

# ARTICLES

## FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

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## INTRODUCTION

Few areas of federal labor law are currently the subject of such wide public interest as "whistleblowing," a now familiar term for employee dissemination of information critical of or reflecting adversely on an employer, typically for the purpose of correcting or preventing some violation of law or other harm.<sup>1</sup> A recent widely publicized episode involved two engineers employed at Morton Thiokol, Inc., a major National Aeronautics and Space Administration contractor for the ill-fated *Challenger* space shuttle. The engineers alleged that they were retaliated against for whistleblowing in matters affecting safety.

Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity where health and safety are at stake.<sup>2</sup> These laws, which protect both public and workplace health and safety interests, however, omit large and potentially important industries such as aviation and pharmaceuticals. In addition, they have created a crazy quilt of investigative, adjudicatory, and review responsibilities, which are summarized at Table 1.<sup>3</sup> Fortunately, congressional interest in protecting other categories of whistleblowing

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1. See generally Comment, *Employment at Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151 (1987) (summarizing wrongful termination litigation and advocating arbitration as best means to resolve employer-employee disagreements); Comment, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (detailing history of employment-at-will doctrine). Note that the term "whistleblower" may refer to those employees who refuse to work because of perceived safety violations, in addition to those employees who make public information reflecting adversely upon an employer.

2. Other federal laws protect private sector whistleblowers in non-health and -safety contexts. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153 (to be codified at 31 U.S.C. § 3732) (amending 31 U.S.C. § 3729 (1982)). In addition, numerous statutes prohibit retaliation against persons who complain of discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1982). Because they do not relate to health and safety programs, these statutes are beyond the scope of this article. Programs applicable to federal employees are also beyond the scope of this article, although they are noted below and the applicable legislation is identified in Table 2, *infra* p. 38.

3. See *infra* p. 37 (Table 1).

appears to be increasing.<sup>4</sup>

While a body of literature has grown up concerning whistleblowing, the statutes referred to in this Article are only now being recognized as part of a larger whole. Until now, with a few notable exceptions,<sup>5</sup> little effort has been made to render a rational account of congressional activity in this area. Additionally, those involved in litigation under one of the statutes have tended not to be involved in litigation under the others. Federal whistleblowing protection appears to be more an appendage to the underlying substantive regulatory program than a focus for legal analysis in its own right or a new subspecialty within the field of labor law. This Article suggests a different perspective, namely that the varieties of legislative and administrative experience under federal health and safety whistleblower protection provisions, taken as a whole, represent a "sea change" in labor law that merits study and legislative attention in its own right.

As Table 1 demonstrates, the Secretary of Labor assigned investigative responsibility to the Wage and Hour Division under eight of the federal whistleblowing statutes, to the Occupational Safety and Health Administration (OSHA) under two others, and to the Mine Safety and Health Administration (MSHA) under still another. Some agencies, including the Department of the Interior (DOI), have both investigative and adjudicatory responsibilities, while others, including the Department of Defense (DOD) and the independent Mine Safety and Health Review Commission (MSHRC), have only adjudicatory roles. With the exception of the relationship between the Wage and Hour Division and the Nuclear Regulatory Commission (NRC), there is little active coordination among the agencies concerned.

Some of the statutes create elaborate hearing procedures; others are silent. They differ widely on matters as critical as the definition of "protected conduct," the statute of limitations, remedies, and the machinery for adjudication and judicial review. Statutes of limitations, for example, range from 30 days to six months.<sup>6</sup> Where employees allege violations of OSHA's own regulations, OSHA investigates, and adjudication is provided by the district courts. Where violations of the Sur-

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4. See S. 2516, 99th Cong., 2d Sess. (1986) (prohibiting reprisals against officers and employees of government contractors for disclosing information to federal agencies).

5. Two excellent works that supply a comprehensive overview of federal protection of private sector whistleblowers are L. LARSON & P. BOROWSKI, *UNJUST DISMISSAL* (1986); S. KOHN, *PROTECTING ENVIRONMENTAL AND NUCLEAR WHISTLEBLOWERS: A LITIGATION MANUAL* (Government Accountability Project 1985).

6. See sources cited *infra* p. 37 (Table 1).

face Transportation Assistance Act of 1982 (STAA)<sup>7</sup> are in issue, however, OSHA investigates, but administrative law judges (ALJ's) at the Department of Labor adjudicate. The Mine Safety and Health Review Commission, an independent agency, decides whistleblowing cases; the Occupational Safety and Health Review Commission — another independent agency — does not. Some statutes cover safety-based refusals to work and employee dissemination of information damaging to the employer. Some contemplate the award of punitive damages, while some authorize temporary reinstatement while the merits of the case are being adjudicated.<sup>8</sup> Under most statutes, employees may obtain judicial review of agency decisions. This is not so, however, in the case of violations of section 11(c) of the Occupational Safety and Health Act<sup>9</sup> (OSH Act) or section 211 of the Asbestos Hazard Emergency Response Act (AHERA).<sup>10</sup> Under these provisions employees must depend upon the willingness of the Labor Department to prosecute causes on their behalf.

These discrepancies reflect vagaries of the legislative process — legislation has addressed various industries on an incremental or piecemeal basis over time — and a number of the discrepancies are difficult to justify according to neutral principles of public administration. On some issues, conscious substantive legislative choice and the political process are reflected in the current institutional arrangements for the protection of private sector health and safety whistleblowers. On the other hand, the institutional “hodge-podge” described in this Article transcends mere untidiness or asymmetry. At a certain point, divergent approaches can overwhelm the law by eroding public confidence in the fundamental coherence of the governmental process. That point has unquestionably been reached in congressional efforts to protect those who suffer employee retaliation for calling attention to health and safety violations.

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7. 49 U.S.C. § 2305 (1982 & Supp. III 1985). The regulations for this Act are found at 29 C.F.R. § 1978 (1986).

8. See *Brock v. Roadway Express Inc.*, 107 S. Ct. 1740 (1987) (holding that temporary reinstatement of complainant prior to full evidentiary hearing does not violate employer's due process rights so long as preliminary procedures are available and full post-reinstatement hearing is expeditiously held). MSHRC regulations comply with this standard. See 29 C.F.R. § 2700 (1986) (providing preliminary procedures and full post-reinstatement hearing for miners alleging wrongful discharge under Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (1982)).

9. See 29 U.S.C. § 660(c) (1982) (providing protection for employees who have instituted or caused to be instituted a complaint against their employers for violations of OSHA regulations).

10. Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

This Article urges: (1) the enactment of omnibus whistleblower legislation that is uniformly applicable to all activities subject to health and safety regulation by the federal government in order to encourage private actions in support of those federal programs and to ensure fairness, uniformity, and rationality in the adjudicatory and remedial processes; and (2) specific actions to be taken by the Secretary of Labor to improve the administration of the current diversity of private sector whistleblower protection programs.<sup>11</sup>

### I. TAXONOMY AND TERMINOLOGY

Although much of the business of ensuring that laws are observed has become the responsibility of the government, rather than of private citizens, the Supreme Court has rejected the notion that private citizens have no role to play.<sup>12</sup> Whistleblower protection provisions are among the tools available to government for the achievement of public objectives. Some of these tools are used directly by the government itself, while others are used by private individuals. Imprisonment, fines, penalties, and forfeitures are, for example, familiar sanctions used by government as direct disincentives to violations of the law.<sup>13</sup> Rewards<sup>14</sup> or *qui tam* provisions might, by contrast, be thought of as indirect incentives to obey the law because they encourage private interests to assist in the achievement of public ends. In some circumstances, the law may create an indirect negative incentive to encourage private citizens to assist in suppressing crime. The Tariff Act, for example, provides that refusing to assist a Customs officer is a misdemeanor.<sup>15</sup> Federal whistleblowing anti-retaliation provisions remove disincentives for private assistance in achieving public ends. Such provisions hold harm-

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11. For earlier recommendations for omnibus legislation, see Abbot, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 WASH. & LEE L. REV. 1383, 1400 (1985); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466, 513-24 (1983).

12. See *United States v. New York Tel. Co.*, 434 U.S. 159, 175 n.24 (1977).

13. Congress could, for example, criminalize acts that interfere with or discourage whistleblowing in areas under federal regulation. Although the literal terms of the Ku Klux Klan Act, 18 U.S.C. § 241 (1982), might cover such misconduct, the Act has been accorded a narrow interpretation, and there is no evidence of it having been used in this fashion.

14. 18 U.S.C. § 3059 (1982).

15. See 19 U.S.C. § 507 (1982) (providing that customs officer, after making known his identity, may demand and must receive assistance of citizens in performance of his duties); see also Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 3152, 100 Stat. 3207 (to be codified at 18 U.S.C. § 981) (providing immunity from civil prosecution for persons who render help at request of Customs officer).

less those employees whose information must reach the government in order to help achieve public goals.<sup>16</sup>

There are certain terminological pitfalls in the whistleblowing area. The phrase "employee protection" is, for example, occasionally used to describe whistleblowing anti-retaliation measures.<sup>17</sup> This term, however, has been used in contexts other than whistleblowing. Another recent enactment<sup>18</sup> uses the vague and essentially meaningless term "public protection."

The terms "discrimination" and "affirmative action" respectively describe protected whistleblowing and the fashioning of remedies. Obviously, these terms have particular meanings in society; their use in this context can inappropriately imply a legal or doctrinal kinship with the race relations area, thereby bringing into play very different concerns and values from those that underly public policy in the whistleblowing area.

## II. THE COMMON LAW CONTEXT

The background against which the federal legislation addressed in this Article arose may be briefly sketched.<sup>19</sup> At common law (American, incidentally, rather than English), the rule evolved that an employee could be dismissed at the will of the employer unless his contract provided otherwise.<sup>20</sup> This doctrine is said to have originated in a treatise published a little more than a century ago,<sup>21</sup> and was embraced promptly and uncritically. Eventually, however, some courts began to

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16. Another disincentive to removal would be to debar government contractors who retaliate against whistleblowers. This was proposed in response to the case of the Morton Thiokol engineers referred to above, H.R.J. Res. 634, 99th Cong., 2d Sess., 132 CONG. REC. 2758 (1986), but the matter died in committee. One of the engineers has sued the company and also asserted a FTCA claim, 28 U.S.C. § 1346(b) (1982), against NASA. *Boisjoly v. Morton Thiokol*, No. 87-194 (D.D.C. filed Jan. 28, 1987), noted in N.Y. Times, Jan. 29, 1987, at A16, col. 1.

17. For example, 29 C.F.R. §§ 24.1-24.9 (1987) implements various federal "employee protection" provisions for which Secretary of Labor has been given responsibility. *E.g.*, Safe Drinking Water Act, 42 U.S.C. § 300(j)-9(i) (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982); Toxic Substances Control Act, 42 U.S.C. § 2622 (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982).

18. Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

19. The growth of interest in the whistleblowing area is evidenced by the fact that scholarly writers now no longer feel a need to set out the history of the area. Jenkins, *supra* note 11, at 467 & n.11 (1983); Comment, *Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine*, 38 ME. L. REV. 67, 70 n.6 (1986).

20. L. LARSON & P. BOROWSKI, *supra* note 5, § 2.04.

21. See Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976).

carve exceptions from the rule. Doctrines have arisen in a number of jurisdictions which hold that there is a "public policy exception" to the employment-at-will rule. In summary, such exceptions hold that an employer cannot discharge an employee for conduct that advances a recognized public policy. The law on this point is essentially state law,<sup>22</sup> and the extent to which it applies to any particular set of facts is likely to vary dramatically from one jurisdiction to another.

### III. THE FEDERAL LEGISLATIVE RESPONSE

In addition to judicial recognition of a public policy exception to the employment-at-will doctrine, Congress and a number of state legislatures have enacted specific provisions ensuring protection against retaliation for employees who assert various rights. The federal legislation includes a variety of statutes, only some of which deal with public health and safety programs.<sup>23</sup> This Article is confined to the measures protecting health and safety whistleblowers, although a broader study may be desirable at a later date to explore the need for rationalizing the entire federal legislative scheme.

#### A. Public Sector Employees

Table 2<sup>24</sup> lists the various federal statutes that seek to protect from retaliation those public employees who engage in whistleblowing. These statutes are beyond the scope of this Article, but a few words may still be in order. The key statute is the Civil Service Reform Act of 1978 (CSRA),<sup>25</sup> which created broad protection for disclosures by civilian federal employees. Health and safety disclosures, however, form only a small part of the field of protected conduct under the CSRA. Most CSRA whistleblower cases involve allegations of waste, fraud, and abuse. The most recent addition to the list of public sector anti-retaliation laws is the Department of Defense Authorization Act of 1987,<sup>26</sup> which extends protection to defense contractor employees for disclo-

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22. L. LARSON & P. BOROWSKI, *supra* note 5, § 11.04 (summarizing federal common law developments in area of wrongful discharge).

23. The best single catalogue of the federal statute appears in L. LARSON & P. BOROWSKI, *supra* note 5, § 11.02-.03. Thoughtful articles have been written by William R. Jenkins, *supra* note 11, and Kohn & Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 ANTIOCH L.J. 99 (1986). Federal regulations also require state OSHA plans to include employee protection provisions. 29 C.F.R. § 1902.4(c)(2)(v) (1986).

24. See *infra* p. 38 (Table 2).

25. 5 U.S.C. § 2101 (1982).

26. Pub. L. No. 99-661, § 942(a)(1), 100 Stat. 3816 (whistleblowing provision to be codified at 10 U.S.C. § 2409).

tures to members of Congress, DOD, or the Justice Department "relating to a substantial violation of law related to a defense contract."<sup>27</sup> This measure is a modification of an earlier proposal that would have extended protection expressly to disclosures relating to a "substantial and specific danger to public health and safety."<sup>28</sup> In addition, the earlier version protected military personnel as well as contractor employees from reprisals.<sup>29</sup>

### B. Private Sector Employees

The range of federal statutes protecting private sector employees who "blow the whistle" on health and safety problems is considerable.<sup>30</sup> Combined, these statutes protect a large portion of the American work force, and fall into several broad categories. Some are industry-based, such as those affecting mining, the nuclear industry, or particular transportation modalities. Some address sweeping environmental concerns, including those for which the Environmental Protection Agency (EPA) is the program agency. And some cut across the broad spectrum of of this country's industrial activities, including the OSH Act,<sup>31</sup> the National Labor Relations Act (NLRA),<sup>32</sup> and the Labor Management Relations Act (LMRA).<sup>33</sup> The same conduct may violate more than one statute, thus involving multiple decisional tracks.<sup>34</sup>

The effectiveness of these arrangements is open to question. As two perceptive students of the field have written, "[t]he record is particularly grim in industry; not one of the industrial whistleblowers we studied survived on the job."<sup>35</sup> "With few exceptions, they are driven out of

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27. *Id.*

28. The disclosures intended to be protected were the same as those protected under the Civil Service Reform Act, 5 U.S.C. § 2302(b)(9)(B) (1982).

29. Proposed section 921 would have extended whistleblower protection to military personnel by restoring the victim's position and punishing the retaliator. H.R. 4428, 99th Cong., 2d Sess. 266 (1986).

30. See sources cited *infra* p. 37 (Table 1).

31. 29 U.S.C. § 660(c) (1982).

32. 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

33. Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982), stands on a somewhat different footing from the other statutes. It creates no remedy for retaliation, but rather prevents an employer from invoking a collective bargaining agreement's no-strike clause where one or more employees quit work "in good faith because of abnormally dangerous conditions" to be considered a strike." *Id.*

34. See *Murphy v. Consolidation Coal Co.*, No. 83-ERA-4 (Dep't Lab. Jan. 17, 1985) (approving settlement under TSCA); *Murphy v. Consolidation Coal Co.*, No. CH3-1-D (Dep't Int. Jan. 14, 1985) (dismissing Surface Mining Control and Reclamation Act (SMCRA) case upon settlement).

35. Glazer & Glazer, *The Whistle-Blowers' Plight*, N.Y. Times, Aug. 13, 1986, at A23, col. 1.



not just their jobs, but their professions, too.”<sup>36</sup>

### C. “Twilight Zone” Cases

In a number of instances, it may be difficult to characterize the class protected by a whistleblower statute as “public” or “private.” For example, the 1984 Defense Department authorization extended whistleblower protection, including coverage of health and safety disclosures, to employees of nonappropriated fund activities. Section 211(a) of the Asbestos Hazard Emergency Response Act of 1986<sup>37</sup> protects all persons from discrimination, specifically including employees of state and local educational agencies. State employees have found protection under the Safe Drinking Water Act (SDWA),<sup>38</sup> and at least one case involving a federal employee — that of EPA employee Hugh Kaufman — has been filed with the Department of Labor under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).<sup>39</sup> In addition, government contractor employees have been held to be protected under several of the whistleblower statutes.<sup>40</sup>

### D. Caseload

Caseload figures for private sector health and safety whistleblowing cases in fiscal year 1985 reveal that by far the largest single category of complaints is under section 11(c) of the OSH Act.<sup>41</sup> These cases, how-

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36. See, Kleinfield, *The Whistle Blowers' Morning After*, N.Y. Times, Nov. 9, 1986, at C1, col. 2 (noting conclusion of Glazer research, *supra* note 35). “But that doesn’t mean they always are reduced to dire poverty and icy isolation. Often they are reincarnated in some new position.” *Id.*

37. Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (1986) (to be codified at 15 U.S.C. § 2641).

38. 42 U.S.C. §§ 300f-j(10) (1982); see *Bauch v. Landers*, No. 79-SDWA-1 (OALJ); *Chase v. Buncombe County Dep’t of Community Improvement*, No. 85-SWD-4 (Solid Waste Disposal Act; county landfill employee). In contrast, a state employee was held not protected under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (1982), on the theory that the state is not a person within the meaning of § 703 of that Act. *Leber v. Pennsylvania Dep’t of Env’tl. Resources*, 780 F.2d 372, 378 (3d Cir. 1986), *cert. denied*, 106 S. Ct. 3294 (1986).

39. 42 U.S.C. § 9601 (1982).

40. *E.g.*, *McAllen v. EPA*, No. 96-WPC-1 (OALJ Nov. 28, 1986); *Conley v. McClellan Air Force Base*, No. 84-WPC-1 (OALJ Sept. 12, 1984); *McGough v. United States Navy*, No. 86-ERA-18 (OALJ Aug. 19, 1986), slip op. at 3 n.3 (dictum). *But see* *Wensil v. B.F. Shaw Co.*, No. 86-ERA-15 (OALJ July 8, 1986) (holding DOE contractor’s employees, who were working at plant not licensed by NRC, not protected despite plain meaning of statute); Peterson, *2d Worker Dismissed by Contractor After Alleging Drug Use at Atom Plant*, Washington Post, Jan. 8, 1987, at A17, col. 1 (noting pendency of *Wensil* jurisdictional issue regarding Savannah River DOE plant).

41. 29 U.S.C. § 660(c) (1982).

ever, do not involve agency hearings; if OSHA finds the case meritorious, it brings a civil action on behalf of the complaining employee. The only intra-agency remedy a complainant has is to seek review within OSHA of an initial decision not to pursue the case.<sup>42</sup> No private right of action exists, and very few section 11(c) cases are pursued by the Labor Department.<sup>43</sup>

The section 11(c) complaint caseload appears to have been fairly stable over the last several years.<sup>44</sup> For example, in fiscal year 1978, OSHA received 3,000 employee complaints.<sup>45</sup> The corresponding numbers for fiscal years 1983 and 1984 were 2,522 and 2,813, respectively.<sup>46</sup>

The second-largest group of cases involves the Surface Transportation Assistance Act,<sup>47</sup> under which OSHA received 354 complaints during fiscal year 1984.<sup>48</sup> The number of complaints declined to 248 in fiscal year 1985.<sup>49</sup> In the first half of 1984, only eight cases were found to have merit, but in the second half of 1984 25 cases were found to have merit.<sup>50</sup> In 1985 58 merit findings were issued.<sup>51</sup> In fiscal year 1985, the Labor Department's Office of Administrative Law Judges (OALJ) docketed 20 STAA cases following OSHA investigation, and conducted six administrative hearings.

Third in frequency are retaliation complaints under the Federal Mine Safety and Health Act.<sup>52</sup> MSHA investigated 205 complaints of safety- or health-related discrimination that were filed during fiscal

42. See *George v. Aztec Rental Center*, 763 F.2d 184 (5th Cir. 1985) (holding no private right of action for private employer's retaliatory discharge of employee who files OSHA complaint); *Holmes v. Schneider Power Corp.*, 628 F. Supp. 937 (W.D. Pa. 1986) (holding no private right of action for employee); see also L. LARSON & P. BOROWSKI, *supra* note 5, § 11.03[20]. This doctrine applies only to conventional whistleblowing actions; in refusal-to-work situations, the employee can seek mandamus requiring the Secretary to enforce the statute. 29 U.S.C. § 662(d) (1982).

43. See Note, *The Employment-at Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. MICH. J. L. REFORM 435, 439-40 (1983) (noting deficiencies in DOL personnel and resources); B. MINTZ, *OSHA HISTORY, LAW AND POLICY* 342 (1984) (lamenting 429 "meritorious" cases languishing in Solicitor's Office at DOL).

44. *But see* 73 DEP'T LAB ANN. REP. FY85 121 (1986) (referring to "substantial increase" in section 11(c) caseload, among others).

45. Solomon & Garcia, *Protecting the Corporate WhistleBlower Under Federal Anti-Retaliation Statutes*, 5 J. CORP. L. 275, 283 (1980).

46. 1984 OSHA ANN. REP. 56.

47. 49 U.S.C. § 2305 (1982).

48. 48. 1984 OSHA ANN. REP. 56.

49. *Labor Dept's Enforcement of "Whistleblower" Law Found Weak*, CONVOY DISPATCH, Feb. 1986, No. 59, at 3, col. 3.

50. *Id.*

51. *Id.*

52. 30 U.S.C. § 801 (1982).

year 1985.<sup>53</sup> The Labor Department's Office of Administrative Law Judges adjudicates cases under a broad range of statutory programs, most of which have nothing to do with whistleblowing. The Office is, however, also responsible for a substantial part of the overall whistleblower caseload. The OALJ received 77 such cases during fiscal year 1985 under the various whistleblowing statutes it administers (including the 20 STAA cases referred to above). Of these, the vast majority were nuclear cases brought under the Energy Reorganization Act (ERA).<sup>54</sup> The OALJ received 264 whistleblowing cases between 1980 and late 1986.<sup>55</sup> However, there have been very few discrimination complaints under the Surface Mining Control and Reclamation Act (SMCRA).<sup>56</sup> The number of whistleblower complaints received by the Department of Labor was not available at the time of publication of this Article, but it appears that in fiscal year 1985 the Wage and Hour Division conducted approximately 50 investigations under the statutes for which it is responsible, of which about one-half were found to be meritorious.

Statistics concerning the incidence of whistleblowing cases brought before the NLRB were also unavailable, although case summaries furnished by the Board's Office of General Counsel indicate that health and safety issues are not uncommon in Board proceedings.<sup>57</sup> For comparative purposes, during fiscal year 1985, the Office of Special Counsel of the Merit Systems Protection Board received 135 whistleblowing disclosures from federal employees.<sup>58</sup>

#### IV. SHORTCOMINGS OF THE CURRENT ARRANGEMENTS

##### A. *Jurisdictional Lacunae*

The most obvious shortcoming of the current federal legislation pro-

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53. In fiscal years 1985 and 1986, the full MSHRC decided 11 cases involving safety complaints or refusals to work. Three cases involved both kinds of discrimination, five involved only safety or health complaints, and three involved only a refusal to work. 73 DEP'T LAB. ANN. REP. FY85 63 (1986); see Letter from L. Joseph Ferrara, General Counsel, MSHRC, to Eugene R. Fidell (Oct. 31, 1986) (discussing MSHRC litigation).

54. 42 U.S.C. § 5851 (1982).

55. *Private Sector Whistleblower Protection Statutes, 1986: Public Hearings Before the Administrative Conference of the United States* 45-46 [hereinafter *ACUS Whistleblower Hearings Transcript*] (testimony of Nahum Litt, Chief Judge, OALJ).

56. 30 U.S.C. § 1293 (1982).

57. Letter from James Y. Callear, Freedom of Information Officer, NLRB, to Eugene R. Fidell (Sept. 4, 1986).

58. OFFICE OF SPECIAL COUNSEL OF MERIT SYSTEMS PROTECTION BD. ANN. REP. FY85 15 (1985).

protecting health and safety whistleblowers is the omission of coverage for major sectors of the economy where health and safety are unquestionably at stake. For example, Congress has yet to extend whistleblowing protection to aviation, aerospace, vessel construction and operation, food and drugs, medical devices, and consumer products generally. Also, while the major environmental laws administered by EPA include whistleblower provisions, one — the Noise Control Act of 1972<sup>59</sup> — does not. Even where the industry itself is covered, the statute may be written to exclude persons whose jobs have safety implications.<sup>60</sup>

Government contractors constitute a major omission to the extent that their activities are not covered by any of the subject-matter-specific anti-retaliation statutes. For example, in 1974 the Department of Labor and the Atomic Energy Commission acknowledged that the whistleblower provisions of the OSH Act are inapplicable to the working conditions of Atomic Energy Commission (AEC) contractor employees who work in facilities which are owned or leased by the government, but operated by the contractor, so long as the AEC prescribes and enforces radiological and nonradiological occupational safety and health standards.<sup>61</sup> This kind of gap has been addressed in a variety of ways, including internal agency regulations or contractual provisions.<sup>62</sup>

Congress has also begun to recognize the need for coverage of government contractors in general. For example, in the aftermath of the *Challenger* disaster, Representative Markey observed: "If the Morton Thiokol engineers were Federal employees, they would have recourse through the Civil Service Reform Act and the Office of Special Counsel. But as employees of a Government contractor, they have no

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59. 42 U.S.C. § 4901 (1982 & Supp. III 1985).

60. See *Paul v. Federal Mine Safety and Health Review Comm'n*, 812 F.2d 717 (D.C. Cir. 1987), *cert. denied*, 107 S. Ct. 3269 (1987) (holding mining engineer not miner). Another controversial issue involves the application of environmental whistleblower provisions to prison inmates. See Kurtz, *Inmates as 'Federal Employees': Whistleblower Law Is Used to Contest Dismissal from Prison Job*, *Washington Post*, Feb. 12, 1987, at A25, col. 3 (noting OALJ ruling that federal inmate is protected by Clean Air Act anti-retaliation section).

61. Department of Energy Order No. 5483.1A (June 22, 1983). This DOE order was an interpretation of section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1) (1982), which reads as follows:

Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

62. See *In re Mestres* (Dep't of Energy Spec. App. Bd. Dec. 27, 1984), *noted in* *Washington Post*, Jan. 29, 1985, at A17, col. 1. Protection may also be afforded under contractual provisions. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 107 (testimony of James E. Jensen).

protection.”<sup>63</sup>

Protection of whistleblowers such as the Morton Thiokol engineers may well raise difficult drafting problems, since it appears that the engineers' expressions of concern were not couched in terms of violations of federal regulations, but rather spoke to the degradation of safety standards peculiar to the shuttle effort. The protection of safety concerns voiced within a company is, not surprisingly, a matter of considerable controversy. Congress should, in framing generic whistleblower protection legislation, carefully consider how such legislation would have affected the *Challenger* case.

Congress has not yet passed general whistleblower protection legislation for employees of government contractors, although it has done so for Department of Defense contractors in the 1987 Department of Defense Authorization Act.<sup>64</sup> Prior to passage of that legislation, an employee of a Defense Department contractor who alleged retaliatory discharge could have sued under the False Claims Act,<sup>65</sup> although the gravamen of such a case is fraud on the government rather than harm to the employee. Although not successful thus far, generic protection for contractor employees was introduced in the 99th Congress<sup>66</sup> and will be reintroduced in some form in the 100th Congress.

Of course, not all health and safety programs involve concerns of the same gravity and magnitude. To take an obvious example, the potential health and safety implications of many violations of NRC regulations could be of a different order of magnitude from an isolated violation of trucking safety regulations. Comparing safety programs requires consideration not only of the scope of the hazard, but also the probability

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63. 132 CONG. REC. H2710 (daily ed. May 14, 1986) (statement of Rep. Markey).

64. See National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 942, 100 Stat. 3816 (to be codified at 10 U.S.C. § 2409) (providing that contractor employee may not be discriminated against as reprisal for disclosing substantial violations of statutory law to member of Congress or Departments of Defense or Justice).

65. 31 U.S.C. § 3729 (1982), amended by False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (to be codified at 31 U.S.C. § 3732); see also Cushman, *Experts See Risk in Troop Carrier: Army's Bradley Vehicle Could Sink in Combat They Say*, N.Y. Times, Sept. 21, 1986, at 1, col. 1 (reporting claim of discharge in retaliation for refusing to sign report that omitted details on flaws in new Army troop carrier).

66. Federal Government Contractors Personnel Protection Act of 1986, S. 2516, 99th Cong., 2d Sess (1986). S. 2516 would have created a federal cause of action, enforceable by the individual in district court, for any reprisal against an officer or employee of a government contractor for disclosing to an agency information that the individual "reasonably believes indicates . . . a substantial and specific danger to public health or safety." *Id.* The agency head would also have been empowered to impose civil penalties of up to \$500,000 per reprisal, subject to an on-the-record APA hearing, 5 U.S.C. § 556 (1982), with judicial review in district court.

of its occurrence. Perhaps a standard could be developed under which one could argue that different measures of employee protection are appropriate in various employment settings. On the other hand, one would think that anything that was sufficiently charged with a public interest to warrant federal regulation should also provide for the protection of whistleblowers simply as an aid to enforcement and ensuring voluntary employer compliance with the underlying safety and health requirements.

One thoughtful reviewer of this Article cautioned that expansion of whistleblower protections to persons in highly sensitive positions might make it too difficult to remove an incompetent or malicious employee.<sup>67</sup> Where the superior can anticipate that his own integrity may be put in issue in the adjudicatory process, there may be a chilling effect on his or her willingness to take needed disciplinary action. The net result would be contrary to the public interest in health and safety. This factor is difficult to assess in empirical terms, but there does seem to be a satisfactory response to it: the adjudicatory process must be reasonably prompt and reliable, and so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline. Agency decisionmakers should be alert to the detrimental effect on health and safety if managers and supervisors form the opinion that turning a blind eye to poor work is preferable to the inconvenience of an investigation and possible hearing. The process should be as free of wasted time and effort as possible so that supervisors are not deterred from performing their jobs.

Nonetheless, as in any disputatious setting, there will always be some who are so put off at the prospect of a government investigation that they may "put up" with a poor performer longer than they should. There is, however, nothing peculiar to this situation; how long would an unsafe employee be retained even though firing him or her would trigger some other kind of discrimination claim?

### *B. Protected Conduct*

The health and safety whistleblowing statutes basically protect two kinds of conduct: (1) disclosures; and (2) in a few instances, refusals to work. Unfortunately, Congress has not acted uniformly in either category.

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67. Letter from John F. Sherman III, Assistant General Counsel, New England Power Service Co., to Eugene R. Fidell (Dec. 15, 1986).

### 1. Protected Disclosures

Congress has used a wide range of terms to describe the disclosures it wants to protect. It is, however, difficult to understand why a uniform set of concepts could not be substituted.

To identify a few of the variations, there are provisions that apply to any disclosure (AHERA),<sup>68</sup> to disclosures to the media (OSH Act),<sup>69</sup> to disclosures to the agency or agencies responsible for administering the underlying regulatory program (e.g., ERA),<sup>70</sup> and to disclosures to a union (FMSH Act,<sup>71</sup> OSH Act) or employer (FMSH Act, OSH Act, SMCRA<sup>72</sup>). The circuits are split on whether the ERA protects "internal" complaints to an employer.<sup>73</sup> The underlying validity of employee safety concerns under the ERA and environmental statutes has been held to be outside of the Labor Department's jurisdiction; thus, the disclosure need only be made in good faith.<sup>74</sup>

Retaliation against concerted activity in response to safety concerns has been held to be an unfair labor practice by the National Labor Relations Board, but the Board has recently emphasized that it "was not intended to be a forum in which to rectify all the injustices of the workplace."<sup>75</sup> Given the requirement for concerted activity, and the Board's emphasis on the fact that the employee in *Meyers Industries*<sup>76</sup> might have an action under state law or (had it been in effect at the time) under the STAA, it seems improbable that the NLRA<sup>77</sup> will prove to be of substantial benefit to whistleblowers who act alone —

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68. 15 U.S.C. § 2641 (1982).

69. 29 U.S.C. § 651 (1982); see *Wedderspoon v. Milligan* 80-WPCA-1, at 10-11 (OALJ July 11, 1980) (holding disclosures to news media also protected under WPCA). See generally Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act*, 4 ANTIOCH L.J. 73, 75 (1986).

70. 42 U.S.C. § 5851 (1982).

71. 30 U.S.C. § 815 (1982).

72. 30 U.S.C. § 1293 (1982).

73. Compare *Brown and Root v. Donovan*, 747 F.2d 1029, 1032 (5th Cir. 1984) (holding internal whistleblowing is not protected unless employee has contact with government) with *Kansas Gas & Elec. Co. v. Brock*, 180 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 3311 (1986) (holding whistleblower protection extends to internal complaint) and *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984) (holding internal complaints protected) and *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (holding complaint need not be made to regulatory authority), *cert. denied*, 106 S. Ct. 1641 (1986).

74. S. KOHN, *supra* note 5, at 28-29.

75. *Meyers Industries*, 1986 NLRB Dec. (CCH) ¶ 18,184, 281 NLRB No. 118, at 19 (Sept. 30, 1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

76. *Meyers Industries* involved a truck driver who was retaliated against for refusing to work and reporting a safety violation to state authorities. 281 NLRB No. 118.

77. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

particularly if their conduct might also be protected under other legislation.<sup>78</sup> Indeed, the current Board has expressly disclaimed an interest in "taking it upon ourselves to assist in the enforcement of other statutes."<sup>79</sup> This narrow perspective appears to be at odds with the philosophy underlying whistleblower provisions, the basic purpose of which is to assist in the achievement of substantive federal health and safety objectives. Because the statute of limitations for unfair labor practice complaints is longer than most of the whistleblowing statutes, contraction of the NLRB's role effectively reduces the protection available to employees. *Meyers Industries* suggests that Congress should not look to the broad coverage of the NLRA as a reason to refrain from enacting generic private sector whistleblower legislation.<sup>80</sup>

## 2. Refusals to Work

Employee refusals to work are protected under the Energy Reorganization Act,<sup>81</sup> the Federal Mine Safety and Health Act,<sup>82</sup> the Federal Railroad Safety Authorization Act,<sup>83</sup> the Labor Management Relations Act,<sup>84</sup> the National Labor Relations Act,<sup>85</sup> and the Surface Transportation Assistance Act.<sup>86</sup> The NLRA protects only "concerted activity" under section 7,<sup>87</sup> rather than individual conduct.<sup>88</sup> Unless the refusal to work is part of a group effort or is an individual effort intended to enlist the support of others, or involves the assertion of a right grounded in a collective bargaining agreement,<sup>89</sup> it will not be pro-

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78. The Supreme Court has recognized that "parties may have a choice of federal remedies," *Cornell Constr. Co. v. Plumbers and Steamfitters Local Union 100*, 421 U.S. 616, 635 n.17 (1975), but one wonders whether dual federal remedies are necessary in the whistleblowing area. If federal whistleblowing legislation were reorganized as recommended herein, there would be less need to be concerned about limitations on the gloss applied to the NLRA, and no need for two federal agencies to address a single issue.

79. *Meyers Industries*, 281 NLRB No. 118, at 19.

80. Indeed, on appeal the District of Columbia Circuit affirmed the NLRB's decision in *Meyers Industries*, holding that the Board's interpretation of "concerted activity" was reasonable. *Prill v. NLRB*, 835 F.2d 1481, 1485 (D.C. Cir. 1987).

81. 42 U.S.C. § 5851 (1982). While the statute is silent, the Secretary of Labor has construed the ERA to protect good faith, reasonable refusals to work on the theory that the ERA and FMSHA are *in pari materia*. *Pensyl v. Catalitic Inc.*, No. 83-ERA-2, slip op. at 5 (SOL Jan. 13, 1984).

82. 30 U.S.C. § 815 (1982).

83. 45 U.S.C. § 441 (1982).

84. 29 U.S.C. § 143 (1982).

85. 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

86. 49 U.S.C. § 2305 (1982).

87. 29 U.S.C. § 157 (1982).

88. See generally Nothstein, *Employee Refusals to Work*, LABOR (Fall 1982).

89. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984).



tected.<sup>90</sup> Section 502 of the LMRA applies to employees who stop work "in good faith because of abnormally dangerous conditions,"<sup>91</sup> but it is unclear whether the provision protects only those workers actually at risk, or others who join with them. In addition to these statutory provisions, safety-based refusals to work are protected by a regulation<sup>92</sup> issued under the OSH Act, and upheld by the Supreme Court in *Whirlpool Corp. v. Marshall*.<sup>93</sup>

The refusal to work provisions typically require that the employee have an actual reasonable belief that he is in danger.<sup>94</sup> For example, the STAA provides:

No person shall discharge, discipline, or in any manner discriminate against an employee . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial vehicle safety and health, or because of the *employee's reasonable apprehension of serious injury* to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition . . . .<sup>95</sup>

### C. Limitation of Actions

The range of statutes of limitations applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible.<sup>96</sup> Absent some showing that would justify differences from one setting to another — and this author has been unable to discern the basis for such a showing — a single statute should govern.

What should the limitation period be? This is necessarily a matter of

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90. Meyers Industries, 1986 NLRB Dec. (CCH) ¶ 18,184, 281 NLRB No. 118, at 20 (Sept. 30, 1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1841 (D.C. Cir. 1987).

91. 29 U.S.C. § 143 (1982).

92. 29 C.F.R. § 1977.3 (1986).

93. 445 U.S. 1 (1980). The Court in *Whirlpool* upheld an interpretive regulation allowing an employee to refuse to expose himself to a dangerous condition without being subjected to subsequent discrimination by the employer. *Id.* at 12.

94. See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386 (1974) (requiring subjective good faith and ascertainable, objective evidence supporting conclusion that abnormally dangerous condition for work exists in order to justify work stoppage under section 502 of LMRA). Section 815(c) of FMSHA, 30 U.S.C. § 815(c) (1982), has been held to apply to refusals to work based on reasonable, good faith belief that the safety of another employee will be endangered. *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 368 (4th Cir. 1986).

95. 49 U.S.C. § 2305(b) (1982) (emphasis added).

96. See sources cited *infra* p. 37 (Table 1).

legislative judgment and should reflect the fact that employers are unlikely to inform the employee that he or she is being dismissed as a reprisal for whistleblowing. Because of this, the employee may not be aware at the time of discharge that a statutory right has been tolled. If an employee must file more than a "notice of appeal" to trigger the whistleblowing hearing process,<sup>97</sup> a 30-day statute of limitations is unreasonable, even if a notice is required to be posted at the workplace advertising the complaint process. Moreover, an employee may well find it impossible to find counsel who can prepare a complaint in such a short period, particularly since much whistleblower litigation is conducted on a contingent fee basis in the hope of securing an award of attorneys' fees.

A significant number of the whistleblowing cases brought to the DOL's Office of Administrative Law Judges are dismissed for untimeliness. Other cases are dismissed for untimeliness by the investigative agencies. On balance, and considering the potential complexity of these cases, a single statute of limitations of not less than 180 days seems appropriate.

#### D. Investigative Arrangements

As discussed previously, various agencies are responsible for the investigation of whistleblower complaints under the private sector statutes.<sup>98</sup> The Wage and Hour Division has been given responsibility for seven whistleblower statutes under which hearings are conducted by the DOL's Office of Administrative Law Judges, as well as for two whistleblower statutes (FLSA and MSAWPA)<sup>99</sup> under which adjudication is conducted by the district courts. In addition, OSHA is responsible for STAA<sup>100</sup> cases that are eventually heard by the OALJ, as well as violations of OSHA's own regulations, which are heard in the district courts.

The basic issue that emerges from the assignment of investigative functions is whether those functions should be performed by the agency with responsibility for the underlying substantive safety program. On the one hand, if the subject matter is complex or technical, it could be

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97. Compare *Richer v. Baldwin Associates*, No. 84-ERA-09/10/11/12 (SOL Mar. 12, 1986) (*pro se* complaint; detailed pleading not required) with *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 100-01 (testimony of Mozart G. Ratner).

98. See sources cited *infra* p. 37 (Table 1).

99. 29 U.S.C. § 201 (1982); 29 U.S.C. § 1855 (1982). The FLSA is not listed in Table 1 because, although the FLSA child labor provisions have a health and safety component, retaliation cases under those provisions are virtually unheard of.

100. 49 U.S.C. § 2305 (1982).

argued that only the program agency would have the technical expertise necessary to evaluate whistleblower cases. On the other hand, there may be concern that the program agency might be less than impartial in whistleblower cases to the extent that a whistleblower's charges may be thought to imply that the program agency was ineffective.<sup>101</sup> Some program agencies are considered to be too sympathetic to the regulated industry; this, as well as lack of resources, may lead to "dispirited" enforcement of safety regulations.<sup>102</sup> In the past, Congress has recognized the possibility that an agency might have such a conflict of interest. An example of this was Congress's breakup of the former Atomic Energy Commission (which had both regulatory and promotional responsibilities) into the NRC and the former Energy Research and Development Administration.<sup>103</sup>

The case for adjudication by the program agency because of its substantive expertise in the underlying technical field is unpersuasive. The program agency would always be available to supply expert witnesses on any truly technical issues. This is presumably the case for those complaints that arise under statutes where adjudication is handled by the district courts, which can claim no special expertise. Also, the whistleblowing statutes do not require a determination that the complainant's safety concern is technologically "correct," but rather that it is merely reasonable in the circumstances. Admittedly, even that question imposes on the decisionmaker an obligation to assess the merits of the worker's health or safety concern. The burden on the decisionmaker would seem to be much less onerous, however, than might be the case if the complainant was protected from reprisal only if his or her safety objection was not only reasonable but also correct.

Congress has not yet taken a clear position on the generic issue of agency conflicts, although under seven of the whistleblower statutes (DoD87, FMSHA, Federal Railroad Safety Authorization Act (FRSAA), MSAWPA, NLRA, OSHA, SMCRA) the program agency is also the whistleblowing investigative agency.<sup>104</sup> While the statutes

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101. *ACUS Whistleblower Hearings Transcript, supra* note 55, at 40-41, 73.

102. Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 1, 1986).

103. Energy Reorganization Act of 1974, § 2(c), Pub. L. No. 93-438, 88 Stat. 1233 (1974) (codified at 42 U.S.C. § 5801 (1982)).

104. Department of Defense Authorization Act of 1987, Pub. L. No. 99-661, § 942, 100 Stat 3942 (to be codified at 10 U.S.C. § 2409); FMSHA, 30 U.S.C. § 815 (1982); FRSA, 45 U.S.C. § 421 (1982); MSAWPA, 29 U.S.C. § 1855 (1982); NLRA, 29 U.S.C. § 151-169 (1982); OSH Act, 29 U.S.C. § 660 (1982); SMCRA, 30 U.S.C. § 1293 (1982). Under DoD87, investigations are done by the Inspector General, thus providing a measure of independence from the procurement agency. On the other hand, the Inspector General's report simply goes to the Secretary, who naturally has

which combine these roles involve technical issues, as seen in the environmental and nuclear areas, certainly there are also technical issues arising under the two mining statutes,<sup>105</sup> under each of which the program agency is also the investigator. To the extent that a statutorily independent Inspector General is assigned investigative responsibility under the Department of Defense Authorization Act of 1987,<sup>106</sup> the danger of institutional conflicts of interest would appear to be minimal under that particular statute.

The public interest would be served by having a single agency responsible for all whistleblowing investigations, since investigation of whistleblowing is itself a specialty. The choice of agency is not crucial, but presumably it should be one that is currently responsible for a substantial share of the government's total caseload of whistleblower complaints. The available data tend to point toward OSHA, although the Wage and Hour Division of the Department of Labor has also amassed valuable experience under the varied statutes for which it has investigative responsibility. The choice is probably best left to the Secretary of Labor. In any event, there is no need to create a new agency or additional staff for this purpose; the non-OSHA caseload data suggest that interagency transfers would suffice to meet any shift in agency responsibilities. If, on the other hand, substantial new categories of employees are brought under whistleblower provisions, some net increase in staff would probably be necessary.

The program agencies should play an active role in support of the investigative agencies, even if they do not themselves have investigative responsibility. In technical cases, the program agencies can (and already do, on occasion) furnish technical advice to the investigative agencies. They can also provide expert witnesses or technical interrogators for hearings. At times, they might wish to appear as *amici* in the whistleblower hearings.<sup>107</sup> And they should receive reports on the outcome of each hearing so that they may take whatever follow-up actions may be appropriate in light of the facts developed in the adjudicatory process. These reports should include the adjudicatory decisions as well as the investigative agency's comments and analysis, where appropriate. The program agencies should take affirmative steps to aid whistleblowers, including the issuance of employee protection regula-

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ultimate responsibility for procurement.

105. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982).

106. Pub. L. No. 99-661, § 942, 100 Stat. 3942 (to be codified at 10 U.S.C. § 2409).

107. See 29 C.F.R. § 18.12 (1986) (*amici* restricted to filing briefs).

tions that could be enforced in the licensing context, where appropriate, such as the NRC has done.<sup>108</sup> Agency regulations could also impose useful notice-posting requirements that would advise employees in advance of their rights under the employee protection statutes.<sup>109</sup> This is particularly appropriate if Congress continues to insist on unrealistically short statutes of limitations.

Concern has been expressed over the short time typically allotted to the investigative agencies for processing employee complaints. Rather than simply eliminating the investigative phase (e.g., permitting the employee to institute an APA<sup>110</sup> hearing without prior agency screening),<sup>111</sup> attention might be given to allowing an APA hearing upon request, if the investigative agency has not completed its investigation within a fixed period.<sup>112</sup> The disadvantage of such an arrangement would be that the employee and employer would be deprived of the potentially useful initial reaction of the agency. At present, a favorable initial ruling by the agency may be critical to the employee's ability to obtain counsel on a contingent fee basis.<sup>113</sup>

Another issue concerns the desirability of requiring or encouraging an employee to exhaust employer-provided remedies as a precondition to an agency hearing.<sup>114</sup> Many firms today have internal mechanisms

108. 10 C.F.R. § 50.7(c) (1987).

109. The Nuclear Regulatory Commission (NRC) has already taken this step. 10 C.F.R. § 50.7(e) (1987). Wage and Hour Division regulations impose other notice-posting requirements. 29 C.F.R. § 500.76(d)(1) (1986); *see id.* § 516.4 (providing notice posting requirements for minimum wage and overtime provisions).

110. Administrative Procedure Act, 5 U.S.C. § 551-559 (1982).

111. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 57-60 (testimony of Kennedy P. Richardson); *see* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986) (suggesting, in alternative, that 30-day limit for Wage and Hour Division investigations be precatory).

112. *See* 42 U.S.C. § 2000e-5(f)(1) (1982) (providing aggrieved persons may institute civil action if EEOC dismisses complaint or fails to sue within 180 days of filing of charges).

113. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 84 (testimony of Stephen M. Kohn). But it has been argued that:

The hypothesis that the Wage and Hour Division investigation is necessary to induce private attorneys to prosecute section 210 cases is refuted by the fact that no such inducement has ever been necessary for common law wrongful discharge claims and the fact that section 210 authorizes the administrative law judge to award attorney's fees which may well exceed what the attorney would otherwise receive under a typical contingent fee agreement. Nor is the Wage and Hour Division investigation necessary to 'screen out' frivolous claims since most private attorneys will decline to undertake cases with no plausible merit.

Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

114. *See ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 14 (testimony of Sen. Charles E. Grassley) (suggesting agencies could be required to bring in outside counsel to identify and investigate employee concerns). Another approach

for the receipt of employee safety complaints; a few have contracted with outside companies to provide external private dispute-ventilation machinery.<sup>115</sup> Before a broad requirement for such programs is imposed, however, serious thought should be given to the fact that an exhaustion requirement may only retard employee access to the public adjudicatory process. Arguably, the exhaustion requirement could also provide the employer with an unfair opportunity for early discovery, possibly even before the employee has legal representation.

If such programs are required, the concerned agencies will have to address the discoverability of documents generated during the process<sup>116</sup> and the need to toll the statute of limitations during the exhaustion period. One attorney representing employers has indicated that documents and statements generated by both sides in the course of exhaustive internal channels would be discoverable.<sup>117</sup> On the basis of the information currently available, the public interest in prompt disposition of employee protection complaints outweighs the competing interest in potentially reducing the need for recourse to formal governmental processes. Certainly public policy "should not aim at driving every internal dispute toward litigation,"<sup>118</sup> but the system should also not create excessive hurdles.

### E. Adjudicatory Procedures

Nowhere is the lack of consistency in federal protection of whistleblowers more apparent than in the arrangements Congress has set for the adjudication of complaints. In eight instances<sup>119</sup> (involving

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might be to encourage or require professionals such as engineers to avail themselves of professional societies' safety committees when ethical issues arise. Unfortunately, however, these mechanisms are not well known. D. Lindorff, *Engineers' Duty to Speak Out*, THE NATION, June 28, 1986, at 881. In addition, employees often do not have the luxury of being able to formulate a request for an opinion, and such committees lack the tools to find needed facts on issues which are often hotly contested.

115. See generally Wargo, *Tracking Employee Concerns*, 32 NUCLEAR INDUSTRY No. 1, at 3 (Jan. 1985).

116. *Durham v. Butler Service Group*, No. 86-ERA-9 (OALJ 1986), discussed in *Safety Concerns Programs Challenged by Intervenors*, NUCLEAR INDUSTRY, No. 6, at 16-17 (June 1986). Access to documents obtained under the SAFETEAM program marketed by a subsidiary of the Detroit Edison Co. was permitted subject to a protective order in *Texas Utilities Electric Co.*, Nos. 50-445 to 446 (ASLB Dec. 23, 1985) (Comanche Peak Units 1 and 2). See generally Heffner, *Limiting Risk: Improving Public Perception of Nuclear Plant Safety Through SAFETEAM* (remarks at American Nuclear Society Annual Meeting, Nov. 12 1985).

117. See Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

118. *Id.*

119. See sources cited *infra* p. 37 (Table 1).

cases arising under the environmental laws and the STAA), on-the-record APA hearings<sup>120</sup> and recommended decisions<sup>121</sup> are the task of the DOL Office of Administrative Law Judges,<sup>122</sup> subject to final action by the Secretary of Labor,<sup>123</sup> with the assistance of the DOL Office of Administrative Appeals. One source of concern has been the lack of detailed regulatory guidance concerning the procedures to be followed in connection with review by the Secretary of Labor.<sup>124</sup> The Department of Labor has shown its concern over the case backlog in the Office of Administrative Appeals.<sup>125</sup> The DOL should streamline the final layer of agency review by promulgating formal rules of appellate procedure. It has also been suggested that a three-member appellate panel should be created to review ALJ decisions in whistleblower cases, and to permit interlocutory appeals from ALJ decisions on certain issues.<sup>126</sup>

Like DOL, the NLRB, the Mine Safety and Health Review Commission, and the Interior Board of Land Appeals also provide on-the-record APA hearings. In railroad cases, the decisional body is the National Railroad Adjustment Board, which does not provide an APA hearing. In four categories of cases (nonappropriated fund employees, shipping containers, migrant workers, and OSHA), the adjudicatory mechanism is a civil action in district court.

Given the caseload of the district courts, reliance on conventional civil actions, rather than appellate court review of agency action, in several of these important anti-retaliation programs makes little sense. Further, in the case of complaints under section 11(c) of the Occupational Safety and Health Act,<sup>127</sup> such reliance makes no sense at all

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120. 5 U.S.C. § 556 (1982).

121. 5 U.S.C. § 557 (1982).

122. The applicable procedural regulations appear at 29 C.F.R. pt. 24 (1987). See generally S. KOHN, *supra* note 5, at chs. 1, 5-6, 8-9.

123. 29 C.F.R. § 24.6 (1986); see also 5 U.S.C. § 557(b) (1982) (providing decisions by agency employees are final unless appealed).

124. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 70-71 (testimony of Stephen M. Kohn).

125. See 73 DEP'T LAB ANN. REP. FY85 174 (1986) (noting survey performed by Inspector General revealing need to eliminate case backlog). As of October 1, 1986, the Office of the Inspector General reports to the DOL Undersecretary rather than the Solicitor of Labor. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 21 (testimony of Judith E. Kramer).

126. Letter from Mozart G. Ratner to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 10, 1986). The suggestion for an appellate panel appears to contemplate that the panel's jurisdiction would be nondiscretionary and that its decisions would not be subject to further review by the Secretary of Labor. *Id.* Alternatively, the panel could hear argument on behalf of the Secretary, as formerly was done in merchant marine disciplinary hearings. Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings*, 45 MO. L. REV. 1, 23 n.151 (1980).

127. 29 U.S.C. § 660(c) (1982).

when combined with the fact that the complainant has no control over the litigation, i.e., if the agency chooses to dismiss a complaint, the employee can only appeal that decision within the Department of Labor;<sup>128</sup> there is no provision for judicial review of the agency's decision not to pursue a section 11(c) case and no private right of action under that provision.<sup>129</sup> This is in sharp contrast with the other provisions which permit an employee who is disappointed with the outcome of an agency APA hearing to seek judicial review.

There are wide discrepancies among agencies in assignment of the responsibility for representation of the employee. In MSHRC proceedings, the miner is represented by MSHA if the agency believes the complaint to be meritorious,<sup>130</sup> but in OALJ cases under the environmental laws, the Wage and Hour Division and the Secretary of Labor represent neither party.<sup>131</sup> Under the STAA,<sup>132</sup> the Assistant Secretary for Occupational Safety and Health can prosecute the trucker's case in the OALJ hearing.<sup>133</sup> Under the NLRA, the General Counsel prosecutes.<sup>134</sup>

The reasons for the discrepancies among the programs are difficult to fathom. One would think that the same rule should apply across the board, but it is not clear that every complainant will want or need the prosecutorial assistance of the investigative agency. Where the complainant is privately represented, the interest in careful husbanding of agency resources (including the need to limit what might otherwise be redundant presentations in the hearing) suggests that the agency should step aside, taking a more passive role in deference to the trial strategy of the party's chosen counsel. If the individual chooses to represent himself or herself, a more active agency posture would be appropriate to ensure a full and effective airing of the issues. In short, the investigative agency should not be required to represent a party who already has counsel, but the agency should be available to prosecute a meritorious claim if the complainant so desires.

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128. OSHA Inst. CPL 2.45A, ¶ 6 (Mar. 8, 1984).

129. S. KOHN, *supra* note 5, at 174 (citing *Taylor v. Brighton Corp.*, 616 F.2d 256, 258 (6th Cir. 1980)).

130. See Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(2) (1982) (providing for filing of miner's complaints by Secretary of Labor where claims not frivolous); T. MEANS, *DISCRIMINATION AND MINER'S RIGHTS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977* 21 n.105 (1984).

131. WAGE & HOUR DIVISION, DEP'T OF LABOR, *FIELD OPERATIONS HANDBOOK* § 52x03(e) (1981).

132. Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 (1982 & Supp. III 1985).

133. 29 C.F.R. §§ 1978.107-.108 (1987).

134. 29 U.S.C. § 153(d) (1982).



The statutes frequently set forth a schedule for agency action on the employee's complaint.<sup>135</sup> These schedules are typically breached<sup>136</sup> and probably serve little practical purpose.<sup>137</sup> To the extent that they indirectly encourage hasty investigative agency positions in complex cases, they may well be counterproductive. However, both sides — and the ALJ — will sometimes agree that more time is needed to serve the substantive purpose of the statute. Litigants may and often do want to relax the schedule in a given case if, for example, more discovery is needed or unanticipated procedural or evidentiary complexities arise. Delays to which all parties consent do not account for all the cases, but they suggest that a rule of reason or *modus vivendi* evolves, whatever the statutory language. The extreme delays in some cases are, however, a matter of concern, whether consented to or not, and the responsible officials may want to ensure that case-tracking mechanisms exist to keep matters from getting out of hand.

Not surprisingly, both employer and employee representatives have expressed frustration with the current arrangements for DOL hearings. For example, employee counsel have called attention to what they perceive as a pattern of discovery abuse by industry counsel.<sup>138</sup> In one re-

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135. *E.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622(b)(2)(A) (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b)(2)(A) (1982); Clean Air Act, 42 U.S.C. § 7622(b)(2)(A) (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(i) (1982); *see also* 29 C.F.R. § 24.6(b)(1) (1986) (providing for ALJ decision within 20 days of complaint filing, and final order by Secretary of Labor within 90 days after receipt of complaint).

136. *Compare* S. KOHN, *supra* note 5, at 3 n.15 (noting statutory schedule for agency action is "more honored in the breach than in the observance . . . hearing and final decision of secretary are rarely conducted within. . . [statutory] time limits [and] respondents' attempts to have a complaint dismissed for failure to meet time limits have failed") and Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 1, 1986) (noting delays up to 600 days) with Brief for Appellants at 49 n.26, *Brock v. Roadway Express, Inc.*, 107 S. Ct. 1740 (1987) (No. 85-1530) (suggesting that prolonged delay in secretarial decision is not typical under Surface Transportation Assistance Act) and U.S. DEP'T OF LABOR OFF. OF ADMIN. LAW JUDGES, SUMMARY OF "TRADITIONAL" LABOR CASES ADJUDICATED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGES 56-57 (1984) (postponements granted only for compelling reason, and time constraints in whistleblower cases are "uniquely restrictive"). In one case arising under the Energy Reorganization Act, it took the Wage and Hour Division over eight months to conclude that the 30-day statute of limitations barred the complaint. *Rose v. Secretary of Labor*, 800 F.2d 563, 566 (6th Cir. 1986) (Edwards, J., concurring).

137. These periods are treated as precatory. *See* 29 C.F.R. § 1978.114 (1987) (failure to meet deadlines does not invalidate Secretary's action).

138. *Testimony of the Government Accountability Project and Trial Lawyers for Public Justice Regarding U.S. Department of Labor Administration of Whistleblower Protection Procedures Before the Administrative Conference of the United States* 4-6 [hereinafter *GAP-TLPJ Testimony*]; *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 71-72.

cent case, there was a dispute over whether an employer's counsel frustrated the employee's ability to obtain the testimony of a needed witness.<sup>139</sup> On the other hand, some believe that there is a danger that employees can, without fear of sanction, file frivolous claims that impose substantial costs on an employer.<sup>140</sup> This criticism overlooks the fact that if a complainant violates an ALJ's order, he may be held in default.<sup>141</sup> None of the statutes, however, provide for attorneys' fees to be awarded against complainants.

The failure of the current arrangements to provide for judicial enforcement of DOL subpoenas should be remedied as soon as possible by providing for enforcement of DOL subpoenas in the manner provided for other agency subpoenas.<sup>142</sup> Until Congress takes such action, the main protection against stonewalling in discovery is the availability of adverse inferences<sup>143</sup> or sanctions akin to those provided under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Sanctions alone, however, do not provide a sufficient response to a willful failure to cooperate with discovery in a health or safety whistleblowing case; more is at stake in a whistleblowing case than merely the outcome of the individual action. The public interest may require that the facts be developed in such a case, not simply that the individual employee obtain relief, whether through sanctions or a settlement. Moreover, even with judicial enforcement of subpoenas, ALJ's should still be at liberty to draw adverse inferences or impose sanctions in the event of failure to allow discovery, because the requirement of applying to a federal court for subpoena enforcement may be too time consuming and costly for the party seeking enforcement<sup>144</sup> — even though enforcement proceedings are supposed to be summary in nature.<sup>145</sup> A party's failure to press

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139. *GAP-TLPJ Testimony*, *supra* note 138, at 4, 6 n.13; Galen, *An Ethical Furor Over a Witness*, Nat'l L.J., Dec. 22, 1986, at 3.

140. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 84-86 (testimony of Stephen M. Kohn). Mr. Kohn questions whether sanctions should be available to penalize an employee or his counsel for frivolous whistleblower complaints. *Id.* He suggests that sanctions may be unnecessary because Wage and Hour Division's investigation is suitable for spotting frivolous claims and that such sanctions would raise attorneys' costs too high for most complainants, many of whom are indigent. *Id.*; *see also id.* at 97 (testimony of Mozart G. Ratner) (suggesting that very few whistleblower complaints are frivolous).

141. 29 C.F.R. § 24.5(e)(4) (1986).

142. Atomic Energy Act, 42 U.S.C. §§ 2201(c), 2281 (1982). *See generally* 3 B. MEZINES, J. STEIN & J. GRUFF, *ADMINISTRATIVE LAW* § 21.02 (1987); 1 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.6 (2d ed. 1978); FED. R. CIV. P. 81(a)(3).

143. *See Industrial Union Dep't v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (unfavorable inference from party's failure to produce evidence in its control).

144. *Id.* at 1339.

145. *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1064 (6th Cir. 1982).

for judicial enforcement of an agency subpoena should, for this reason, not preclude either adverse inferences or appropriate agency sanctions.

Misconduct by counsel — another of the charges levelled by the complainants' bar — is a serious matter that can thwart the achievement of congressional objectives and thereby endanger public health and safety. The arrangements currently in place give agency decisionmakers ample authority to penalize such misconduct, and this authority should be invoked upon a showing of good cause.<sup>146</sup> In the unlikely event that ALJ's prove to be indifferent on this score, the Secretary of Labor can be expected to take a firm stand on review. In addition, the usual forums for the consideration of ethical violations remain available. If the misconduct deprives a party of a fair hearing, the decision should be set aside on judicial review.

#### F. Remedies

The basic remedies available under the employee protection statutes consist of backpay, reinstatement, and attorneys' fees. In some instances, additional relief may be ordered. For example, a number of statutes authorize actual damages, and a variety of kinds of injury have been compensated under those provisions.<sup>147</sup> These include medical expenses, front pay, and job search expenses. In one ERA case, an employee was awarded \$10,000 for mental pain and suffering and injury to reputation.<sup>148</sup> Another employee received \$70,000 "to cover past and future medical expenses . . . and as recompense for . . . humiliation and mental suffering."<sup>149</sup>

Only two of the environmental employee protection provisions (SDWA and Toxic Substances Control Act (TSCA)) specifically authorize punitive damages. The Department of Labor has held such damages to be unavailable in other contexts.<sup>150</sup> The reason for this disparity is unclear, although TSCA<sup>151</sup> and SDWA<sup>152</sup> were developed

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146. See *Hasan v. Nuclear Power Serv. Inc.*, No. 86-ERA-2 (OALJ Sept. 25, 1986) (disqualifying counsel for misconduct).

147. S. KOHN, *supra* note 5, at 61-62.

148. *DeFord v. TVA*, No. 81-ERA-1 (DOL Apr. 30, 1984) (following remand from *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1982)).

149. *English v. General Elec. Co.*, No. 85-ERA-00002, slip op. at 18 (ALJ Aug. 1, 1985), noted in Franklin, *Dismissed Nuclear Worker Awarded \$10,000*, N.Y. Times, Aug. 4, 1985, at 23, col. 1.

150. *Landers v. Commonwealth-Lord Joint Venture*, No. 83-ERA-5, slip op. at 17 (1983), noted in S. KOHN, *supra* note 5, at 64 & n.18. Under several statutes, exemplary damages may be awarded if a civil action is brought to secure compliance with the Secretary's order. TSCA, 15 U.S.C. § 2622(d) (1982); SDWA, 42 U.S.C. § 300-9(ii)(4) (1982); ERA, 42 U.S.C. § 5851(d) (1982); CAA, 42 U.S.C. § 7622(d) (1982).

151. 15 U.S.C. § 2622 (1982).

from a common model. With no conceivable explanation for the differences available, a single rule should apply.

Agencies are also authorized to order the abatement of the employer's conduct as well as "affirmative action," although little, if any, use has been made of the latter power. Future cases will probably see increasing use of the affirmative action power.

Under the FMSHA<sup>153</sup> and STAA,<sup>154</sup> Congress authorized interim relief in the form of temporary reinstatement while the employee's complaint is pending. Significantly, the STAA provision has been sustained against constitutional challenge.<sup>155</sup>

Other remedies may be available through the program agency if, for example, the agency licensed the employer in some fashion. Under the Atomic Energy Act,<sup>156</sup> the NRC has taken administrative action against licensees because of retaliation against whistleblowing.<sup>157</sup> However, as the NRC has indicated, "the action taken by NRC focuses on the licensee to change the conduct of the discriminator. It is not a direct remedy to the employee."<sup>158</sup>

### G. Judicial Review

The arrangements for judicial review fall into two basic categories.<sup>159</sup> In the case of surface mining and railway whistleblowing, review lies in the district court, whereas in other cases review lies in the court of appeals. Once uniform agency hearing procedures are achieved, uniform review at the court of appeals level would be appropriate given the similarity of issues in such cases. Since surface mining cases go through the Interior Department hearing process with review by the Board of Land Appeals, there seems to be no reason to require an intermediate stop at the district court.<sup>160</sup>

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152. 42 U.S.C. § 300f (1982).

153. 30 U.S.C. § 815(c) (1982).

154. 49 U.S.C. § 2305 (Supp. III 1985).

155. *Brock v. Roadway Express Inc.*, 107 S. Ct. 1740 (1987). *But see* *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985) (holding unconstitutional certain procedures of Federal Mine Safety and Health Review Commission).

156. Pub. L. No. 79-585, 60 Stat. 755 (codified as amended at 42 U.S.C. § 2011 (1982)).

157. 10 C.F.R. § 50.7(c) (1987).

158. Letter from A.B. Beach, Deputy Director, Enforcement Staff, Office of Inspection and Enforcement, NRC, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 10, 1986).

159. See sources cited *infra* p. 37 (Table 1).

160. See *Leber v. Pennsylvania Dep't of Env'tl. Resources*, 780 F.2d 372 (6th Cir. 1986) (state agencies not subject to employee protection proceedings), *cert. denied*, 106 S. Ct. 3294 (1986).

A more fundamental concern is the fact that under the OSH Act<sup>161</sup> and the Asbestos Hazard Emergency Reponse Act,<sup>162</sup> if the investigative agency declines to bring a civil action for the employee, the employee can neither obtain judicial review of that decision nor bring his own action against the employer. Agency decisions not to prosecute are understood to be nonreviewable, although the doctrine would seem to have no application where an individual employee has been harmed by the violation of a prohibition on retaliation. There is no apparent explanation for closing the courthouse doors to such individuals while keeping them open under so many of the other statutes. If nothing else, such an approach drives whistleblowing cases into the state courts under state doctrines, even though the federal interest may be paramount.<sup>163</sup>

#### H. Interaction with Program Agencies

As Senator Grassley stressed at the Administrative Conference's October 1, 1986 public hearing, it is important not only that the whistleblower be protected from retaliation, but also that the substantive safety and health concern be addressed.<sup>164</sup> This requires close coordination between the agencies responsible for the underlying regulatory program and those responsible for administration of the anti-retaliation provisions.

To date, the program and investigative agencies have taken some steps to foster coordination to achieve better compliance with underlying safety and health obligations. The Wage and Hour Division and the NRC have a memorandum of understanding (MOU) setting forth the working arrangements between their two agencies in nuclear whistleblowing cases.<sup>165</sup> Attorneys representing employees, however, view this arrangement as ineffective.<sup>166</sup> Similarly, OSHA and the

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161. 29 U.S.C. § 660(c) (1982).

162. Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

163. The fact that a section 11(c) case must be brought by the government harms employers by rendering inapplicable any statute of limitations. *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980).

164. The belief that no action will be taken to correct a problem which a whistleblower discloses tends to discourage whistleblowing. MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE 27-31 (1981), cited in Martin, *The Whistleblower Revisited*, 8 GEO. MASON L. REV. 123 (1985).

165. 47 Fed. Reg. 54,585 (1982), discussed in *Kansas City Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509-10 (10th Cir. 1985), cert. denied, 106 S. Ct. 3311 (1986); see also 29 C.F.R. § 244(a) (1986) (program agency to receive copy of all complaints).

166. See *GAP-TLPJ Testimony*, supra note 138, at 10-11; *Ryan v. Brock*, No. 86-4058 (2d Cir. 1986) (ordering DOL to reopen ERA case on basis of NRC report).

NLRB have a MOU<sup>167</sup> for the coordination of litigation under section 11(c) of the OSH Act<sup>168</sup> and section 8 of the NLRA,<sup>169</sup> and MSHA and the Labor Board have entered into an agreement for the overlap in their jurisdictions.<sup>170</sup>

Other agencies, however, have not pursued the same approach.<sup>171</sup> For example, the Department of Transportation has only an informal working arrangement with the Department of Labor for cooperation in cases arising under the Surface Transportation Assistance Act,<sup>172</sup> and EPA (which has substantive responsibility for several environmental laws that have anti-retaliation provisions) has no written understanding with DOL. It also remains possible for a single act of retaliation to trigger more than one statutory scheme. If such a situation arises, the agencies should either be permitted to conduct a joint hearing or one should serve as "lead agency" for the dispute. If all federal anti-retaliation protections were consolidated, the potential for wasteful duplication would be avoided.<sup>173</sup> Given the fact that whistleblower protection is intended to protect public health and safety, formal arrangements should exist to ensure: (1) that all investigative agencies receive the necessary assistance from program agencies, particularly in cases where technical information is important; (2) that program agencies receive prompt detailed reports of the results of all whistleblowing and adjudicatory proceedings; and (3) that complaining employees be advised of the action taken by program agencies to remedy the safety problem about which the complaint was filed.<sup>174</sup>

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167. See Memorandum of Understanding Between OSHA and NLRB, 40 Fed. Reg. 26,083 (1975).

168. 29 U.S.C. § 660(c) (1982).

169. 29 U.S.C. § 158 (1982).

170. Litigation Procedures, 45 Fed. Reg. 6189 (1980).

171. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 69-70 (testimony of Stephen M. Kohn).

172. 49 U.S.C. § 2305 (Supp. III 1985); see also Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Administration, to Marshall J. Breger, Chairman, ACUS (Sept. 29, 1986) (discussing limited role of Department of Transportation in DOL proceedings).

173. In some instances, two remedial programs may work at cross purposes. For example, in *Thomas v. TVA*, No. SL07528610208 (MSPB May 9, 1986), a MSPB administrative law judge overturned the dismissal of a supervisor at a nuclear power plant who had been found by TVA to have discriminated against one of his supervisees. Although the supervisee had invoked the protection of the ERA, he did so after the statute of limitations had expired. TVA nonetheless took disciplinary action based on the supervisee's allegation, and it was that action that the MSPB proceeding set aside.

174. Cf. N.Y. STATE-CITY COMM'N ON INTEGRITY IN GOV'T, REPORT AND RECOMMENDATIONS ON WHISTLEBLOWING PROTECTION IN NEW YORK 5 (Oct. 8, 1986) ("complainant should be entitled to be informed of final disposition of his complaint").

### *I. Access to Law and Interagency Doctrinal Growth*

Two final and, to a degree, related concerns involve the public availability of decisional law and the impediments to interaction between the separate bodies of law being developed by the various adjudicatory agencies responsible for whistleblower statutes. While decisions of the MSHRC, NLRB, and Interior Board of Land Appeals are reported, those of the DOL Office of Administrative Law Judges were not.<sup>175</sup> OALJ decisions were available only in Washington,<sup>176</sup> the Department office responsible for a substantial portion of the overall whistleblower caseload. The result was that litigants before the OALJ had a more difficult time ascertaining the law. This caused proceedings to be less focused, as well as made it more difficult for employers and employees to know their basic rights. In addition, it thwarted the desirable goal of cross-fertilization between the OALJ and other whistleblower adjudicatory agencies. This insulation makes little sense and, building on the statutory patchwork, tends to retard the development of a coherent body of law in this area.

The sufficiency of the publication of the OALJ decisions remains an open question. At present, research that steps from one anti-retaliation program to another is needlessly cumbersome because of the variety of reporting services. Publication of the OALJ cases will only partially alleviate that problem. If digesting and indexing of whistleblowing cases continue to follow separate systems within each agency, the present network will have been only slightly improved.

This does not suggest that the bar currently confronts a "Tower of Babel" in the whistleblowing area, but the present arrangements necessarily leave the door open to doctrinal variations where they may be unwarranted. If Congress decides to bring all private sector health and safety whistleblowing jurisdiction under one "roof," with a single set of statutory provisions administered by a single agency, this concern will disappear. If Congress does not, serious attention should be given to integrating the reporting arrangements.

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175. The Department of Labor announced that it would publish all OALJ and Secretarial decisions in whistleblower cases beginning January 1, 1987. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 76 (testimony of Stephen M. Kohn). The Department should be commended for this desirable step, since employees and employers will be better able to determine in advance the lawfulness of a particular issue. However, it would also be useful for the Department to publish pre-1987 decisions as well. This assumes that appropriate indices would also be provided.

176. *Id.* at 70.

## V. RECOMMENDATIONS

Clearly, Congress must address important questions regarding the current arrangements for the protection of private sector health and safety whistleblowers. Based on the findings outlined above, Congress and involved agencies should take the following steps.

Congress should enact omnibus whistleblowing legislation to replace all extant federal private sector health and safety whistleblowing provisions. This legislation should include: (1) protection for all private sector employees (including government contractor employees) and state and local government employees against retaliation for whistleblowing with respect to violations of federal safety and health requirements; (2) assignment of investigative responsibility to the Secretary of Labor for all private sector health and safety whistleblowing retaliation cases; (3) provision for on-the-record Department of Labor APA hearings<sup>177</sup> in all private sector health and safety whistleblowing cases, with discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts; (4) provision for a single definition of "protected conduct"; (5) provision for a single statute of limitations of not less than 180 days; (6) provision for a single set of remedies (including debarment and suspension of government contractors); (7) provision for a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and (8) provision for a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements, and mandatory coordination with program agencies.

Subject to the actions taken by Congress as recommended above, the Secretary of Labor should: (1) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of decisions of the Office of Administrative Law Judges; (2) transfer all private sector health and safety whistleblowing investigative responsibility to the Occupational Safety and Health Administration, since (under section 11(c) of Occupational Safety and Health Act<sup>178</sup> and section 405 of the Surface Transportation Assistance Act<sup>179</sup>) OSHA currently receives by far the largest number of private sector health and safety whistleblowing complaints; (3) develop, in consultation with the agencies responsible for the substantive regulatory program, detailed written procedures, as nearly uniform as the Secretary

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177. 5 U.S.C. § 556 (1982).

178. 29 U.S.C. § 660(c) (1982).

179. 49 U.S.C. § 2305 (Supp. III 1985).



deems practicable, for coordinating investigation, adjudication, and follow-up in whistleblowing cases; and (4) cause all ALJ and Secretarial decisions in whistleblowing cases to be indexed and published, including those rendered prior to January 1, 1987.

In addition to these changes, Congress and the Executive Branch may wish to address a number of related issues, such as the question of preemption. As was persuasively explained at a public hearing conducted by the Administrative Conference of the United States,<sup>180</sup> there is a considerable amount of whistleblowing litigation in the state and federal courts, resting not on federal whistleblowing protections, but on state law doctrines such as the public policy exception to the employment-at-will doctrine.<sup>181</sup> State law doctrines are evolving rapidly in this area, and it would be premature to consider legislation preempting state causes of action for retaliation that could be adjudicated in a federal forum. Given the current doctrinal ferment, the words of Justice Brandeis in *New State Ice Co. v. Liebmann*<sup>182</sup> come to mind:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>183</sup>

Or, as the First Circuit more recently put it in a different context, "[t]he cutting edge of reform should be left to uncoerced community initiatives."<sup>184</sup>

For the moment at least, bearing in mind the approach the Administrative Conference has taken,<sup>185</sup> the author recommends that states be

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180. See generally *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 76-83 (testimony of Anthony Z. Roisman) (discussing differing interests of federal and state governments).

181. Fidell, *Nuclear Whistleblowing Issues in 1986* (remarks at Am. Nucl. Soc'y, Nov. 12, 1985), at 6 nn.7-9 (citing *Lang v. Pacific Gas & Elec. Co.*, No. 60185 (San Luis Obispo Co., Cal. Super. Ct.), *on removal*, No. 85-6191HLH (C.D. Cal.); *Herman v. H.P. Foley Co.*, No. 59672 (San Luis Obispo Co., Cal. Super. Ct.), *on removal*, No. 85-2246-RG(Bx) (C.D. Cal. May 20, 1985); *Stokes v. Bechtel N. Am. Power Corp.*, 614 F. Supp. 732, 735 n. 1 (N.D. Cal. 1985); *Parks v. Bechtel Corp.*, No. C-84-8037-WHO (N.D. Cal.); *Raymond Kaiser Eng'rs v. Superior Court*, No. 8027975 (Cal. Dist. Ct. App. Aug. 23, 1984); *Berstler v. Hirsch*, No. 83-6122 (E.D. Pa. July 10, 1983); *Atchison v. Brown & Root, Inc.*, No. 83-29889 (Harris Co., Tex. Dist. Ct.), *on removal*, No. H85-3568 (S.D. Tex.)). *Stokes* and *Parks* were remanded to the California courts. *Stokes v. Bechtel N. Am. Corp.*, 614 F. Supp. 732, 735 n.1 (N.D. Cal. 1985).

182. 285 U.S. 262 (1932).

183. *Id.* at 311 (Brandeis, J., dissenting).

184. *Anaya v. Hansen*, 781 F.2d 1, 7 & n.8 (1st Cir. 1986).

185. Administrative Conference Recommendation No. 84-5, Preemption of State Regulation by Federal Agencies, 1 C.F.R. § 305.84-5 (1987).

permitted to continue to pursue their own courses of legal development. That process, so deeply rooted in our federal system, should not lightly be derailed, particularly at a time when all federal programs are under increasing scrutiny to prevent inappropriate intrusion into areas traditionally of concern to the states.

Another issue potentially freighted with political considerations concerns the assignment of responsibility for adjudication of safety-based whistleblowing retaliation complaints. The processes that led to the creation of an independent Mine Safety and Health Review Commission *with* responsibility for such cases and the creation of an independent Occupational Safety and Health Review Commission *without* such responsibility probably are of such a nature that recommendations for change will be of little use absent a definite consensus among the interested constituencies.

Under these circumstances, it may be best to confine the focus to more structural or adjectival matters, such as the enactment of uniform standards for protected conduct, adjudicatory procedures and remedies, strengthening the hearing process through judicially enforceable subpoenas, and rationalization of the arrangements for judicial review.<sup>186</sup> However, broader coverage should be extended to employees in industries having impacts on public health and safety, and all private sector health and safety federal whistleblowing protections ought to be administered by a single adjudicatory agency in the interest of fostering like treatment of like cases and maximizing the development of adjudicative expertise in employee protection matters.

Based on this study, there is reason for concern on several fronts. Aside from the overall need to restructure, extend, and rationalize the federal government's protection of health and safety whistleblowers in the private sector, the data indicate that in many cases it takes far longer than Congress contemplated to investigate and adjudicate whistleblowers' claims. Such delays, which may reflect resource problems, can also arise where the parties and ALJ conclude that more time is needed to do a proper job. Where the parties do not so agree, however, the delay may deter some complainants. Delay may ill serve employer interests as well.

In addition, the study suggests a need for greater interagency coordination. Consolidation of adjudicatory functions provides an important step toward the solution of the problem, but as long as numerous pro-

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186. With respect to any recommendations regarding the allocation of responsibility for judicial review, the views of the Judicial Conference of the United States and the Federal Judicial Center should first be secured.

gram agencies have an interest in the subject matter, the need for improved coordination will be substantial. The Department of Labor may want to consider addressing this problem by developing a program for regular interagency coordination of policies with regard to the protection of whistleblowers. This would result in a multi-agency omnibus memorandum of understanding and an established interagency coordinating body to encourage communication and interaction among the agencies and responsible staff.

Finally, although nothing in this Article should be understood as intimating an opinion on whether justice was done in any particular whistleblowing case, it is concluded that: (1) 30-day statutes of limitation are unreasonable; (2) judicially enforceable subpoenas are essential to the conduct of effective whistleblowing adjudications; and (3) basic notions of fairness are offended when, under section 11(c) of the Occupational Safety and Health Act,<sup>187</sup> or section 211 of the Asbestos Hazard Emergency Response Act,<sup>188</sup> victims of retaliation have no access to the federal courts if their cases are not pursued by the Department of Labor.

#### CONCLUSION

The protection of private sector health and safety whistleblowers is an issue of fundamental workplace fairness and an issue affecting a large portion of the federal regulatory scheme. The current panoply of federal whistleblower statutes is complex and confusing, even to the experienced labor law practitioner. Although the increasing congressional interest in protecting health and safety whistleblowers is to be commended, the present conglomeration of statutes and regulations inhibits, rather than furthers, the rational development of law in this area.

The time is right for reform of the federal whistleblower protection scheme. The recommendations contained herein represent a substantial step forward toward a more rational and even-handed form of regulation. Indeed, the Administrative Conference of the United States has recently formally recommended many of the principal conclusions of this Article.<sup>189</sup> Moreover, legislation has been introduced that would achieve many of the same goals.<sup>190</sup> Without such action, we run the

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187. 29 U.S.C. § 660(c) (1982).

188. Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (1986) (to be codified at 15 U.S.C. § 2641).

189. 52 Fed. Reg. 23,629, 23,631 (1987) (to be codified at 1 C.F.R. § 305.87-2).

190. Uniform Health and Safety Whistleblower Protection Act, S. 2095, 100th Cong., 2d Sess., 134 CONG. REC. S1447 (daily ed. Feb. 23, 1988).

risk that the present arrangements, which were conceived as means of remedying real-life problems, will collapse under the crushing burden of complexity, inconsistency, and irrationality.

TABLE 1  
PRIVATE SECTOR EMPLOYEE PROTECTION STATUTES  
(Health & Safety)

<i>Statute</i>	<i>Program Agency</i>	<i>Investigative Agency</i>	<i>Adjudicatory Agency</i>	<i>Statute of Limitations*</i>	<i>Judicial Review</i>
AHERA <sup>191</sup>	EPA	DOL	Dist Cts	90 days	N/A
CAA <sup>192</sup>	EPA	WHD	OALJ	30 days	Ct Apps
CERCLA <sup>193</sup>	EPA	WHD	OALJ	30 days	Dist Cts
DOD87 <sup>194</sup>	DOD	DOD	None in Act	None in Act	N/A
ERA <sup>195</sup>	NRC	WHD	OALJ	30 days	Ct Apps
FMSHA <sup>196</sup>	MSHA	MSHA	MSHRC	60 days	Ct Apps
FRSAA <sup>197</sup>	DOT (FRA)	FRA	Nat'l RR Adjustment Bd	30 days	Dist Cts
ISCA <sup>198</sup>	DOT (USCG)	DOL	Dist Cts	60 days	N/A
LMRA <sup>199</sup>	NLRB	N/A	NLRB	6 mos	Ct Apps
MSAWPA <sup>200</sup>	WHD	WHD	Dist Cts	180 days	N/A
NLRA <sup>201</sup>	NLRB	NLRB (OGC)	NLRB	6 mos	Ct Apps
OSHA <sup>202</sup>	OSHA	OSHA	Dist Cts	30 days	N/A

\* The limitation periods refer to the time for filing a complaint with the investigative agency, rather than for seeking judicial review.

191. Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. No. 99-519, § 211, 100 Stat. 2970 (to be codified at 15 U.S.C. § 2641).

192. Clean Air Act (CAA), 42 U.S.C. § 7622 (1982).

193. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (1982).

194. Department of Defense Authorization Act of 1987 (DOD87), Pub. L. No. 99-661, § 942, 100 Stat. 3816 (to be codified at 10 U.S.C. § 2409).

195. Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982).

196. Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C. § 815 (1982).

197. Federal Railroad Safety Authorization Act of 1980 (FRSAA), 45 U.S.C. § 421 (1982).

198. International Safe Containers Act (ISCA), 46 U.S.C. § 1501 (1982).

199. Labor Management Relations Act (LMRA), 29 U.S.C. § 141 (1982).

200. Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. § 1855 (1982).

201. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

202. Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 (1982).

SDWA <sup>203</sup>	EPA	WHD	OALJ	30 days	Ct Apps
SMCRA <sup>204</sup>	DOI (OS- MRE)	OSMRE	BLA	30 days	Dist Cts
STAA <sup>205</sup>	DOT  (FHWA)	OSHA	OALJ	180 days	Ct Apps
SWDA <sup>206</sup>	EPA	WHD	OALJ	30 days	Ct Apps
TSCA <sup>207</sup>	EPA	WHD	OALJ	30 days	Ct Apps
FWPCA <sup>208</sup>	EPA	WHD	OALJ	30 days	Ct Apps

TABLE 2  
PUBLIC SECTOR EMPLOYEE PROTECTION STATUTES  
(Health & Safety)

<i>Statute</i>	<i>Program Agency</i>	<i>Investigative Agency</i>	<i>Adjudicatory Agency</i>	<i>Statute of Limitations</i>	<i>Judicial Review</i>
ASHDCA <sup>209</sup>	EDUC	None in Act	None in Act	None in Act	N/A
AHERA <sup>210</sup>	EPA	DOL	Dist Cts	90 days	N/A
CSRA <sup>211</sup>	OPM	OSC	MSPB	20 days	Fed Cir
DOD84 <sup>212</sup>	DOD	DOD IG + Components	OASD(A)	None in Act or Regs	Dist Cts
EO12196 <sup>213</sup>	All (less military)	DOL	Program Agencies	None	N/A

203. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f (1982).

204. Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1293 (1982).

205. Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 2305 (Supp. III 1985).

206. Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1982).

207. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1982).

208. Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1251 (1982).

209. Asbestos School Hazard Detection Act of 1980 (ASHDCA), 20 U.S.C. §§ 3601-3611 (1982).

210. Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. No. 99-519, § 211, 100 Stat. 2970 (to be codified at 15 U.S.C. § 2641).

211. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

212. Department of Defense Amendments of 1984, 10 U.S.C. § 1587 (Supp. III 1985).

213. Exec. Order 12196, 45 Fed. Reg. 1279 (1980).