.

³⁸ Id.

³⁹ Id. at 740.

committees to satisfy legislative needs. To Rep. John Moss, the Justice Department analysis was a demand that Congress “rely upon spoon-fed information from the President.”⁴⁰

Congress created an inspector general for the Defense Department in 1982. Legislation in 1988 added a section on “Safeguarding of Military Whistleblowers,” including prohibitions on retaliatory personnel actions against a member of the armed services for making or preparing a protected communication with a Member of Congress or an inspector general. The IG was authorized to investigate allegations by a member of the armed services who claimed that a prohibited personnel action had been taken or threatened to be taken.⁴¹ The conference report explained:

The conferees note that in the course of their duties, members of the Armed Forces may become aware of information evidencing wrongdoing or waste of funds. It is generally the duty of members of the Armed Forces to report such information through the chain of command. Members of the armed forces, however, have the right to communicate directly with Members of Congress and Inspectors General (except to the extent that such a communication is unlawful under applicable law or regulation), and there may be circumstances in which service members believe it is necessary to disclose information directly to a Member of Congress or an inspector general. When they make lawful disclosures, they should be protected from adverse personnel consequences (or threats of such consequences), and there should be prompt investigations and administrative review of claims of reprisals. When such a claim is found to be meritorious, the Secretary concerned should initiate appropriate corrective action, including disciplinary action when warranted.⁴²

Congress made other modifications to the Military Whistleblower Protection Act in 1989, 1994, 1998, 2000, 2002, and 2004. The text of the statute and its legislative history appear at 10 U.S.C. § 1034 (2006).

The Fight over Nondisclosure Agreements

In 1983, President Reagan directed that all federal employees with access to classified information sign “nondisclosure agreements” or risk the loss of their security clearances.⁴³ Concerned about losing access to agency information, Congress passed

⁴⁰ Id.

⁴¹ 102 Stat. 2027, § 846 (1988).

⁴² H. Rept. No. 100-989, 100th Cong., 2d Sess. 436-37 (1988). This language also appears at 134 Cong. Rec. 16977 (1988).

⁴³ National Security Decision Directive 84 (1983); see Louis Fisher, “Congressional-Executive Struggles Over Information Secrecy Pledges,” 42 Adm. L. Rev. 89, 90 (1990).

legislation in 1987 to prohibit the use of appropriated funds to implement the Administration's nondisclosure policy.⁴⁴ The dispute was taken to court and in 1988 District Judge Oliver Gasch held that Congress lacked constitutional authority to interfere, by statute, with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information.⁴⁵ Judge Gasch bolstered his decision with quotations from two Supreme Court decisions — *Department of the Navy v. Egan* (1988) and *United States v. Curtiss-Wright* (1936) — and in each case his legal analysis was flawed.

Both the House and the Senate submitted briefs rejecting Judge Gasch's understanding of the President's powers in the field of national security. On April 18, 1989, the Supreme Court issued a per curiam order that vacated Judge Gasch's decision and remanded the case for further consideration.⁴⁶ The Court cautioned Judge Gasch to avoid expounding on constitutional matters: "Having thus skirted the statutory question whether the Executive Branch's implementation of [Nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees' [the government's] argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security."⁴⁷ The Court counseled Judge Gasch that the district court "should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional issues."⁴⁸ On remand, Judge Gasch held that the plaintiffs had failed to state a cause of action and dismissed the case on that ground, finding it unnecessary to address any of the constitutional issues.⁴⁹

Misreading of *Egan*. Judge Gasch quoted this language from the Supreme Court's decision in *Egan*: "The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."⁵⁰ From these words he concluded that the President has plenary power in protecting classified information, even to the extent of excluding Congress. His misconception about *Egan* has been repeated in testimony and statements by the Justice Department in opposing national security whistleblower legislation. My comments here about the deficiencies of the Gasch opinion apply equally to the position by the Justice Department.

⁴⁴ 101 Stat. 1329-432, § 630 (1987); 102 Stat. 1756, § 619 (1988).

⁴⁵ *National Federation of Federal Employees v. United States*, 688 F.Supp. 671 (D.D.C. 1988).

⁴⁶ *American Foreign Service Assn. v. Garfinkel*, 490 U.S. 153 (1989).

⁴⁷ *Id.* at 158.

⁴⁸ *Id.* at 161.

⁴⁹ *American Foreign Service Ass'n v. Garfinkel*, 732 F.Supp. 13 (D.D.C. 1990).

⁵⁰ *National Federation of Federal Employees v. United States*, 688 F.Supp. 671, 685 (D.D.C. 1988), citing *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The Supreme Court decided *Egan* wholly on statutory — not constitutional — grounds. Moreover, the case had absolutely zero to do with congressional access to classified information. It was purely an intra-executive dispute: the Navy versus the MSPB. The Court upheld the Navy’s denial of a security clearance to Thomas Egan, who worked on the Trident submarine. It ruled that the grant of security clearance to a particular employee was “a sensitive and inherently discretionary judgment call,” one that “is *committed by law* to the appropriate agency of the Executive Branch.”⁵¹ The principal issue was how to interpret congressional policy expressed in statutory language, not the Constitution.

The focus on statutory, not constitutional, issues is reflected in the briefs. The Justice Department noted: “The issue in this case is one of statutory construction and ‘at bottom . . . turns on congressional intent.’”⁵² The Court directed the parties to address this question: “Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance.”⁵³ The questions centered on the interpretation of 5 U.S.C. §§ 7512, 7513, 7532, and 7701.

Oral argument before the Court on December 2, 1987, explored the statutory intent of Congress. At no time did the Justice Department suggest that classified information could be withheld from Congress. Although the Court referred to the President’s constitutional powers, including those as Commander in Chief and as head of the executive branch,⁵⁴ and noted the President’s responsibility with regard to foreign policy,⁵⁵ the decision was one of statutory construction. In stating that courts “traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” the Court added this important qualification: “*unless Congress specifically has provided otherwise.*”⁵⁶ The Justice Department in its brief had stated: “Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive branch in military and national security affairs.”⁵⁷

⁵¹ Department of the Navy v. Egan, 484 U.S. at 527 (emphasis added).

⁵² U.S. Department of Justice, “Brief for the Petitioner,” Department of the Navy v. Egan, October Term 1987, at 22 (citing *Clarke v. Securities Industry Ass’n*, No. 85-971, Jan. 14, 1987).

⁵³ *Id.* at (I) (emphasis added).

⁵⁴ Department of the Navy v. Egan, 484 U.S. at 527.

⁵⁵ *Id.* at 529.

⁵⁶ *Id.* at 530 (emphasis added).

⁵⁷ U.S. Department of Justice, “Brief for the Petitioner,” Department of the Navy v. Egan, October Term, 1987, at 21.

Both the Supreme Court and the Justice Department exaggerated the extent to which federal courts have been reluctant to decide cases involving military and national security affairs. Beginning in 1800, the Supreme Court regularly accepted and decided war power cases and the legality of certain military actions. Only in the Vietnam War years did federal courts begin a pattern of ducking these cases on various grounds of standing, mootness, ripeness, political questions, prudential considerations, and equitable discretion.⁵⁸ The President's national security powers surfaced at times during oral argument on *Egan*,⁵⁹ but the case began as one of statutory construction and was decided on that ground.

In citing the President's role as Commander in Chief, the Court said that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."⁶⁰ If Congress had never enacted legislation regarding classified information, the President would be in the position of exercising his best judgment to protect that category of information. But if Congress expresses its policy by statute, as it has done, it narrows the President's range of action and courts turn to statutory policy for guidance.

Misreading *Curtiss-Wright*. In addition to *Egan*, Judge Gasch relied on language from the Supreme Court's *Curtiss-Wright* decision to conclude that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern."⁶¹ The central issue in *Curtiss-Wright* was at all times the scope of *congressional*, not presidential, power. The source of the authority was entirely legislative: a statute passed by Congress in 1934 giving the President authority to impose an arms embargo in a region in South America. When President Franklin D. Roosevelt issued a proclamation to implement the statute, he relied exclusively on the statutory authority. At no time during the litigation did anyone, including the executive branch, assert the existence of any type of independent or plenary presidential power.⁶²

Several courts have remarked on the quality of Justice George Sutherland's opinion for the Court in *Curtiss-Wright*. The main holding — that Congress could use more general standards in foreign affairs than it could in domestic affairs — is

⁵⁸ Louis Fisher, "Judicial Review of the War Power," 35 Pres. Stud. Q. 466 (2005).

⁵⁹ See Louis Fisher, "Congressional Access to National Security Information," 45 Harv. J. on Legis. 231-32 (2008).

⁶⁰ Department of the Navy v. Egan, 484 U.S. at 527.

⁶¹ National Federation of Federal Employees v. United States, 688 F.Supp. at 685.

⁶² Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139, 143-44 (2007).

unexceptional. The dispute surrounds the pages of dicta he added at the end, claiming plenary, independent, and inherent powers for the President in foreign affairs. Justice Sutherland cited this language in a speech given by John Marshall when he served as a member of the House of Representatives in 1800: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁶³ From that language Sutherland would write:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁶⁴

Marshall’s speech in 1800 had nothing to do with plenary or exclusive power of the President. It had only to do with the duty of President John Adams under the Constitution to carry out an extradition provision in the Jay Treaty. It was only after Congress had acted by statute or treaty to make national policy that the President became the “sole organ” in carrying out the law. Yet the Justice Department continues to rely on the sole-organ doctrine to object to congressional whistleblower legislation in the field of national security.⁶⁵

In the Steel Seizure Case of 1952, Justice Robert Jackson referred to *Curtiss-Wright* by noting that “much of the opinion is dictum” and the most that can be drawn from it is the intimation that the President “might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress.”⁶⁶ In 1981, a federal appellate court cautioned against placing undue reliance on “certain dicta” in Sutherland’s opinion: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of

⁶³ *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

⁶⁴ *Id.* at 319-320.

⁶⁵ In opposing S. 494, the “Federal Employee Protection of Disclosures Act, William E. Moschella, Assistant Attorney General, wrote to Senator Susan M. Collins, chairman of the Committee on Homeland Security and Governmental Affairs, on April 12, 2005: “This provision would unconstitutionally deprive the President of his authority to decide, based on the national interest, how, when, and under what circumstances particular classified information should be disclosed to Congress. The Constitution not only generally establishes the President as the head of the Executive branch but also makes him Commander in Chief of all military forces, the sole organ of America’s foreign affairs, and the officer in the Government with the express duty (and corresponding authority) to take care that the laws are faithfully executed” (at 3).

⁶⁶ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (concurring opinion).

plenary Presidential power over any matter extending beyond the borders of this country, we rejected that characterization.”⁶⁷

CIA Whistleblower Act of 1998

It is interesting that Justice Department testimony and letters consistently refer to its opposition in 1998 to pending legislation on a CIA whistleblower bill but never acknowledge that the bill, as modified, became law.⁶⁸ The House and the Senate considered the Department’s constitutional objections as expressed in a written opinion by the Office of Legal Counsel (OLC) and in testimony offered by an OLC deputy. Both chambers found the objections inadequate and unpersuasive. The Senate Intelligence Committee, after listening to OLC’s position at a hearing, reported the legislation two hours later by a vote of 19 to zero.⁶⁹

On November 26, 1996, OLC issued an eight-page opinion on the application of executive branch rules and practices on the disclosure of classified information to Members of Congress. It held that bills drafted to assure congressional access to classified information, allowing intelligence community employees to share that information with Congress without the permission of their supervisors, was unconstitutional. The Senate Intelligence Committee held hearings on the OLC memo and invited the Congressional Research Service to analyze it.⁷⁰

The committee held two days of hearings and proceeded to unanimously report legislation that OLC had decided was unconstitutional. The committee announced that the Administration’s “intransigence on this issue compelled the Committee to act.”⁷¹ The House Intelligence Committee also held two days of hearings on a bill that provided an

⁶⁷ American Intern. Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981). For an analysis of Justice Sutherland’s opinion in *Curtiss-Wright*, the scholarly response to it, and the Supreme Court’s subsequent reliance on it, see Louis Fisher, “The ‘Sole Organ’ Doctrine,” The Law Library of Congress, August 2006, available at <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf>

⁶⁸ E.g., letter of Aug. 22, 2006 from William E. Moschella, Assistant Attorney General, to The Honorable Duncan Hunter, chairman of the House Committee on Armed Services, regarding H.R. 5122, at 3 (“We note that the prior Administration took this same position in 1998, strongly opposing as unconstitutional legislation that would have vested employees in the intelligence community with a unilateral right to disclose classified information to Congress”). The identical letter was sent to The Honorable John W. Warner, chairman of the Senate Committee on Armed Services. The position by Mr. Moschella is repeated in a letter of March 13, 2007 from Richard A. Hertling, Acting Assistant Attorney General, to The Honorable Henry A. Waxman, chairman of the House Committee on Oversight and Government Reform, at 2-3.

⁶⁹ Louis Fisher, *The Politics of Executive Privilege* 254-55 (2004).

⁷⁰ Prepared statement by Louis Fisher, Congressional Research Service, “Executive Employee Access to Congress,” reprinted in “Disclosure of Classified Information to Congress,” hearings before the Senate Select Committee on Intelligence, 105th Cong., 2d Sess. 5-13 (1998).

⁷¹ S. Rept. No. 105-165, 105th Cong., 2d Sess. 5 (1998).

alternative procedure for giving Congress access to information from national security whistleblowers.⁷²

Two major issues emerged. One was the question whether CIA employees should report their concerns only to the Inspector General. Was the IG to be the “sole process” by which an employee may report a serious or flagrant problem to Congress? Second, should the head of an intelligence agency have a “holdback” power? That is, should the agency head be authorized to block a whistleblower’s complaint “in the exceptional case and in order to protect vital law enforcement, foreign affairs or national security interest.”⁷³

When the House bill was reported it was decided that the IG mechanism for whistleblowers should not be the “sole process” for them to report wrongdoing to Congress. The House bill provided an additional procedure to the existing IG route.⁷⁴ The House Intelligence Committee recognized that some agency employees might “choose not to report a problem either through the process outlined [in the bill] or through another process authorized by their management, but instead approach the committee directly.”⁷⁵ The committee also decided to eliminate the “holdback” provision. Agency heads would have no authority to block disclosures by agency employees to Congress. A statutory acknowledgement of holdback authority was dropped because it was considered “unwarranted and could undermine important congressional prerogatives.”⁷⁶

Like the Senate, the House Intelligence Committee rejected the Administration’s “assertion that, as Commander in Chief, the President has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity.”⁷⁷ The committee denied that the President, as Chief Executive, “has a constitutional right to authorize all contact between executive branch employees and Congress.” The issue of whether an agency employee “must ‘ask the boss’ before approaching the intelligence committees with unclassified information about wrongdoing seems well below any constitutional threshold.”⁷⁸ The handling of classified information was addressed in the bill that became law.

⁷² House Permanent Select Committee on Intelligence, “Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act,” 106th Cong., 1st Sess. (1999).

⁷³ *Id.* at 4.

⁷⁴ H. Rept. No. 105-747 (Part 1), 105th Cong., 2d Sess. 13 (1998).

⁷⁵ *Id.* at 20.

⁷⁶ *Id.* at 14.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.*

The compromise bill established “an additional process to accommodate the disclosure of classified information of interest to Congress.” The new procedure was not “the exclusive process by which an Intelligence Community employee may make a report to Congress.” The conference report stated that “the managers agree that an Intelligence Community employee should not be subject to reprisals or threats of reprisals for making a report to appropriate Members or staff of the intelligence committees about wrongdoing within the Intelligence Community.”⁷⁹ The statute, covering communications from the agency to Capitol Hill through the intelligence committees, listed a number of principles that rejected the claim of plenary presidential power over classified information:

- (1) national security is a shared responsibility requiring joint efforts and mutual respect by Congress and the President;
- (2) the principles of comity between the branches of Government apply to the handling of national security information;
- (3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a ‘need to know’ of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community;
- (4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community;
- (5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and
- (6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.⁸⁰

Congress has enacted modifications to this statute but they do not alter the congressional rejection of “sole process” and “holdback.”⁸¹

⁷⁹ H. Rept. No. 105-780, 105th Cong., 2d Sess. 34 (1998).

⁸⁰ 112 Stat. 2413-14, § 701 (1998).

⁸¹ 115 Stat. 1399-1400, § 309 (2001).

Policy Objections

The Justice Department has raised a number of policy objections to amendments to whistleblower legislation. Testimony in 2003 by a Justice Department official remarked that once a legislative proposal has been introduced in Congress it “must be judged not simply on whether it would provide maximum protection to any and all allegations of whistleblower reprisal, but whether the additional protection afforded by the bill is worth the costs.”⁸² In striking the appropriate balance, congressional committees “should make no mistake that the costs would be substantial, both in terms of the bill’s impact on vital national security interests, and the inefficiencies the bill would create in the management of the Federal workforce.”⁸³

Congress always has the constitutional duty to weigh various concerns and potential costs when it legislates. The individuals with the legitimacy and authority for making those determinations are the elected Members of Congress, not officials in the executive branch. Observations by Administration witnesses are entitled to courteous respect but no more than that. The testimony above appears to suggest that any legislation affecting “vital national security interests” must defer to the judgment of executive officials because of some superior expertise. The final judge of national policy, however, must be Congress.

The testimony in 2003 suggested that agency employees who exercised national security whistleblower rights would invariably be of low and suspect quality. Proposed legislative changes would “do nothing to strengthen the protection for legitimate whistleblowers, but instead would provide a legal shield for unsatisfactory employees.” Suggested changes “would permit almost any employee against whom an unfavorable personnel action is taken to claim whistleblower status.” The bill “would make it far too easy for unsatisfactory employees to use the whistleblower laws as a shield against legitimate agency actions. Ultimately, it would discourage Government managers from making the decisions necessary to running an efficient and effective Federal workplace.”⁸⁴

This line of argument has been repeated by the Justice Department in letters issued to Congress in 2005 and 2007.⁸⁵ On what basis does an official in the Justice

⁸² Statement of Peter Keisler, Assistant Attorney General, Civil Division, Department of Justice, before the Senate Committee on Governmental Affairs, concerning S. 1358, The Federal Employee Protection of Disclosures Act, November 12, 2003, at 1 (hereafter “Keisler statement”).

⁸³ *Id.*

⁸⁴ *Id.* at 2, 4.

⁸⁵ April 12, 2005 letter from William E. Moschella, Assistant Attorney General, to The Honorable Susan M. Collins, chairman of the Senate Committee on Homeland Security and Governmental Affairs, at 1 (“a legal shield for unsatisfactory employees”); March 13, 2007 letter from Richard A. Hertling, Acting Assistant Attorney General, to The Honorable Henry A. Waxman, chairman of the House Committee on Oversight and Government Reform, at 1 (“a legal shield for unsatisfactory employees”).

Department conclude that the only likely beneficiaries of new legislation on national security whistleblowers would be malcontents and irresponsible employees who should not be in the Federal Government and would manipulate any available procedure to keep their jobs? Yet Justice Department testimony confidently predicts that the proposed bill “would simply increase the number of frivolous claims of whistleblower reprisal.”⁸⁶ Such claims are too extreme, one-sided, and unsubstantiated to be taken seriously.

Similarly, the testimony refers to unnamed studies that “demonstrate that one of the most important factors impacting upon employee morale is the existence of poorly performing employees and the difficulty that managers face in addressing these problems.”⁸⁷ One wonders how “poorly performing employees” are able to work in agencies that have highly classified projects and are perhaps given security clearances. On what possible grounds does the Justice Department base these generalizations?

Constitutional Objections

The Justice Department testimony in 2003 also identified what it considered to be constitutional defects in pending whistleblower legislation. Yet these objections invariably assume that the President has a superior status over Congress in matters involving national security and access to classified documents. For example, the testimony “strongly opposed” proposals to authorize the MSPB and the courts “to review any determinations relating to a security clearance — a prerogative left firmly within the Executive branch’s discretion.” Decisions regarding security clearances “are inherently discretionary and are best left to the security specialists rather than non-expert bodies such as the MSPB and the courts.” Relying on *Egan*, the testimony claimed that the President’s “exclusive power to make security clearance determinations is based on his constitutional role as Commander-in-Chief.”⁸⁸ Justice Department communications to Congress after 2003, regarding national security whistleblower legislation, make similar errors in analyzing *Egan*.⁸⁹

As explained above, *Egan* was solely a dispute between two agencies within the executive branch and had nothing to do with congressional access to classified information. Whatever discretion a President has under Article II or the Commander-in-Chief Clause can depend on legislation passed by Congress. Yet the Keisler testimony in 2003, repeated by subsequent Justice Department letters, objected to pending legislation on the ground that it “interferes with the Executive Branch’s constitutional responsibility

⁸⁶ Keisler statement, at 5.

⁸⁷ *Id.* at 8.

⁸⁸ *Id.* at 10.

⁸⁹ E.g., April 12, 2005 Moschella letter, *supra* note 85, at 3-4, 5-6; the August 22, 2006 Moschella letter, *supra* note 68, at 2, 6; March 13, 2007 Hertling letter, *supra* note 85, at 1, 3; December 17, 2007 letter from Attorney General Michael B. Mukasey to The Honorable Nancy Pelosi, Speaker of the House of Representatives, at 2, 3, 5.

to control and protect information relating to national security.”⁹⁰ Notice that Congress, according to this analysis, is subordinate not only to the President but to the Executive Branch. No citations are offered to defend this theory and no reliable citations are available. Later, the Keisler testimony claims that the proposed legislation was “troubling because it intrudes upon the President’s constitutional power to control the flow of classified information.”⁹¹ Implied in this statement is that the President has exclusive power over that flow, including to Members of Congress and their committees and staff.

That impression is reinforced by a Justice Department letter of August 22, 2006, which objected that pending national security whistleblower legislation “constitutes an unconstitutional interference with the President’s constitutional responsibilities respecting national security and foreign affairs. Although the designated individuals might have appropriate clearances to receive the classified information, it is the President’s prerogative to determine who has the need to know this information.”⁹² Under that interpretation, even though all Members of Congress have security clearances and many congressional staff are similarly cleared, the President could determine that lawmakers and staffers have no need to know. Such a reading of the Constitution would subordinate Congress to presidential judgments, allowing the executive branch to block information to conceal not only serious misconduct but illegal and unconstitutional actions. The CIA whistleblower statute of 1998 specifically stated that Congress “as a co-equal branch of Government is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a ‘need to know’ of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community.”⁹³

Conclusions

Statements from the executive branch offer both policy and constitutional objections to pending national security whistleblower legislation. The objections are based in large part on misinterpretations of key court decisions and a misconception about the relative roles of the President and Congress in national security affairs. Congress has a constitutional need to have access to national security information and should not be satisfied with what the executive branch, on occasion, decides to share with the lawmakers and their staff. Access is needed to preserve Congress as a coequal and separate branch and to protect its capacity to exercise the checks and balances that are vital to individual liberties and freedoms. Congress has the constitutional authority to devise procedures that will assure access not only to information voluntarily given by the President and his department heads but information made available by agency employees.

⁹⁰ Keisler statement, at 12-13.

⁹¹ *Id.* at 19.

⁹² August 22, 2006 Moschella letter, *supra* note 68, at 3.

⁹³ 112 Stat. 2413, § 701(b)(3) (1998) (Intelligence Community Whistleblower Protection Act).

Biosketch

Louis Fisher is Specialist in Constitutional Law with the Law Library of the Library of Congress. The views expressed here are personal, not institutional. Earlier in his career at the Library of Congress, Fisher worked for the Congressional Research Service from 1970 to March 3, 2006. During his service with CRS he was Senior Specialist in Separation of Powers and research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught in a number of universities and law schools.

He is the author of nineteen books, including *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006), *Presidential War Power* (2d ed. 2004), *American Constitutional Law* (with Katy J. Harriger, 8th ed. 2009), *Constitutional Conflicts between Congress and the Presidency* (5th ed. 2005), and *Political Dynamics of Constitutional Law* (with Neal Devins, 4th ed. 2006). He has received four book awards.

Fisher has been invited to testify before Congress on such issues as CIA whistleblowing, war powers, state secrets, covert spending, NSA surveillance, restoring the rule of law, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying.