palgrave▸pivot

WHISTLEBLOWING IN THE WORLD

Government Policy, Mass Media and the Law

Edited by
Carmen R. Apaza and Yongjin Chang

Whistleblowing in the World

Carmen R. Apaza • Yongjin Chang
Editors

Whistleblowing in the World

Government Policy, Mass Media and the Law

palgrave
macmillan

Editors
Carmen R. Apaza
Facultad de Ciencias Administrativas y Recursos Humanos
Universidad de San Martín de Porres
Lima, Peru

Yongjin Chang
Department of Public Management and Policy Analysis Program
Graduate School of International Relations
International University of Japan
Niigata, Japan

ISBN 978-3-319-48480-8 ISBN 978-3-319-48481-5 (eBook)
DOI 10.1007/978-3-319-48481-5

Library of Congress Control Number: 2017930209

© The Editor(s) (if applicable) and The Author(s) 2017
This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Cover illustration: Détail de la Tour Eiffel © nemesis2207/Fotolia.co.uk

Printed on acid-free paper

This Palgrave Macmillan imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Introduction

In the search for more integrity and accountability in government, whistleblowing has been playing an important and crucial role. But what elements make the process effective? Apaza and Chang (2011) proposed an original analytical comparative framework to assess effective whistleblowing. The framework identifies five elements of effectiveness in whistleblowing that are relevant in all democracies: type of whistleblowing, coverage by mass media, documentation of evidence, retaliation, and legal protection. Other factors that might influence effectiveness—such as national history, civic organizations, economic levels, degree of democratization, ethnicity, and religion—are not included in the framework because these elements did not influence the whistleblowing cases that are object of the research.

By using Apaza and Chang's framework this inquiry analyzes four cases from different regions of the world: Peru, South Korea, Thailand, and the United States. Each case is described and analyzed in an individual chapter. Then, using pattern-matching methodology, each case is analyzed focusing on the aforementioned five elements of effectiveness. In all instances, authorities successfully prosecuted or punished prominent public figures in spite of high-level corruption and official cover-ups. Each case had strong political, legal, and social repercussions that at least promised permanent reforms.

In the first chapter, we define effective whistleblowing, describe the five factors of effectiveness in whistleblowing, and explain the methodology to conduct the research. Then, the cases of Peru, South Korea, Thailand, and the United States are described and analyzed in the second, third, fourth,

and fifth chapters respectively. Chapter 6 assesses the effectiveness of the whistleblowing process in each case and analyzes the comparative findings, including additional appropriate benchmarks for reform. Based on the results, it suggests improvements in whistleblower protection systems for each country that may be applied in other countries as well. Finally, it should be mentioned that Chapters 1, 2, and 3 are partly revised from the original article—Apaza & Chang (2011) in *Public Integrity* and published here with copyright permission from Taylor & Francis.

Acknowledgments

Writing this book has been a wonderful and a fascinating journey. We owe many thanks to many people. First, we want to thank our coauthors, Thomas Devine and Srisombat Chokprajakchat, for their great contributions to this study. Second, we want to thank Dr. David H. Rosenbloom and Dr. James Bowman for their important comments and suggestions on an early work of this study. Third, we thank Mrs. Alma Stewart and editorial reviewers for their help with the book edition. Fourth, we want to thank Taylor & Francis for the copyright permission for our previous work titled "What makes whistleblowing effective: Whistleblowing in Peru and South Korea" published in *Public Integrity 13*(2), pp. 113–130. Finally and most importantly, we want to thank our family members in Peru and South Korea for their support to our scholarly work.

Contents

1 Effective Whistleblowing Conceptual Framework 1
Carmen R. Apaza and Yongjin Chang

2 Whistleblowing in Peru 9
Carmen R. Apaza

3 Whistleblowing in South Korea: The Case of Woo Suk Hwang 23
Yongjin Chang

4 Whistleblowing in Thailand: Anti-Corruption Policy in Thailand and a Whistleblower Protection Measure 37
Srisombat Chokprajakchat

5 Whistleblowing in the United States of America: "Irrefragable Proof" and the Next Generation of U.S. Government Whistleblower Rights 59
Thomas Devine

6 Summary and Conclusions 77
Carmen R. Apaza, Yongjin Chang, Srisombat Chokprajakchat and Thomas Devine

Index 89

List of Tables

Table 2.1 Summary table of the case 17
Table 2.2 Effectiveness indicators of the case 17
Table 3.1 Summary table of the case 32
Table 3.2 Effectiveness indicators of the case 32
Table 4.1 Summary table of the case 56
Table 4.2 Effectiveness indicators of the case 56
Table 5.1 Summary table of the case 72
Table 5.2 Effectiveness indicators of the case 73
Table 6.1 Effectiveness indicators in the study whistleblowing cases 84
Table 6.2 Assessment of effectiveness in the study whistleblowing cases 86

CHAPTER 1

Effective Whistleblowing Conceptual Framework

Carmen R. Apaza and Yongjin Chang

> *Whistleblowing is the disclosure of information by an employee or contractor alleging willful misconduct carried out by an individual or group of individuals within an organization (Figg 2000). As insiders, whistleblowers are the source of valuable information that neither the government nor the public can get from oversight systems. They are knowledgeable people who know precisely what their organizations are doing. Therefore, whistleblowing is an important means of improving government transparency and accountability*
>
> (Jos 1991; Rosen 1998; Rosenbloom 2003).

This chapter is partly revised from the original article, “What makes whistleblowing effective: Whistleblowing in Peru and South Korea” published in *Public Integrity 13*(2), pp. 113–130 and published here with a copyright permission from Taylor & Francis.

C.R. Apaza (✉)
Facultad de Ciencias Administrativas y Recursos Humanos,
Universidad de San Martín de Porres, Lima, Peru
e-mail: capaza1@yahoo.com

Y. Chang
Department of Public Management and Policy Analysis Program,
Graduate School of International Relations, International University of Japan,
Niigata, Japan
e-mail: yjc2015@iuj.ac.jp

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_1

Abstract Is whistleblowing effective—does it really work? What elements make the process effective? Apaza and Chang answer these inquiries by analyzing previous works on whistleblowing and identifying factors that influenced the final outcomes of blowing the whistle. Through this analysis, the authors identify five factors known to influence effective whistleblowing: type of whistleblowing, role of mass media, documentation of evidence, retaliation, and legal protection. Those factors are then evaluated through a case study method (e.g. archival and pattern-matching research methodology).

Keywords Effective whistleblowing · Factors of effectiveness · Case study · Type of whistleblowing · Role of mass media · Documentation of evidence · Retaliation and legal protection · Archival research · Pattern-matching research

But is whistleblowing effective—does it really work? What elements make the process effective? To help address these questions, four cases are compared here. In most instances, authorities successfully prosecuted or punished prominent public figures in spite of high-level corruption and official cover-ups. Each case had strong political, legal, and social repercussions that at least promised permanent reforms. Yet, analyzing effectiveness is hampered by lack of formal standards in process, research that evaluates effectiveness, and research outside the United States.

Studies of whistleblowing have delved into why employers do not want whistleblowing to occur (Lovell 2003; Miceli and Near 1984; Miceli, Near, and Schwenk 1991; Qusqas and Kleiner 2001), why employees blow the whistle (Appelbaum et al. 2006; Brewer and Selden 1998; Menzel and Benton 1991), and how whistleblowing influences government policies (Johnson and Kraft 1990).

Relatively few studies offer international or comparative perspectives. Notable among these are comparative works by Johnson (2004) and Calland and Dehn (2004). Johnson compared whistleblower protection in the United States, Russia, India, and Israel, considering their political, social, and cultural conditions. Calland and Dehn (2004) introduced whistleblowing cases in the United States, China, Scotland, and South Africa and discussed legal responses and nonprofit organizations in the United States, the United Kingdom, Japan, South Africa, and Australia. Although they offered many insights and suggested points of comparison,

these studies did not develop a comparative analysis or evaluation of effectiveness in the whistleblowing process.

This focus on effectiveness has important implications for many areas of law and public policy. For example, if legal protection for whistleblowers is a factor in effectiveness, it follows that a democratic society should support whistleblower protection laws. Asking if and why whistleblowing works can also help set priorities in this expanding field of law. About 30 countries have enacted relevant laws. However, only a few, such as the United Kingdom, South Africa, the United States, Canada, and Japan, have comprehensive statutes (Banisar 2006).

Near and Miceli (1995) defined effectiveness in whistleblowing as "the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistle-blowing and within a reasonable time frame" (p. 681). Dworkin and Baucus (1998) suggested that effectiveness is attained "if the organization launched an investigation into the whistleblower's allegations—on their own initiative or required by a government agency, or if the organization took steps to change policies, procedures, or eliminate wrongdoing" (p. 1289). Ellison et al. (1985) suggested that successful whistleblowing should have two components. The first, "Did they achieve what they had in mind?" and the second, "Did others, in some way, heed their warnings?" (p. 17).

Yet, common sense immediately suggests other important benchmarks of reform, such as whether authorities prosecuted the wrongdoers or punished them for their crimes. Even with more benchmarks for reform, the resulting definition is too narrow for analyzing and evaluating the whistleblowing process as a whole. After all, examining other consequences of the original whistleblowing, such as political disruption and retaliation against whistleblowers, might yield a different assessment of cases.

Based on the literature, Apaza and Chang (2011) define effective whistleblowing as an action which: (1) makes the organization launch an investigation; (2) causes it to take steps to change policies or procedures; (3) terminates the wrongdoing within a reasonable time frame; and (4) results in no retaliation to whistleblowers, due to the availability of appropriate legal protection. In other words, Apaza and Chang (2011) identified five factors known to affect whistleblowing:

(1) Type of whistleblowing
(2) Role of mass media

(3) Documentation of evidence
(4) Retaliation
(5) Legal protection

Research suggests that the presence (or absence) of these factors creates similar effects in different countries despite differences in cultural and social settings.

First, an external whistleblower is a person who reports an organization's illegal, immoral, or illegitimate workings to someone outside the organization; an internal whistleblower reports wrongdoing to someone inside the organization (Dworkin and Baucus 1998). According to the literature, external whistleblowing is more effective than internal. Rothschild and Miethe's (1999) interview results show that "44% of the external whistleblowers thought that their organization had changed its practices as a result of their disclosure," while only "27% of the internal whistleblowers thought that their organization had changed its practices as a result of their disclosure" (p. 126). Dworkin and Baucus (1998) also suggest external whistleblowing is more effective than internal because it often sparked investigations or other remedial actions by the organization. However, while external whistleblowing may be effective in stimulating change, external whistleblowers experience more severe retaliation than internal ones.

Second, even though mass media play obvious and critical roles, specific research about its impact on whistleblowing is scarce. Callahan and Dworkin (1994) analyze data from two studies from the Database of Merit Systems Protection Board (MSPB), and from James Perry's 1990 work, and suggest that employees are likely to use media as an external whistleblowing channel when there is no effective response to an internal report, when the top level of management is involved, or when they fear retaliation from employers above the level of their supervisors (Callahan and Dworkin 1994). Ellison et al. (1985) pointed out several reasons for whistleblowers favoring the media in blowing the whistle: they can enjoy anonymity, make supporting documents public, and release the information at an appropriate time.

Third, research suggests that when employees have objective evidence of misconduct, whistleblowing will be more successful. For whistleblowers, who need to get through thorny legal processes and investigations, the strength of the evidence should be the first element to consider in deciding to blow the whistle. According to Near and Miceli (1995), when the whistleblowers have better quality evidence, it is more likely that

they will choose external channels to blow the whistle. Similarly, Dworkin and Baucus (1998) have found that "external whistleblowers often have greater evidence or a witness" (p. 1294).

Fourth, retaliation against whistleblowers is very common and severe. About 60% of them answered that they either were fired or were forced to resign (Jos, Tomkinson, and Hays 1989). Rothschild and Miethe (1999) also found that 69% of whistleblowers lost their jobs or were forced to retire, 68% received negative job performance evaluations, and 64% were blacklisted from getting another job in the same field. Rothschild and Miethe (1999) suggested that retaliation against external whistleblowers is more common than that against internal whistleblowers because external whistleblowing commonly brings adverse publicity. In reaction to adverse publicity, organizations use more comprehensive forms of retaliation against external reporting (Dworkin and Baucus 1998).

Even in countries where there is appropriate legal protection, whistleblowers experience retaliation, thus discouraging employee involvement in whistleblowing. In the United States, whistleblowers have experienced serious retaliation in spite of the Civil Service Reform Act of 1978 (CSRA) and the Whistleblower Protection Act of 1989 (WPA), which provide statutory protections for federal employees who blow the whistle on fraud, waste, and abuse. In a 2005 survey conducted by the MSPB, about 20% of respondents said they had been denied a job promotion because of whistleblowing (Apaza 2008). Retaliation is even more severe where there is no appropriate legal protection. For example, Jiang Yanyong, who blew the whistle on the Chinese government's attempt to keep secret the spread of SARS, went to jail (Jakes 2003), and an Indian whistleblower, Satyendra Kumar Dubey, who spoke out about road construction project corruption, was killed (Devraj 2003).

Fifth, based on the detailed description of whistleblowing in the United States, Israel, Russia, and India, Johnson (2004) emphasizes that "the presence of independent, fair, strong, and effective laws and law enforcement agencies" is one of the most important variables in reducing the levels of corruption in a country (p. 155). She also mentions that because its laws encourage whistleblowing and protect the whistleblowers, the United States has more whistleblowers than anywhere else in the world (p. 41). Whistleblower protection laws are now becoming popular globally as about 30 countries have enacted national laws on whistleblowing. However, only a few countries, such as the United Kingdom, South

Africa, the United States, Canada, and Japan have comprehensive laws (Banisar 2006). Protection statutes help to encourage whistleblowing by making the process safer and fostering a favorable environment for those who disclose misconduct (Kaplan 2001). Such laws reduce the chances of retaliation against whistleblowers by their employers or colleagues and can change "organizational culture to view whistleblowing as a civic obligation and public virtue, rather than insubordination, snitching, or tattling" (Rosenbloom 2003, p. 133).

1 Methodology

To evaluate the aforementioned factors influencing effective whistleblowing, this study adopts the case study method. A case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident (Yin 2003, p. 13). The case study method is well suited to whistleblowing research because it can show conditional findings in detail and can examine interactions of a cause-and-effect relationship (Jensen and Rodgers 2001). Case analysis enables scholars to build concepts and theories of public administration research with systematic knowledge (Rosenbloom 1994) and can help practitioners understand "what to do and what to avoid, what works and what does not in specific circumstances" (p. 44).

Applying the case study method, this study considers four units of analysis referring to effective whistleblowing in Peru, South Korea, Thailand, and the United States. The cases had similarities that invited further analysis and predicted parallel results (Yin 2009, p. 54).

References

Apaza, C. (2008). *Whistleblowing and the Federal Employee: Effective Legal Protection, Open Communication and Organizational Attitude*. PA Times, ASPA. Special Section, p. 6.

Apaza, C., & Chang, Y. (2011). What makes whistleblowing effective: Whistleblowing in Peru and South Korea. *Public Integrity*, *13*(2), 113–130.

Appelbaum, S. H., Kirandeep, G., Mousseau, H., & John, M. (2006). Whistleblowing: International Implications and Critical Case Incidents. *Journal of American Academy of Business*, *10*(1), 7–13.

Banisar, D. (2006, March 23–25). *Whistleblowing International Standards and Developments*. Paper presented at the Primera Conferencia International Sobre Corruption y Transparencia, Ciudad de Mexico.

Brewer, G. A., & Selden, S. C. (1998). Whistle Blowers in the Federal Civil Service: New Evidence of the Public Service Ethics. *Journal of Public Administration Research and Theory*, *8*(3), 413–439.

Callahan, E. S., & Dworkin, T. M. (1994). Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers. *American Business Law Journal*, *32*(2), 151–184.

Calland, R., & Dehn, G. (Eds.). (2004). *Whistleblowing Around the World*: Law, Culture, and Practice. London: Public Concern At Work (PCAW) and the Open Democracy Advice Centre (ODAC).

Devraj, R. (2003). Murder Revives Indian Whistleblowers' Bill. *Asia Times*. Available at http://www.atimes.com/atimes/South_Asia/EL12Df02.html.

Dworkin, T. M., & Baucus, M. S. (1998). Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes. *Journal of Business Ethics*, *17*(12), 1281–1298.

Ellison, F., Keenan, J., Lockhart, P., & Schaick, J. V. (1985). *Whistleblowing Research: Methodological and Moral Issues*. New York: Praeger Publishers.

Figg, J. (2000). Whistleblowing. *Internal Auditor*, *57*(2), 30–37.

Jakes, S. (2003). Jiang Yanyong. Time. Available at http://www.time.com/time/asia/2003/poypm2003/jiang_yanyong.html. Accessed September 27, 2009.

Jensen, J. L., & Rodgers, R. (2001). Cumulating the Intellectual Gold of Case Study Research. *Public Administration Review*, *61*(2), 235–246.

Johnson, R. A. (Ed.). (2004). *The Struggle Against Corruption*. New York: Palgrave Macmillan.

Johnson, R. A., & Kraft, M. E. (1990). Bureaucratic Whistleblowing and Policy Change. *The Western Political Quarterly*, *43*(4), 849–874.

Jos, P. H. (1991). The Nature and Limits of the Whistleblower's Contribution to Administrative Responsibility. *American Review of Public Administration*, *21*(2), 105–118.

Jos, P. H., Tompkins, M. E., & Hays, S. W. (1989). In Praise of Difficult People: A Portrait of the Committed Whistleblower. *Public Administration Review*, *49*(6), 552–561.

Kaplan, E. (2001). The International Emergence of Legal Protections for Whistleblowers. *The Journal of Public Inquiry*, Fall/Winter, 37–42.

Lovell, A. (2003). The Enduring Phenomenon of Moral Muteness: Suppressed Whistleblowing. *Public Integrity*, *5*(3), 187–204.

Menzel, D. C., & Benton, E. (1991). Ethics Complaints and Local Government: The Case of Florida. *Journal of Public Administration Research and Theory*, *1*(4), 419–435.

Miceli, M. P., & Near, J. P. (1984). The Relationships among Beliefs, Organizational Position, and Whistleblowing Status: A Discriminant Analysis. *The Academy of Management Journal*, *27*(4), 687–705.
Miceli, M. P., Near, J. P., & Schwenk, C. R. (1991). Who Blows the Whistle and Why? *Industrial and Labor Relations Review*, *45*(1), 113–130.
Near, J. P., & Miceli, M. P. (1995). Effective Whistle-Blowing. *The Academy of Management Review*, *20*(3), 679–708.
Qusqas, F., & Kleiner, B. H. (2001). The Difficulties of Whistleblowers Finding Employment. *Management Research News*, *24*(3/4), 97–100.
Rosen, B. (1998). *Holding Government Bureaucracies Accountable* (3rd ed.). Westport: Praeger Publishers.
Rosenbloom, D. H. (1994). The use of case studies in public administrative education in the USA. *Journal of Management History*, *1*(1), 33–46.
Rosenbloom, D. (2003). *Administrative Law for Public Managers.* Boulder, Colorado: Westview Press.
Rothschild, J., & Miethe, T. D. (1999). Whistle-Blower Disclosures and Management Retaliation. *Work and Occupations*, *26*(1), 107–128.
Yin, R. K. (2003). *Case Study Research: Design and Methods* (3rd ed.). Thousand Oaks, CA: Sage Publications, Inc.
Yin, R. K. (2009). *Case Study Research: Design and Methods* (4th ed.). Thousand Oaks, CA: Sage Publications, Inc.

Carmen R. Apaza is a professor at Universidad de San Martin de Porres. Her research interests include corruption in government, public sector reforms, and development. She has held managerial positions in the Peru's public sector and served as Principal Expert in Public Administration for the Organization of American States. She has taught at American University, City University of New York, and Eastern Washington University.

Yongjin Chang is an assistant professor at the Graduate School of International Relations of the International University of Japan. He received his Ph.D. in public administration from the School of Public Affairs at American University in 2008 and worked as a research professor at Korea University from 2010 to 2015.

CHAPTER 2

Whistleblowing in Peru

Carmen R. Apaza

Abstract Apaza analyzes the first publicly known whistleblowing case in Peru during the Fujimori administration. The chapter also draws attention to the crucial structural and organizational changes that the whistleblowing case caused in the entire executive branch as many officials were fired, including the whistleblower. Apaza highlights the role of external whistleblowing mass media (i.e. TV channels and newspapers) and strong evidence (i.e. videos of illegal activity, thousands of pages of documents submitted to Congress and the public prosecutor) influencing the effectiveness of the whistleblowing case. Big reforms were made in government because of this case even though there was no legal protection against retaliation.

Keywords Whistleblowing in Peru · Fujimori administration · Videos of illegal activity · Government reforms · Legal protection · Retaliation

---

This chapter is partly revised from the original article, "What makes whistleblowing effective: Whistleblowing in Peru and South Korea" published in *Public Integrity 13*(2), pp.113–130 and published here with a copyright permission from Taylor & Francis.

C.R. Apaza (✉)
Facultad de Ciencias Administrativas y Recursos Humanos, Universidad de San Martín de Porres, Lima, Peru
e-mail: capaza1@yahoo.com

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_2

1 Introduction

According to Transparency International Corruption Perceptions Index 2013,[1] Peru has a score of 38 on a scale of 0 (very corrupt) to 100 (very clean). In previous indexes, Peru obtained similar low scores. Among the many reasons for such scores is the lack of an efficient whistleblowing legal framework.[2]

Although laws and regulations on public service ethics exist (e.g. Law N° 27815—*Ethics Code for the Public Servants*, and Supreme Decree 033-2005-PCM *Regulation of the Law on Ethics Code and the Public Function*),[3] they are unclear and/or insufficient regarding whistleblowing protection. For instance, Articles 19 and 21 of Supreme Decree No 33-2005-PCM establish that every public entity is responsible to design, apply, and release incentives and stimuli, as well as protection mechanisms for civil servants. However, these protection mechanisms are not clearly defined in most public institutions.

Basically, there are no formal mechanisms through which civil servants can report corruption (i.e. phone hotline, e-mail address, or local office).[4] According to Law N° 27785, there should be an internal auditor inside every public institution, who could receive corruption reports.[5] But few public entities have established an office (other than the internal auditor) to receive corruption denunciations. These entities include CADER (Comisión de Atención de Demandas y Reclamos) inside the Ministry of Education, Defensoria del Asegurado inside Peru's Social Security Health System (ESSALUD), and the Defensoria de la Salud inside the Ministry of Health.[6] The remaining vast majority of public institutions lack adequate channels to report wrongdoings. Thus, blowing the whistle on public corruption has been relatively rare and corruption cases have proved difficult to prosecute.

2 Description of the Case

The whistleblowing case analyzed in this chapter is one of the most serious corruption cases disclosed through whistleblowing in Peru. It caused not only a crisis in the bureaucracy but also a huge political storm that affected the presidency. It happened at the end of President Fujimori's second term of administration.

2.1 Socio-Political Context of the Case

Mr. Alberto Fujimori became president of Peru in 1990 after winning the presidential election with more than 60% of the national vote (Election Watch 1990). He campaigned as a non-politician who just wanted to help Peruvians succeed in their fight against poverty and corruption. A catch-phrase of his campaign was "integrity, technology, and jobs."

During his first term (1990–1995), President Fujimori reformed a number of public organizations, including the Peruvian Customs Service that experienced a lot of trouble with corruption. In 1991, the Fujimori administration obtained a loan from the Inter-American Development Bank to modernize Customs (De Wulf and Sokol 2004). President Fujimori appointed Mrs. Carmen Higaonna, a highly competent economic engineer, as National Superintendent of Customs and asked her to implement the modernization of the National Customs Service. Higaonna succeeded impressively in modernizing this organization. For instance, after the reform by 1996, Customs tax collection represented about 35% of the national revenue (International Trade Centre 2007), a figure higher than the 23% in 1990.

The success in modernizing public institutions permitted Mr. Fujimori to win re-election for a second term (1995–2000). But, during his second presidential term, the media exposed several expensive instances of political and bureaucratic corruption. Fujimori's legal adviser Vladimiro Montesinos seemed to be involved in most of the cases. The denunciations were overlooked, however, because evidence was not sufficient to prosecute.

At the beginning of 1999, Mr. Fujimori was in the midst of his political campaign for a third presidential term when the whistle was blown.

2.2 The Whistle Is Blown

On March 21, 1999, in a popular Peruvian television program *Panorama*, broadcasted by Channel 5, Mr. Jorge Mufarech, at that time the Minister of Labor and Chief of the National Commission Against Customs Fraud and Contraband, denounced alleged corruption in the Customs Administration amounting to millions of dollars. He pointed out that the National Intendent of Customs Enforcement, the Head of Statistics and Data Processing Division, and other managers and head of divisions were involved in the

corruption cases forming an alleged corruption network inside Customs.[7] Mufarech said that he had documents and a video supporting his denunciation and that he would give these documents to the public prosecutor. Also, he mentioned that Mr. A, who at that time was serving as a Chief of Press for the National Superintendency of Customs, had submitted key documents to him for the purpose of making a public denunciation of the corruption case.[8]

On March 28, 1999, TV Channel 5 broadcast a video in which the then Head of Division of Customs Inspection and Audit was allegedly receiving money from a representative of a large importer, against which there were numerous allegations of fraud. In the video, the official seemed to be engaging in a friendly conversation with the representative; before ending the conversation, the representative handed the official a sum of money, and then shook hands.[9]

Contrary to what people expected, President Fujimori declared to the media his support for Mrs. Higaonna, the National Superintendent of Customs. He said that she had made extraordinary efforts in modernizing Customs and combating contraband. However, he did not deny that there could be corrupt public officials inside Customs. Thus, President Fujimori instructed his prime minister, Victor Joy Way, to follow the investigations carefully. He affirmed that, if the public officials denounced by Mufarech were found guilty, they would be severely punished.[10] In the same vein, Higaonna declared to the media that if some of Customs' employees were really involved in corruption, she would immediately punish them.[11]

2.3 Investigations

By April 1, Mufarech had finished submitting to Ad Hoc Public Prosecutor, César Alegre, a document entitled "Atestado Policial N° 003-99-Aduanas-UIE," which provided extensive information supporting his denunciations.[12] It gave detailed information about very organized groups of people who committed contraband in the Peruvian southern region. According to the document, those people imported contraband from Bolivia by using big trucks that were not inspected by the police or by Customs officials. However, the document did not have the names of the Customs officials involved. Therefore, the Ad Hoc Public Prosecutor requested further investigation.[13]

President Fujimori declared to the media that Alegre would quickly and duly investigate Mufarech's denunciation. Thus, Alegre had to work even Saturdays and Sundays.[14]

After receiving more documents from Mufarech, Alegre discovered the presence of about 50 importers and 40 Customs employees allegedly involved in the case As a result, the prosecutor cited the people involved in the denounced corruption case in order to make a declaration before the National Fiscal Office.[15]

Higaonna announced to the press that she was willing to resign from Customs while the investigation was conducted. "I do not have anything to hide. I have already given my declaration to the public prosecutor. Peruvian Customs has a good reputation inside and outside the country. This good image is being damaged by Mufarech's unproven denunciation," she said.[16]

In Congress, Mr. Mufarech declared his accusations against some Customs heads.[17] He affirmed that he had submitted to the public prosecutor a document of more than 1000 pages[18] supporting his denunciation. After listening to Mufarech's arguments, the Congress decided to form three Enforcement Commissions in order to analyze Mufarech's denunciation and to determine responsibilities.[19]

2.4 Consequences of the Whistleblowing

Immediately after Mufarech denounced alleged corruption in Customs on TV Channel 5, and while the Ad Hoc Public Prosecutor conducted the corresponding investigations, other Peruvian TV channels broadcasted a series of additional videos revealing alleged corruption committed by high-ranking public officials in many other public institutions.

These exposures had immediate bureaucratic and political repercussions. At the bureaucratic level, on March 25, 1999, the accused managers from the National Superintendency of Customs were suspended from their positions.[20] At the political level, Mufarech's denunciations caused uncertainty and political instability in government. Fujimori tried to solve the executive crisis by conducting an immediate evaluation of the ministerial cabinet. Thus, he asked all his ministers to submit their letters of resignation. By mid-April 1999, Fujimori accepted the resignations submitted by Jorge Mufarech, Minister of Labor; Carlos De Romaña, Minister of Health; Felipe García, Minister of Education; Belisario de las Casas, Minister of Agriculture; María Rizo, Minister of the Presidency; and María Luisa Cuculiza, Minister of Women.[21]

On April 18, 1999, Mrs. Higaonna resigned from her position as National Superintendent of Customs. Fujimori accepted her resignation

in order to permit better investigation into the denunciations made by Mufarech.[22]

But these political movements did not solve the government crisis. Political pressure was so severe that Fujimori fled Peru to Japan at the end of 1999. From Japan, he resigned from his position instead of completing his term that would have ended in July of 2000. After a long extradition process, Fujimori returned to Peru to face an extensive and much-publicized criminal proceeding before the Special Criminal Division of the Supreme Court. On April 4, 2009, Fujimori was sentenced to 25 years in prison.[23]

3 Analysis

3.1 Documentation of Evidence

This whistleblowing case counted on objective evidence such as documents of more than 1000 pages and a video showing an alleged bribery case in the Customs administration. But how was this documentation obtained?

By March 1999, Mr. A, at the time Chief of Press for the National Superintendency of Customs, had been working for Customs for seven years. He had access to critical information about contraband and Customs fraud. In a press interview dated April 19, 1999, Mr. A said that on February 16th and 17th he was told to initiate a complaint against Mufarech, at the time Minister of Labor and Chief of the National Commission Against Customs Fraud and Contraband, because he was gathering a lot of information about Customs fraud which had led him to publicly criticize Customs' management.[24] Instead of doing that, Mr. A gathered all the necessary information to support a denunciation against some Customs Enforcement Managers who had allegedly been committing fraud. Thus, in the third week of March of 1999, Mr. A allegedly submitted Customs' reserved information to Mufarech.

Regarding the video, according to Customs' Public Prosecutor at the time, Miguel Molleda, a large importing firm filmed the video in 1996. It was not made to denounce a corruption case but to impress Customs' managers. It was not meant to punish them for committing Customs fraud.[25] It is unclear though how Mufarech got the video. Nevertheless, what is crucial is that this video was the first one of a series of videos showing alleged corruption in Fujimori's administration.

3.2 Type of Whistleblowing

Both whistleblowers, Mr. A and Jorge Mufarech, used external whistleblowing mechanisms. Mr. A did not report the alleged corruption instances to his boss at Customs or to the Internal Audit Office inside Customs, he allegedly preferred to submit all the information to Mufarech. In the same way, Mufarech went to blow the whistle on TV Channel 5 instead of reporting to the Head of the Ministerial Cabinet or to his boss, the President.

Dworkin and Baucus (1998) maintain that the choice of internal versus external channels may vary depending on the employee's level of education, training, or skills. These authors say that highly educated or skilled employees often have greater knowledge of where to report wrongdoing, including possible alternative reporting channels within the firm if normal avenues appear blocked or upper management refuses to respond to the employee's information. Mr. A, being a smart journalist, knew that the Customs' internal procedure to make a denunciation of corruption was through the internal audit office. However, he preferred denouncing outside the Customs office aiming to assure proper investigation of the case.

3.3 Role of Mass Media

In this particular case, we can clearly identify the power of mass media such as television and the press. Experts have mentioned that the media is the fourth power in the government. Mufarech knew that the best way to make Peruvians pay attention to his denunciation was by denouncing it through the mass media (i.e. TV Channel 5 that covered almost all regions of Peru).

The media broadcast videos that documented the corruption, covered all investigation procedures, and followed up the corruption investigations in the judiciary system. This media attention created strong public pressure on the government, and Fujimori used the media to respond. However, the revelations made it difficult for Fujimori to convince the public of his administration's integrity. Fujimori's statement, "In my government there is no corruption,"[26] aroused widespread skepticism after the videos on corruption were broadcast.

During 1999, after Mufarech's resignation, almost every night, national news program broadcast a new video showing corrupt public administrators and politicians. The Enforcement Commission of the Congress presented some videos and Fujimori's political opponents presented other videos.

3.4 Retaliation/Legal Protection

According to the Peruvian Constitution, there is freedom of media and public opinion.

Basically, any individual or organization may own a media business. At the time of the case study more than 20 newspapers and 7 TV channels were freely working. Moreover, there were several radio stations and magazines on all subjects. But there was no regulation for protecting whistleblowers. This meant that if a public official wanted to reveal a corruption case committed by another public official, he/she would face possible retaliation from the denounced person. Therefore, there was almost no denunciation through whistleblowing until Mr. A and Mufarech's denunciations. But blowing the whistle caused a lot of trouble to both of them.

It is not unnatural for employers and supervisors to harbor resentment toward an individual who has reported or testified about wrongdoing in the organization (Zachry 1998). Certainly, after Mr. A blew the whistle, all managers and some coworkers looked at him as a "traitor." He lost his job. Mufarech was also seen as traitor by other Fujimori's ministers. He was pressed to step down. However, the public looked at them as "Heroes of Democracy."

3.5 Impact and Resulting Reforms

Mufarech's whistleblowing caused structural and organizational changes in the Customs service. It also affected the entire executive branch as many officials were fired, and six ministers left their positions. It could be said that the wrongful practice was partly terminated within a reasonable time frame (less than two months).

The fact that the denunciation was made by one of President Fujimori's ministers made Peruvians doubt the integrity of the administration. In a survey conducted by the University of Lima, the level of approval for the administration, at the time, was only 28.5%. Another survey, conducted by the private agency Apoyo, gave an approval rating of 42%.[27]

Mufarech's denunciation was highly delicate. The president faced such strong public pressure against his administration that he declared to the press that the denounced case should be investigated. "If investigations confirm Mufarech's denunciation, the corrupt Customs officials will definitely have to be suspended," the President said.[28]

Public demand grew for more thorough investigation both of this case and of corruption in general. The government launched a quick and

in-depth investigation conducted by an ad hoc public prosecutor and overseen by the prime minister and Congress. But Fujimori's efforts did not successfully tackle the crisis.

The events in this case took place at high levels of government and had widespread social and political repercussions. Reforms did take place as a direct result of the whistleblowing. Some of these changes even happened soon after the whistle blew. However, the conviction process in the case of Fujimori took more than nine years. See below a summary table of the case (Table 2.1) and an effectiveness indicators table of the case (Table 2.2).

Table 2.1 Summary table of the case

Initial whistleblowing	Charges by a cabinet minister of corruption in another agency of the government
Resulting reforms	Suspension of accused managers Launching of congressional commission Many prosecutions for corruption soon after event Resignation of cabinet ministers
Type of whistleblowing	External, by television interview
Role of mass media	Initial revelations on television; broadcasting of video evidence; extensive coverage by newspapers
Documentation of evidence	Videos Documents submitted to Congress and public prosecutor
Retaliation	Whistleblower lost his position.
Legal protection	No specific protection for whistleblowers

Table 2.2 Effectiveness indicators of the case

Indicators	Peru
Reforms of wrongdoing	Suspension of accused managers Launching of Congressional commission Resignation of cabinet ministers Many successful prosecutions for corruption
External whistleblowing	Through television
Extensive mass media coverage	Initial revelations on television; broadcasting of video evidence; extensive coverage by newspapers
Strong evidence	Videos of illegal activity Thousands of pages of documents submitted to Congress and public prosecutor
Legal protection against retaliation	None

4 Summary and Conclusion

4.1 *Summary*

In this case, the whistleblower Mufarech, a former Minister of Labor during the Fujimori administration, revealed expensive alleged public corruption in Customs through a very popular TV political program called *Panorama*, Channel 5. He provided *Panorama* a video showing a Customs' division head receiving money from an importer. Allegedly, the public official received the money from a representative of an importer company in order to avoid harmful Customs fraud. This alleged corruption case created a big political scandal and caused uncertainty in the whole Peruvian society. Moreover, it had the effect of a bomb inside the executive office of President Fujimori. In the end, the whistleblowing caused structural and organizational changes in the Customs service. It also affected the entire executive branch as many officials resigned or were fired, including the whistleblowers.

4.2 *Conclusion*

We can conclude that external whistleblowers tend to be more effective in changing organizational practices. External whistleblowers also experience more extensive retaliation than internal whistleblowers, and patterns of retaliation by management against the whistleblower vary depending on whether the whistleblower reports internally or externally.

In this case the objective evidence (documents and a video) was extremely important to the success of whistleblowing in a corruption case. Convincing evidence is an important indicator. However, the expanded assessment indicates that effectiveness in whistleblowing may not be that simple to achieve. While it may be relatively easy to dismiss officials, pass laws, form investigative committees, and prosecute corruption, it is more difficult to gather documented evidence and protect whistleblowers from retaliation.

This case helps demonstrate the need for transparency and accountability in government and thus for strong anti-corruption laws. The case illustrates the importance of free speech and of an independent press as well. The results also suggest that Peru should enact a whistleblower protection law and establish a better whistleblowing system. Proper channels for reporting wrongdoing and unethical behavior inside government will help authorities to discover and deter corruption and fraud.

Notes

1. Transparency International 2013: Corruption Perceptions Index 2013. Available at: http://www.transparency.org/cpi2013/results
2. MESICIC, 2009, pp. 30–32, 57.
3. Law N° 27815—Ethics Code for the Public Servants–Ley del Código de Etica de la Función Pública published on August 13, 2002 in *Diario Oficial El Peruano*; Supreme Decree 033-2005-PCM- Regulation of the Law on Ethics Code and the Public Function "–Aprueban Reglamento de la Ley del Código de Etica de la Función Pública—published on April 19, 2005 in *Diario Oficial El Peruano*. Also, Supreme Decree No. 005-90-PCM—Administrative Career Law—"Ley de Bases de la Carrera Administrativa y de Remuneraciones del Sector Público y su Reglamento.
4. Law N° 27785—Ley Orgánica del Sistema Nacional de Control y de la Contraloría General de la República; Resolución de Contraloría General N° 443-2003-CG—approves the Service to Receive "denuncias" (denounces).
5. Law N° 27785 Ley Orgánica del Sistema Nacional de Control y de la Contraloría General de la República.
6. Global Integrity: Peru Integrity Indicators Scorecard. Available at: http://report.globalintegrity.org/Peru/2007/scorecard/60
7. *Diario la República*, March 27, 1999.
8. *Diario la República*, March 22, 1999.
9. *Diario la República*, April 12, 1999.
10. *Diario la República*, March 23, 1999.
11. *Diario la República*, March 23, 1999.
12. *Diario la República*, March 23, 1999.
13. *Diario la República*, April 1, 1999.
14. *Diario la República*, April 12, 1999.
15. *Diario la República*, April 9, 1999. *Diario la República*, April 12, 1999.
16. *Diario la República*, March 23, 1999.
17. *Diario la República*, April 7, 1999.
18. *Diario la República*, April 10, 1999.
19. *Diario la República*, April 14 1999.
20. *Diario la República*, March 25, 1999; *Diario la República*, March 23, 1999; *Diario la República*, March 26, 1999.
21. *Diario la República*, April 14 1999.
22. *Diario la República*, April 18, 1999.
23. *Diario La República,* April 4, 2009
24. *Diario la República*, April 19, 1999.
25. *Diario la República*, March 30, 1999.
26. *Diario la República*, April 24, 1999
27. *Diario la República*, April 23, 1999.
28. *Diario la República*, March 23, 1999.

References

De Wulf, Luc and José B. Sokol, editors. (2004). Customs Modernization Initiatives. Case Studies. Washington DC: The World Bank, P. 65.

Diario la República, Lima, Peru. (1999, March 22). http://www.3.larepublica.com.pe/1999/MARZO/pdf22/politica.htm.

Diario la República, Lima, Peru. (1999, March 23). http://www.3.larepublica.com.pe/1999/MARZO/pdf23/politica.htm

Diario la República, Lima, Peru. (1999, March 25). http://www.3.larepublica.com.pe/1999/MARZO/pdf25/politica.htm.

Diario la República, Lima, Peru. (1999, March 26). http://www.3.larepublica.com.pe/1999/MARZO/pdf26/politica.htm.

Diario la República, Lima, Peru. (1999, March 27). http://www.3.larepublica.com.pe/1999/MARZO/pdf27/politica.htm.

Diario la República, Lima, Peru. (1999, April 1). http://www.3.larepublica.com.pe/1999/APRIL/pdf1/politica.htm.

Diario la República, Lima, Peru. (1999, April 7). http://www.3.larepublica.com.pe/1999/ABRIL/pdf7/politica.htm.

Diario la República, Lima, Peru. (1999, April 9). http://www.3.larepublica.com.pe/1999/APRIL/pdf9/politica.htm.

Diario la República, Lima, Peru. (1999, April 10). http://www.3.larepublica.com.pe/1999/ABRIL/pdf10/politica.htm.

Diario la República, Lima, Peru. (1999, April 12). http://www.3.larepublica.com.pe/1999/ABRIL/pdf12/politica.htm

Diario la República, Lima, Peru. (1999, April 14). http://www.3.larepublica.com.pe/1999/ABRIL/pdf14/politica.htm.

Diario la República, Lima, Peru. (1999, April 18). http://www.3.larepublica.com.pe/1999/APRIL/pdf18/politica.htm.

Diario la República, Lima, Peru. (1999, April 19). http://www.3.larepublica.com.pe/1999/APRIL/pdf19/politica.htm.

Diario la República, Lima, Peru. (1999, April 23). http://www.3.larepublica.com.pe/1999/APRIL/pdf23/politica.htm.

Diario la República, Lima, Peru. (2009, April 4). http://www.larepublica.pe/sentencia-fujimori/07/04/2009/ujimori-es-sentenciado-25-anos-de-prision-por-delitos-contra-los-ddhh.

Dworkin, T. M., & Baucus, M. S. (1998). Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes. *Journal of Business Ethics*, *17*(12): 1281–1298.

Election Watch. (1990). Election Results June 1990- September 1990. *Journal of Democracy*, *1*(4), 126–127.

Global Integrity: Peru Integrity Indicators Scorecard. Available at: http://report.globalintegrity.org/Peru/2007/scorecard/60.

International Trade Centre. (2007). *Fostering Trade through Public-Private Dialog. Moving Goods, Services and People Across Borders*. Available at: http://www.intracen.org/btp/issues/services/publications/services_oct07_part1.pdf.

MESICIC (Committee of Experts on the Mechanism for Follow-up on the Implementation of the Inter-American Convention Against Corruption). Peru, Final Report for the Third Round of Review (2009, September 18).

Transparency International Corruption Perceptions Index. 2013. Available at: http://www.transparency.org/cpi2013/results

Zachry, M.-K. (1998). Whistleblowers protected in varied settings. *Supervision, March*, *59*, 1–3.

Carmen R. Apaza is a professor at Universidad de San Martin de Porres. Her research interests include corruption in government, public sector reforms, and development. She has held managerial positions in Peru's public sector and served as Principal Expert in Public Administration for the Organization of American States. She has taught at American University, City University of New York, and Eastern Washington University.

CHAPTER 3

Whistleblowing in South Korea: The Case of Woo Suk Hwang

Yongjin Chang

Abstract Chang analyzes a whistleblowing case about scientist Hwang's academic misconduct in South Korea. The author addresses the whole process of whistleblowing conducted by two former researchers and TV program producers about Dr. Hwang's data fabrication and illegal egg donation. The chapter also draws attention to the social impact this case caused in the public as South Korea society holds ethics and honesty in high esteem. Chang highlights the role of external whistleblowing through television and mass media. Although the whistleblowers did not have substantial evidence or legal protection against retaliation, they got Hwang's public renunciation of falsified results and the firing of accused scientists.

Keywords Hwang's data fabrication · Illegal egg donation · External whistleblowing · Falsified results · Social impact

---

This chapter was revised from the original article, "What makes whistleblowing effective: Whistleblowing in Peru and South Korea" published in *Public Integrity 13*(2), pp. 113–130 and published here with a copyright permission from Taylor & Francis.

Y. Chang (✉)
Department of Public Management and Policy Analysis Program,
Graduate School of International Relations,
International University of Japan, Niigata, Japan
e-mail: yjc2015@iuj.ac.jp

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_3

1 Introduction

By the end of 2004, South Korea was totally in chaos because of an academic misconduct scandal of Woo Suk Hwang, a prominent scientist in the field of biotechnology worldwide. People in Korea were stunned by ethical violations and fabrications of the world-reputed, promising Korean scientist. For more than two months, Koreans could read or watch news every day about him and his misconducts. The impact on government was considerable, and this case strongly influenced Korean society.

Not many people, however, were aware that this scandal was uncovered by whistleblowers who had previously worked in Dr. Hwang's lab. If the whistleblowers had not exposed Dr. Hwang's misconduct to the public, Dr. Hwang would have still been considered as one of best scientists worldwide, and the Korean government would have invested billions of dollars into Dr. Hwang's research without careful oversight or would have been deceived by the fake academic results provided by Dr. Hwang. In Korea, many people still think of whistleblowing and whistleblowers as disloyal and betrayers of organizations. We could clearly find this concept in the process of Hwang's scandal. Dr. Hwang's case presents oversight failures of government, university, and academic journals, the importance of whistleblowing, and strong legal protection for whistleblowers.

2 Description of the Case

Until November 2005, Woo Suk Hwang had been an outstanding scientist in South Korea, reputed as a "national hero" in South Korea and a "the world leader" in the field of stem cell research (Park 2005). He was the pride of South Korea, a man who was born in the 1950s after the Korean War, overcame an impoverished childhood, and succeeded as a brilliant professor in the field of biological science, especially in animal and human cloning.

Dr. Hwang and his colleagues published two landmark articles about human cloning in the renowned journal *Science* in 2004 and 2005.[1] The article in 2005 was a breakthrough in human cloning. Dr. Hwang and his research team produced 11 human stem cell lines through therapeutic cloning (Kolata 2005). Scientists in the world praised them: "It is a tremendous advance," "The Koreans' work is incredibly impressive," and "It is a fantastic-a major breakthrough" (Park and Gorman 2005).

His cloned dog, "Snuppy," was chosen as *Time*'s Most Amazing Invention of 2005 (Alice Park 2005). He got the Best Scientist Award in Korea on June 24, 2005, with a promise of a $15 million fund for five years from the Korean government (Han 2006), though the government, unusually, had already invested $65 million to his research (Wade 2005).

His success stories seemed never-ending. No one thought he would be the most disgraceful scientist in recent Korean history until his ethical violations and photo fabrications in his research were revealed by two whistleblowers and broadcasted by a television program in South Korea in December 2005. All oversight systems for scientific misconducts, such as the government, universities, and scientific journals, did not work appropriately at all, except whistleblowing.

2.1 Whistleblowers L & M and PD's Notebook

On the midnight of June 1, 2005, Seung-Ho Choi and Hak-Soo Han, program producers of "PD's Notebook," a weekly television investigative documentary program on Munhwa Broadcasting Company (MBC) in South Korea found an interesting post on the program's Internet discussion board. The title was "About Professor Hwang." Intriguingly and unusually, the person put his specific private information—his name, work, and telephone number on the post (Han 2006).

The person wrote that "I worked at Professor Hwang's laboratory for few years. Dr. Hwang is a national hero, and people respect him truthfully. You may not believe in my story about the articles published in the *Science*. I was hesitant to write this story here because I don't have strong evidence and Professor Hwang is one of the most influential scientists in Korea. After I tell the truth about his research to the public, Korea might lose international reputation in stem cell cloning field and I would be in danger. However, I believe that we cannot hide truth and the reputation based on dishonesty should be vanished in a moment. Please contact me" (Han 2006, 29).

After Mr. Choi and Han had read this post, they decided to meet the person.

On June 3, 2005, Mr. Han met the person (after this, I will call him Whistleblower L) in front of the hospital where Whistleblower L was working. Whistleblower L said "Mr. Han, which is a priority, truth or national interest?" He paused for a while and said. "I think the data in the article Hwang published in 2005 might be fabricated. From a professional's point of view, it is almost impossible to make 11 human embryonic stem cells from

patients' cells yet, and the eggs used in the experiment were paid" (Han 2006, 32, 36). He showed a photocopied note about egg donors who did not know about the side effects of egg extraction and how their eggs would be used. Later, Whistleblower L sent Mr. Han an e-mail about the 2004 article. In the mail, he said the teratoma photos in figure 2 on page 1,672 in the 2004 article were fabricated. Jong-Huk Park, Sun-Jong Kim,[2] and I knew about that. Dr. Hwang ordered and enforced us to do the fabrication (Han 2006).

A few days later Mr. Han met the other whistleblower, the wife of Whistleblower L. She also worked in Dr. Hwang's laboratory and was one of the coauthors in the article published in 2004. She (after this, I will call her Whistleblower M) said that some of the junior members of Dr. Hwang's laboratory donated their eggs.

If all the things that the two whistleblowers said are true, Dr. Hwang violated four ethical standards. First, he used eggs from someone who received payment, not voluntarily donated. Second, he did not inform donors about potential risks of their experiments. Third, he used eggs donated by junior members of his research laboratory. Fourth, he fabricated his data and photos to show superior research results in two articles in Science in 2004 and 2005. All four misconducts are serious ethical violations in the field of biological science. Considering the first three violations, the Declaration of Helsinki, "a statement of ethical principles to provide guidance to physicians and other participants in medical research involving human subjects," requires that human subjects involved in medical experimentations must be volunteers and adequately informed of the potential risks of the research (The Declaration of Helsinki, B-20 and B-22). The declaration also states that physicians should be particularly careful when human subjects are in a dependent relationship with the physicians or may assent under pressure. In this case, a well-informed physician who is not engaged in the investigation and has entirely independent relation should obtain the informed consent from the human subject (The Declaration of Helsinki, B-23). Moreover, if the data and photos in the articles published in 2004 and 2005 were fabricated and faked, it would be a severe problem for the academic credential of Korea in the world.

2.2 *Unethical Egg Donations*

Because the whistleblowers did not have strong proof to show all violations, after the interviews, the whistleblowers and TV program producers tried to find substantial evidence of this scientific misconduct.

After Han PD had met the whistleblowers, he started examining the MizMed hospital where Dr. Hwang got eggs for his experiment. Han PD interviewed the people who sold their eggs without any notice about the usage of their eggs and the side effect of egg extraction. He also found a medical record, showing that at least one of the donors was a junior researcher in Dr. Hwang's laboratory (Han 2006; Cyranoski 2005). When Dr. Hwang interviewed with *Time* on February 23, 2004, he said that he and his colleagues found 16 female volunteers to provide their eggs and they were not paid. Also when *Nature*, a well-known biological science magazine, raised ethical questions about paying money to the egg donors and egg donation by junior members of the laboratory in May 2004, Dr. Hwang strongly confirmed that no members of his laboratory donated their eggs, and the Internal Review Board (IRB) of Hanyang University Hospital in Seoul supported his denial (Cyranoski 2004). Moreover, much of the Korean media endorsed his denial and the Korean government supported Dr. Hwang's research with generous funding and making him a national hero ("Will," 2005).

After the interviews, Han PD found that Dr. Hwang lied to the people in the world and the Korean government that naively supported him without any suspicion.

2.3 Photo and Fingerprint Fabrications

To verify photofabrication in the 2004 and 2005 articles, the Han PD team asked for samples of the stem cells from Dr. Hwang's lab to do a DNA test, which can match the stem cells to the patients' cells (Lemonick 2006). They found that both cells were not identical. It meant that Dr. Hwang fabricated the stem cell photos in the 2005 article (Han 2006).

Han PD also visited the University of Pittsburg to interview Jong-Huk Park and Sun-Jong Kim, former researchers in Dr. Hwang's lab. He wanted to be sure about the photo fabrications in the 2004 article, which Whistleblower L mentioned. These researchers worked at Dr. Gerald Schatten's lab at the University of Pittsburgh from 2004, after the 2004 article was published. Dr. Schatten is one of the coauthors in the article Dr. Hwang published in 2005. When Dr. Schatten was invited to Korea in 2003, he was surprised by the egg handling techniques of Dr. Hwang's team. Since then Dr. Hwang and Schatten cooperated with each other and kept a close relationship. Dr. Schatten helped Dr. Hwang publish the 2005 article in *Science*.

In the interview with Han PD, researcher Kim confessed that he knew about the photo fabrications and did the fabrications under Dr. Hwang's direction. He said, "He should not have done the photofabrication" (Han 2006, 262).

Although the whistleblowers did not have strong evidence at the beginning, the TV program team helped them get enough pieces of evidence to prove Dr. Hwang's misconduct in his research.

3 Analysis

The events, in this case, took place at high levels of scientific research and had widespread repercussions within the Korean and international scientific communities. The initial whistleblowing resulted in the investigation and some punishment for some wrongdoing.

3.1 Type of Whistleblowing

As described earlier, whistleblower L used the Internet to blow the whistle. In the *PD's Notebook*, an investigative documentary program of MBC, he posted a discussion board entitled "About Professor Hwang." Curiously, the whistleblower posted his real name and contact information. Only the program staff read the post, and the producers, Seung Ho Choi and Hak Soo Han, tried to keep their sources anonymous.

3.2 Role of Mass Media

In this case, although the whistleblowers did not possess strong evidence at the beginning, the TV program team helped them gather and establish enough evidence to prove Hwang's misconduct. The program producers prepared two episodes about Dr. Hwang's research misconducts. On November 22, 2005, the first episode, "Suspicious Egg Donation in Woo Suk Hwang's Myth," went on air. The episode presented the egg donor issues of Dr. Hwang's research.

Two days after the program broadcasted, Dr. Hwang admitted that two of his junior researchers donated their eggs and Sung II Roe, one of his research partners, paid money to the egg donors. He also announced that he would resign from the head position of the World Stem Cell Hub, a newly established stem cell research institute in South Korea, which was

established with $132 million from the South Korean government in October 2005 (Walsh 2005).

After the TV program and Dr. Hwang's press conference, people in South Korea were separated into two groups. One group was composed of conservative media, the government, patients, and their families and individuals who strongly supported Dr. Hwang's research with "outpouring nationalism and sympathy for the goals of Dr. Hwang's stem cell research" even though his research seriously violated ethical standards (Brooke and Choe 2005). These people did not want to believe the evidence that the TV program showed, and some of them threatened the program producers by posting the producers' family pictures on the Internet. They also forced the companies that advertised their products on the PD's Notebook program not to provide commercials to the program. On November 26, 2005, all commercial advertisements for the program were canceled (Han 2006). The citizens who supported Dr. Hwang built a website community called "I Love Hwang Woo Suk." These people started a candlelight demonstration in front of the office of MBC (Brooke and Choe 2005). Many Koreans firmly believed that Dr. Hwang's ethical violations were not serious, and the lapse was caused by cultural differences between Korea and the West ("Stem-cell," 2005). Some conservative news media found the whistleblowers and visited their workplaces for an interview, and finally released their names to the public.

On the contrary, the other group consisted of many non-profit organizations, a few neutral and more radical news media, a young scientists' Internet community (Biological Research Information Center: BRIC), and some citizens, who shocked by the truth of Dr. Hwang's research, tried to protect the PD's Notebook program and whistleblowers, and find stronger evidence of Dr. Hwang's fabrication. One critical incident happened on December 5, 2005, when the TV program producers had a difficult time since the general public threatened them, calling them betrayers of Korea and all advertisements for the program were canceled. Moreover the government, which provided massive amounts of money to Dr. Hwang's research, also blamed them. Making the situation worse, one news media reported that Mr. Han interviewed the researcher at the University of Pittsburgh under pressure, threatening him to say bad comments about Dr. Hwang. All of these situations led them not to broadcast the second episode about Dr. Hwang's scientific misconducts. However, two anonymous Korean scientists in the BRIC found fabrications of the stem cell photos and DNA fingerprints in the

2005 article and posted it in the BRIC's Internet bulletin board. Pressian, independent Internet news media, immediately released the news. After this incident, 30 professors in the Department of Biological Science at Seoul National University asked the president of the University to investigate Dr. Hwang's research. On December 12, an investigation committee was established and started examining Dr. Hwang's researches. Finally, the second episode of the program about Dr. Hwang's fabrication was broadcasted on December 15, 2005 (Han 2006).

3.3 Retaliation

For the whistleblowers, the consequences of blowing the whistle were very harsh. On December 6, 2005, Whistleblower L reluctantly submitted his resignation letter to the hospital where he worked. Even though the hospital was not directly involved in Hwang's research, his supervisor forced him to resign from his position. The reasons were that reporters who wanted to interview him interrupted the daily management of the hospital and that everyone had to be concerned about the Department of Science and Technology because the government owned the hospital. Whistleblower M also quit her job from a university institute. After leaving their jobs, they could not find any other employment (Han 2006). To help their financial situation, the BRIC asked for donations from their members and the public. The BRIC received about $10,000 from 179 donors from December 6 to 12, 2006, and gave it to the whistleblowers (BRIC, 2006). Although the total amount of money was not enough for two adults to live on for a long time, this Internet donation showed that many Koreans supported them.

Except for this donation, the whistleblowers have not had any protection from Korean government or laws.

3.4 Legal Protection

In 2001, the South Korean government enacted the Anti-Corruption Act and established the Independent Commission Against Corruption to protect whistleblowers. The act provides that all citizens, including public officials, can blow the whistle on government officials' corruption by presenting evidence to the Commission (Anti-Corruption Act, 2001, Chapter 3).

Unfortunately, Whistleblowers L and M were not protected by this law. There are two main reasons. First, the law does not cover external whistleblowing. It provides that people who find corruption can blow the whistle only to the Commission (Anti-Corruption Act, 3:25). Second, the whistleblowers

did not have hard evidence that could show the violation of laws and financial damage to public organizations (Anti-Corruption Act, 2001, Chapter 1). Hence, even though Korea has whistleblower protection provisions of the Anti-Corruption Act, these provisions are not enough to protect all whistleblowers.

3.5 Consequences of Whistleblowing

The impact of this whistleblowing was huge enough to people who were involved in Dr. Hwang's research. On December 23, 2005, Seoul National University Investigation Committee reported that Dr. Hwang had falsified data from 9 of 11 stem cell colonies, and used more eggs than the number he reported in the 2005 article (Wade 2005). In January 2006, the committee's final report said the committee panels found that DNA fingerprints of stem cells in the 2004 article were also fabricated (Park and Kim 2006). Conclusively, both papers were unconditionally retracted from *Science* on January 12, 2006 (Kennedy 2006).

Dr. Hwang was fired from the professor position at Seoul National University and was charged with misusing and embezzling $2.96 million in government funds and private donations ("South," 2006). Government prosecutors prepared fraud charges that could be punished by up to 10 years in prison (Choe 2006).

Because of this scandal, Ki Young Park, the President Advisor of Science and Technology and one of the coauthors of Dr. Hwang's 2004 article in *Science*, (Shin 2005) also resigned. Ms. Park was the most important person who provided millions of taxpayers' money to Dr. Hwang's research without any suspicion (Shin 2005). She was the bridge connecting the government and Dr. Hwang. People were suspicious of her contribution to the 2004 article because she was trained as a botanist, not as a biologist or a medical researcher. When the Seoul National University Investigation Committee inspected her, she confessed that she did not contribute any effort to write the 2004 article (Lee 2007, 301).

Even though Dr. Schatten immediately ended the relationship with Dr. Hwang on November 13, 2005, after he learned of Dr. Hwang's ethical violations and he did not know the fabrication until December 2005, he was accused of research misbehavior by an investigative team appointed by the University of Pittsburgh on February 10, 2006 because he lobbied hard to publish the paper in *Science*, without any substantial evidence of data (Wade 2006).

4 Summary and Conclusion

4.1 Summary

In this case, the whistleblowers revealed Hwang's academic misconduct through an external channel, a social investigation TV program. Even though they did not have substantial evidence to verify the misconduct at the

Table 3.1 Summary table of the case

Initial whistleblowing	Charges by researchers of unethical behavior and falsification of evidence in a scientific study
Resulting reforms	Public renunciation of falsified results
	Firing of accused scientists
	Investigation by internal university committee
	Prosecution of Woo Suk Hwang for fraud
Type of Whistleblowing	External, by the Internet
Roles of mass media	Active participation by television producers in uncovering evidence of wrongdoing
	Public airing of allegations and presentation of evidence
Documentation of evidence	Testimony of participants
	Fabricated photos
Retaliation	Whistleblowers lost their positions.
Legal protection	Only internal whistleblowing covered by protection laws

Table 3.2 Effectiveness indicators of the case

Indicators	*South Korea*
Reforms of wrongdoing	Public renunciation of falsified results
	Firing of accused scientists
	Investigation by internal committee of Seoul National University
	Dr. Woo Suk Hwang charged with fraud
External whistleblowing	Through Internet and television
Extensive mass media coverage	Initial contact to television program; active participation of TV journalists in gathering and documenting evidence; public revelation on television
Strong evidence	Supervised replication of research to prove photos were fabricated
	Personal testimony of participants who admitted guilt
Legal protection against retaliation	Protection limited to cases of internal whistleblowing where financial damage can be proved

beginning, the TV program team actively cooperated with the whistleblowers to find convincing evidence of the wrongdoing. After the TV program had gone on air, the Seoul National University committee investigated Hwang's research and fired Hwang from his position at the university. In Korea, the anti-corruption law protects whistleblowers from 2001; however, the law could not defend the whistleblowers due to the limitation of the law.

See a summary table of the case (Table 3.1) and an effectiveness indicators table of the case (Table 3.2) on previous page.

4.2 Conclusion

There are four implications of this case. First, whistleblowing is crucial to improve government accountability and transparency even though whistleblowers are considered as betrayers by many. In this case, had the two whistleblowers not blown the whistle, the Korean government would have spent huge amounts of money on Dr. Hwang's research without close oversight. Second, mass media is important to make a whistleblowing case successful. In this case, the role of mass media was influential. The whistleblower had chosen the right media, which was neutral and progressive and had a high point of view to let the public know about the issue of Dr. Hwang's misconducts. In particular, the producers of the TV program worked hard to find the truth even though they were in a seriously dangerous situation. Third, people in Korea should change their concept of whistleblowing. Economic development might be necessary but if the economic development is not based on transparency and accountability, it can be a castle on sand—we do not know when it may come down crumbling. Economic growth in South Korea has been remarkable since the 1970s; however, the ethical system in the country is not as strong as much as its economic rank. In 2007, Korea's GDP ranking was 13;[3] however, its position in the corruption perceptions index in the same year was 43.[4] These indexes, even though there are arguments of validity against using these indexes, might show that the Korean government has focused more on economic development than moral foundation of the country. Dr. Hwang's academic integrity violations show us the value conflicts between integrity and economic development in Korea. Dr. Hwang violated several ethical guidelines of scientific research field to show his performance, but his research was related to Korea's economic gains. Because of the economic profits, people in Korea were separated into two groups, whether supporting his research or not, even though he damaged academic integrity. Fourth, the anti-corruption laws should be revised to improve whistleblower protection. The whistleblowers,

in this case, could not get any protection from the government and the law. The whistleblowers lost their jobs and had a hard time finding another one in the same field. The Korean government should broaden its protection for whistleblowers to discover and deter corruption and fraud.

Notes

1. Dr. Hwang and his colleagues published two articles in March 2004 and in 2005 in *Science*: Woo Suk Hwang, et al. 2004, Evidence of a Pluripotent Human Embryonic Stem Cell Line Derived from a Cloned Balstocyst, Vol. 303. No. 5664, pp 1669–1674 and Woo Suk Hwang, et al. 2005, Patient-Specific Embryonic Stem Cells Derived from Human SCNT Blastocysts, Vol. 308, no. 5729, pp. 1777–1783. Both articles were formally retracted because of data fabrication.
2. Both researchers work at the Dr. Hwang's laboratory.
3. http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf, last visited on March 3, 2009.
4. http://www.transparency.org/policy_research/surveys_indices/cpi/2007, last visited on March 3, 2009.

References

Anti-Corruption Act of 2001. Available at http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/south%20korea/anti-corruption%20act%202001%20-%20%20korea.pdf.

BRIC. (2006). Available at http://www.ibric.org/myboard/read.php?Board=sori&id=10681.

Brooke, J., & Sang-hun, C. (2005, November 29). South Koreans Rush to Defend Cloning Research against Criticism. *New York Times*.

Choe, S.-H. (2006, January 11). Lesson in South Korea: Stem cells aren't cars or chips. *The New York Times*.

Cyranoski, D. (2004, June 3). Korean bioethicists call for inquiry into stem-cell work. *Nature*, *429*, 490.

Cyranoski, D. (2005, November 24). Korean stem-cell crisis deepens. *Nature*, *438*, 405.

Han, H. S. (2006). *How can i report this news, everyone?* Seoul: Sahae Pyungron.

Kennedy, D. (2006). Editorial retraction. *Science*, *311*, 335.

Kolata, G. (2005, May 20). Korean reports ease in cloning for stem cells. *The New York Times*.

Lee, H. K. (2007). Don't forget Hwang Woo Suk. *Seoul: Korean Doctors' Weekly*.

Lemonick, M. (2006, January 01). The rise and fall of the cloning king. *Time*.

Park, A. (2005, November 10). Dogged pursuit: First sheep, now a dog—what next? How a lab in South Korea perfected a cloning technique that is likely to transform medical research around the world. *Time*.

Park, A., & Gorman, C. (2005, May 23). Inside the Korean cloning lab. *Time*.

Park, A., & Kim, S. (2006, January 09). Independent panel confirms stem cell fraud. *Time*.

Shin, S. K. (2005, December 19). President Roe Moo Hyun's overcredulity and Park Ki Young's negligence. *Hankyoreh*, *21*, p. 590.

Wade, N. (2005, December 25). Clone scientist relied on peers and Korean pride. *The New York Times*.

Wade, N. (2006, February 11). University panel faults cloning co-author. *New York Times*.

Walsh, B. (2005, November 27). A cloning cover-up. *Time*.

(2005, November 17). Will the regulator please stand up. *Nature, 438*, 257.

Yongjin Chang is an assistant professor at the Graduate School of International Relations of the International University of Japan. He received his Ph.D. in public administration from the School of Public Affairs at American University in 2008 and worked as a research professor at Korea University from 2010 to 2015.

CHAPTER 4

Whistleblowing in Thailand: Anti-Corruption Policy in Thailand and a Whistleblower Protection Measure

Srisombat Chokprajakchat

Abstract Srisombat analyzes the first whistleblowing case where the whistleblower obtained protection from the National Anti-Corruption Commission (NACC). The author addresses the efforts of a whistleblower to prevent the Union Power Development Company from building a coal power plant and other environmentally destructive projects. The chapter also draws attention to the social impact this case caused in the public as the whistleblower initiated a crusade for her community's right to protect the environment. Srisombat highlights the role of mass media coverage (i.e. newspaper) and strong evidence (i.e. a complaint file). Although the whistleblower was sent to the prison because of her denunciations, her case influenced the implementation of witness protection.

Keywords National Anti-Corruption Commission · NACC · Union Power Development Company · Whistleblowing complaint file · Witness protection

S. Chokprajakchat (✉)
Doctoral Program in Criminology, Justice Administration and Society, Department of Social Sciences, Faculty of Social Sciences and Humanities, Mahidol University, Nakhon Pathom, Thailand
e-mail: srisom88@yahoo.com, srisombat.cho@mahidol.ac.th

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_4

1 Introduction

In 1999, according to the Constitution of Kingdom of Thailand B.E. 2540 (1997), the Organic Act on Counter Corruption B.E. 2542 (1999) was enacted. It set up the Office of the National Counter Corruption Commission (ONCCC) and the National Counter Corruption Commission (NCCC). The ONCCC was established as the administrative body of the NCCC supporting the performance of its counter corruption activities (National Counter Corruption Commission 2002). The main duties of the NCCC include counter corruption, inspection of assets, and prevention of corruption. In 2008, the official names of the National Counter Corruption Commission (NCCC) and the Office of the National Counter Corruption Commission (ONCC) with its resolution 40/2551 on 15 July B.E.2551 (2008) were changed to the National Anti-Corruption Commission (NACC) and the Office of the National Anti-Corruption Commission (ONACC) respectively (National Anti-Corruption Commission., NACC, 2012).

On March 31, 2011, the Thai government ratified the United Nations Against Corruption (UNAC). This ratification led to the first amendment of the Organic Act on Counter Corruption. One important amendment had to do with allowing the NACC to set up conditions under which contractors of large public projects must provide detailed income and expenditure accounts, and submit such information to the Department of Revenue for checking (Tilleke and Gibbins n.d. *Thailand: Strengthening Anti-Corruption Measures and the Public Procurement Process*).

Thailand has not yet signed the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention. The nation still does not have a procurement and foreign anti-corruption law. It does not have a whistleblowing act either; however some advancement can be seen within the amended Organic Act on Counter Corruption (Organic Act on Counter Corruption, No.2, B.E. 2554 (2011)).

This chapter will first provide an overview of anti-corruption efforts in Thailand. It will examine the role of the NACC and other agencies involved. Second, it will address whistleblowers' protection measures in Thailand incorporated within Organic Act on Counter Corruption No. 2. B.E. 2554 (2011). Finally, through a case study, this chapter will analyze the recent whistleblowing measure approved by the amended Organic Act on Counter Corruption.

2 Overview of Anti-corruption System in Thailand

Before a counter corruption body had been established, Thailand promulgated the 1947 Penalty Procedures for Civil Servants and Municipal Officers Committing Disciplinary Offenses or Being Incompetent Act. It was effective until December 31, 1948. The law contained similar provisions to those of the 1945 Act, which specifically established the procedures for investigating disciplinary charges against state officials (Rathamarit 1987). This law established that any state official or municipal officer who had become unusually wealthy and was unable to prove that the wealth was acquired through legal means shall be charged with the commission of malfeasance in office, which was liable to a disciplinary penalty and removal from office. The public prosecutor would subsequently file the case with the court to order that the property acquired from illegitimate sources be confiscated.

Later, importance was given to the establishment of a formal counter corruption body beginning in the aftermath of the political turmoil on October 14, 1973 through to the pre-1997 Constitution of the Kingdom of Thailand. This was attributable to the political upheaval, which was followed by a public outcry for action against corrupt politicians and state officials at all levels. Nevertheless, it seemed that the prevention and suppression of corruption in accordance with the law was not satisfactory. During 1977–1999, the Counter Corruption Commission received more than 40,000 complaints. The Commission found grounds for further action in only 1,681 cases (National Counter Corruption Commission 1999). Of all the *prima facie* cases, the commission found grounds for criminal prosecution or for both disciplinary and criminal actions in only 817 cases that were related to corruption in the public sector, and grounds for disciplinary action in only 801 cases. In general, there are limitations in the tackling of unlawful acts particularly when there is no injured party making an allegation.

Since the proclamation of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and the establishment of an independent body under the constitution (i.e. the NCCC) the commission performed its duties diligently for a little over three years.

The 1997 constitution was replaced by the 2007 constitution. It laid down several principles concerning the prevention and suppression of corruption. The most important point is the provision for the NCCC to continue its duty in inquiring into facts related to criminal proceedings against persons holding political positions. As for state officials, the NCCC prosecutorial mandate was

altered by the constitution and limited to high-ranking officials or those holding positions of director level or equivalent. The constitution set up another counter corruption body: the Office of the Public Sector Anti-Corruption Commission (PACC) and the Commission of Counter Corruption in the Public Sector (CCPS Commission). There are other agencies whose tasks are related to the prevention and suppression of corruption. In fact, Thailand has 15 well-established pillars as the main components for enforcement of national anti-corruption laws. This does not include the Assets Scrutiny Committee (ASC), which was an ad hoc body set up in 2007. As far as the roles and duties of those anti-corruption agencies are concerned, the institutional theory may be used as a conceptual framework for explaining the phenomenon of the creation of independent agencies, the roles of anti-corruption bodies, and competent authorities who exercise powers according to the law. The core agencies in enforcing anti-corruption laws are: (1) the Securities and Exchange Commission, (2) the Bank of Thailand, (3) the Office of the Auditor General of Thailand, (4) the Assets Scrutiny Committee (ASC), (5) the Royal Thai Police (RTP), (6) the Office of Public Sector Anti-Corruption Commission (PACC), (7) the National Anti-Corruption Commission (NACC), (8) the Anti-Money Laundering Office (AMLO), (9) the Election Commission (EC), (10) the Department of Special Investigation (DSI), (11) the Office of the Attorney General, (12) the Office of the Ombudsmen, (13) the Prime Minister's Office, (14) the Office of the Civil Service Commission, and (15) the Committees of the House of Representatives and the Senate (Chokprajakchat 2011, p. 116).

The key roles in the investigation process are under the Department of Special Investigation (DSI), the Election Commission (EC), the Anti-Money Laundering Office (AMLO), the National Anti-Corruption Commission (NACC), the Office of Public Sector Anti-Corruption Commission (PACC), and the Royal Thai Police Assets Scrutiny Committee (ASC). The key role in the prosecution process is under the Office of the Attorney General (OAG). The key role in the court proceedings is under the Courts of Justice/the Supreme Court of Justice's Criminal Division for Persons Holding Political Position.

3 Whistleblowing as a New Measure

Although Thai law had not clearly defined the legal process for whistleblowing some criminal justice standard, such as principles of evidence, admissibility, practice of retaining witnesses, immunity from

prosecution, and the effect of giving a clue for this benefit of the trial are to be observed.

The Criminal Procedure Code provides general criteria for admission of evidence (admissibility rule). According to this rule, the court shall not admit any evidence that is obtained by an act of intimidation, coercion, promise, inducement, or any other unjust act: “Any real, documentary or parole evidence may be admitted if it is likely to prove the guilt or innocence of the defendant; provided that such evidence must not have been obtained by an act of inducement, promise, threat, deception or any other unjust act” (Criminal Procedure Code, B.E. 2477 [1934]). An instance of an unjust act could be the following: inducing the accused to confess or furnish any information about the commission of the offense in return for provisional release or any other benefit. Any statement, information, or evidence obtained by such illegitimate means shall be excluded from being admitted as evidence (Exclusionary Rules) in the court trial.

However, with regard to evidence or information obtained in a sting operation, Thai Court considers the sting operation a method for the state authority to collect evidence. Hence, it is admissible as evidence. On the contrary, evidence or information obtained by the conduct of a method inducing a person to commit an offense that otherwise the person would not have been likely to commit (i.e. entrapment) is regarded as evidence obtained in an illegitimate manner and the court shall not admit it as evidence in the trial.

In a case where evidence and witnesses are scarce and where the offender or the accomplices are the only ones who know or have some information about the wrongdoing, the police cannot place a charge against an accomplice and/or interrogate the accomplice as a witness in the investigation process, thereby applying the person as a prosecution witness in order to furnish crucial information to the court. This situation is called “granting the witness immunity” (Bunnag 2012). In this regard, the Thai Criminal Procedure Code does not prescribe any provisions for witness immunity, though, in practice, the investigation officer often grants immunity for an accomplice in return of his or her testimony in a prominent case.

In contrast, in an investigation conducted by the NACC, the commission may grant witness immunity to a witness or an accomplice as means to obtain information or a clue, which could lead to the offender’s capture and prosecution.

In a case where the offense is related to narcotics, if the court finds that the information or the clue furnished by the informant is beneficial to the

trial, the court may sentence the informant to a punishment lesser than the punishment prescribed for the offense. "If the Court opines that any offender has given the important information for the very benefit of suppressing the commission of offense relating to narcotics to administrative official or police official or inquiry official, the Court may inflict less punishment to any extent than that prescribed by the law for such offense" (Narcotics Act 1979 A.D., Section 100/2). In this regard, some examples of the Supreme Court judgments include:

- The Supreme Court judgment No. 3072/2553 establishes that giving the benefit to the offender is discretionary. It is not compulsory (The Supreme Court judgment of 2553 cited in Bunnag 2012).
- The Supreme Court judgment No. 6287/2553 establishes that the clue must be information, which the police cannot discover through conventional duty performance (The Supreme Court judgment of 2553 cited in Bunnag 2012).
- The Supreme Court judgment No. 526/2551 reduced the sentence for a defendant charged of drug distribution who furnished information about other stashed narcotics, resulting in capture of more narcotics (The Supreme Court judgment of 2553 cited in Bunnag 2012).

While some countries have enacted a Procurement and Foreign Anti-Corruption Practices Act, Thailand does not have a specific law prohibiting bribery committed by foreign or international public officials. Thai anti-bribery laws apply only to domestic Thai public officials" (Mancill and Suthisarnsuntorn 2012, p.249). It is not applicable to bribery of foreign public officials and recovery of assets. In this regard, although the criminal code does not provide the definition of "public official," in Decision No. 700/2490, the Supreme Court interpreted the term "official" as Thai government officials only (Mancill and Suthisarnsuntorn 2012). However, the recent amendment to the Organic Act on Counter Corruption criminalizes bribery to foreign officials and international organizations (OACC, 2015).

The NACC has attempted to set out appropriate measures to provide protection for any person who reports in good faith to the NACC to enhance the performance of the NACC and increase effectiveness in the prevention and suppression of corruption as an independent agency under the Constitution. Since the Organic Act on Counter Corruption (No. 2) B.E. 2554 became effective in April 2011, several new features were

established. For instance, the NACC can ask for information concerning financial transactions from the AMLO (e.g. Section 103/2 for whistle-blowers). Section 103/6 gives the "Non-prosecution" power to the NACC, making this legal provision the most important highlight of this act.

> In a case where the National Counter Corruption Commission (NCCC) finds that any proceedings require arrangement of protection and assistance measures for the person making the allegation, injured person, person making the request, person making the complaint, person giving the statement or person giving any clue or information concerning corruption or unusual wealthiness, or other information beneficial to the proceedings under this Organic Act, the National Counter Corruption Commission shall notify the relevant agency, in order to provide protection measures, whereby such person shall be deemed to be a witness, who is entitled to the protection measure under the law on witness protection in a criminal case (Organic Act on Counter Corruption B.E. 2554 (2011)).
>
> In an event where damage is inflicted against the life, body, health, property or rights of the person under the first paragraph or the spouse, ancestor or descendant of such person, or any other person, closely-related to such person, resulting from intentional commission of a crime because such person having provided with cooperation, statement, clue or information for the National Counter Corruption Commission, such person shall be entitled to submit an application to the responsible agency, in order to receive necessary and reasonable compensation under the law concerning witness protection in the criminal case. (Organic Act on Counter Corruption (No. 2) B.E. 2554 (2011), Section 103/2)

Thus, Section 103/2 provides measures for the protection of and assistance for a person who makes allegations, an injured person, a person who files a lawsuit, or a complainant under the provisions of this organic law or a person who reports facts concerning an offense of corruption, unusual wealth, or other information that may contribute to the performance of the NACC in the prevention and suppression of corruption as stipulated in this organic law.

> The National Counter Corruption Commission shall provide with the money reward for the person under Section 30, or may provide with any reward or benefit for the person under the first paragraph of 103/2, as the case may be, out of the budget, which shall be prescribed by the National

> Counter Corruption Commission. (Organic Act on Counter Corruption No. 2. B.E. 2554 (2011), Section 103/3)
>
> In an event where the person under the first paragraph of Section 103/2 is a State Official and the National Counter Corruption Commission finds that the act done, or statement or clue or information given by such person is highly beneficial to the prevention and suppression of corruption and worth recognition as a model for State Officials and people in general, the National Counter Corruption Commission shall propose to the Council of Ministers that it considers an increase of pay grade and elevation of position for such person in a special case, thus, in accordance with rules, procedures and conditions, which are prescribed by the National Counter Corruption Commission and approved by the Council of Ministers. (Organic Act on Counter Corruption No. 2. B.E. 2554 (2011), Section 103/4)

In the case where there are damages to life, body, health, liberty, reputation, property, or right of the said person or his/her spouses, parents, descendants, or other close relatives due to the breach of agreement by intention concerning the undertaking or the reporting of facts to the NACC, that person is entitled to receive compensation as necessary and appropriate by virtue of the law governing witness protection:

(1) Propose to the prime minister that he issue an order to the person's supervisor or the person having the power to order his appointment or removal or reassign the person to his/her previous position or other appropriate position.
(2) Make a request to the Office of the Civil Service Commission or personnel administration department of another state agency for appointment of that person to a position not lower than the previous one in another agency in a timely manner with the consent of that person.

For corruption cases, the Organic Act on Counter Corruption No. 2. B.E. 2554 (2011) empowers the NACC to protect witnesses. Usually when corruption cases involve high-ranking state officials, the accomplice is afraid of the power of those state officials, which may harm his or her own life. Therefore, the NACC has issued The National Anti-Corruption Rules, Procedures and Conditions in Acquisition of a Witness Immunity from Prosecution B.E. 2554 (2011). However, the NACC has not yet provided general guidelines on its application. For example, there is no guideline for the first step in the process to count on.

Previously, Thai law has not defined the functions or authority of the whistleblower. But in practice, Thai criminal justice recognizes the existence of the whistleblower. Moreover, it considers principles of evidence admissibility, practice of obtaining immunity from prosecution for witnesses, and granting the benefit of trial for giving a clue.

The Criminal Procedure Code provides general criteria for admission of evidence (i.e. admissibility rule). For instance, the court shall not admit any evidence that is obtained by an act of intimidation, coercion, promise, inducement, or any other unjust act.

> Any real, documentary or parole evidence may be admitted if it is likely to prove the guilt or innocence of the defendant; provided that such evidence must not have been obtained by an act of inducement, promise, threat, deception or any other unjust act. (Criminal procedure Code, B.E.2477 (1934), Section 226)

Any statement, information or evidence obtained by such illegitimate means, shall be excluded from being admitted as evidence (Exclusionary Rules) in the court trial. However, evidence or information obtained in a sting operation is admissible as evidence. Thai Court considers that a sting operation is merely a means to obtain evidence from the offender (i.e. a method for the state authority to collect evidence). On the contrary, evidence or information obtained by the conduct of a method inducing a person to commit an offense that otherwise the person would not have been likely to commit (e.g. entrapment), is regarded as evidence obtained in an illegitimate manner and the Court shall not admit it as evidence in the trial.

In a complex case, where evidence and witnesses are scarce and where only the offender or accomplice is aware of occurrence or has information of the commission, the police officer may not place a charge against the accomplice and can interrogate him/her as a witness in the investigation process, thereby treating the person as a prosecution witness in order to furnish crucial information to the court. This situation is called "granting the witness immunity." Thai Criminal Procedure Code does not prescribe any provisions for witness immunity, though, in practice, the investigation officer often grants immunity for an accomplice in return of his or her testimony in a prominent case.

An investigation conducted by the NACC should follow the National Anti-Corruption Rules, Procedures and Conditions in Acquisition of a

Witness Immunity B.E. 2554 (2011). It authorizes the commission to grant the witness immunity in the investigation process. It is noticeable that "granting the witness immunity" aims to acquire information that is likely to be a clue leading to the offender, whereas the principle of excluding evidence, which has been produced or obtained in an illegitimate manner, is for the purpose of preventing an officer from conducting an illegitimate act. The court shall deliberate only on legitimate evidence. Thus, if a police officer intimidates, induces, or gives a promise to an accomplice in order to obtain information or clue about the offense, the obtained information or clue cannot be used as evidence to convict other defendants in the case.

In a case related to narcotics where the informant is prosecuted and tried as a defendant before the court to the extent that the court admits the informant's testimony as evidence and convinced the defendant is guilty, if the court finds that the information or the clue furnished by the informant is beneficial to the trial, the court may sentence the informant to a punishment lesser than the punishment prescribed for the offense.

> If the Court opines that any offender has given the important information for the very benefit of suppressing the commission of offense relating to narcotics to administrative official or police official or inquiry official, the Court may inflict less punishment to any extent than that prescribed by the law for such offense. (Narcotics Act 2522, B.E 1979 A. D. Section 100/2)

Examples of the Supreme Court judgments are the following.

- The Supreme Court judgment No. 3072/2553. This case determines that giving the benefit to the offender under this section is discretionary, as the court considers appropriate. It is not compulsory because it is not apparent whether the police officer manages to arrest the person, whom the defendant has implicated. The court therefore shall not reduce the sentence (The Supreme Court judgment of 2553 cited in Bunnag 2012).
- The Supreme Court judgment No. 6287/2553. This case deliberates a landmark decision that the clue must be information, which the police cannot discover through the conventional duty performance. The suppression operation must have resulted from

obtaining of such clue. Otherwise, the court shall not reduce the sentence (The Supreme Court judgment of 2553 cited in Bunnag 2012).

- The Supreme Court judgment No. 526/2551. In this case, the defendant was arrested for the charge of distribution, but the defendant furnishes information about other stashed narcotics, resulting in capture of more narcotics. Thus, the court may reduce the sentence (The Supreme Court judgment of 2553 cited in Bunnag 2012).
- Supreme Court judgment No. 5244/2539 (Syamol's Case). In this case the offender, the person contracted by the victim's husband to kill the victim was granted witness immunity in return for furnishing information to the officer that the husband was the person, who contracted him, and the person who committed the murder was someone else, who was subcontracted by the offender. In this case, the offender is discharged or prosecuted as a defendant. The court managed to convict the defendant because of admitting the furnished information as well (The Supreme Court judgment of 2553 cited in Bunnag 2012).

4 A Case Study

In this section a case called "Mrs. A case" is the first example where the NACC has provided protection for informing about misconduct, or whistleblowing (Office of National Anti-Corruption Commission [ONACC] 2013).

Mrs. A is a 51-year-old woman lives at Tambol Thong Chai, Amphoe Bang Saphan, Prachuap Khirikhan Province. She was originally residing in Amphoe Hua Hin, Prachuap Khirikhan Province. She used to work as a kindergarten teacher at Darun Suksa, Amphoe Hua Hin, Prachuap Khirikhan Province. In 1983, she married Mr. B, and moved to Ban Krut Village, Amphoe Bang Saphan, Prachuap Khirikhan Province. They earn their living by practicing fishery, feeding up cows, and running a grocery. Mrs. A and Mr. B have three children. On August 11, 2008, Mrs. A received the 2007 Environmental Preservation Mother Award. On March 5, 2012, an Honorary Bachelor of Politics Degree was conferred upon Mrs. A by Ramkhamhaeng University.

4.1 Movement Circumstances

In 1997, Mrs. A initiated a social and environmental movement from the locality where she lived. When she was informed that a group of capitalists was coming to purchase plots of land for construction of the Hin Krut Power Plant and title deeds were subsequently issued, Mrs. A along with her husband protested against the construction of this power plant. They were informed that a coal power plant would be constructed at Moo 9, Tambol Thong Chai, Amphoe Ban Krut, Prachuap Khirikhan Province. She along with the Ban Gud Natural and Environmental Conservation Group submitted to the Industry Minister a letter opposing the construction of an industrial site in Prachuap Khiri Khan Province (National News Bureau of Thailand Public Relation Department, NNT 2007).

This action made Mrs. A hated by some of the local populace, as they found her movement to be an obstacle to development in the area. At the same time, the movement caused significant loss to the group of capitalists. As a result, they tried to stop Mrs. A's movement by dangerous ways. For example, there were several attempts to shoot Mrs. A both at her home and during travels away from her home.

Mrs. A was also a leader of the movement to protest against encroachments on the public swamp areas in Tambol Mae Ramphueng, Amphoe Bang Saphan, Prachuap Khirikhan Province, preventing the governmental agency from issuing title deeds over the public land, which was not a degraded forest area as claimed by the capitalists applying for issuance of the title deeds. For these reasons, the group of capitalists was not pleased with Mrs. A's movements and hired some individuals to hunt her down while Mrs. A and her people requested for justice from the Royal Thai Police. Thus, the police officer from Mueang Prachuap Khirikhan Provincial Police Station was assigned to oversee their safety (NACC n.d.). Moreover, the Deputy Commander of the 7th Region Provincial Police deployed police officers to provide her with protection.

On January 13, 2001, Mrs. A led the villagers under the name of Green Shirts to intrude into a Chinese Banquet of approximately 2,000 tables. The event was held by the Union Power Development Co., Ltd. on the occasion of celebrating three years of the 60 billion Baht coal power plant construction project, at Ban Kok Ta Hom. The event was attended by the project owner and the former Prime Minister, who was acting as the chairperson of the board (Office of National Anti-Corruption Commission [ONACC] 2013).

The provincial court acquitted Mrs. A for such act (Black case no. 1480/2002; Red case no. 3283/2003 cited in Office of National Anti-Corruption Commission [ONACC] 2013). In 2005, she appealed noting that her alleged act aimed to protect community rights is in accordance with 1997 Constitution. The appeal court overturned the lower court's ruling and sentenced her to six months in jail (Black case no. 3533/2546; Red case no. 2355/2005 cited in Office of National Anti-Corruption Commission [ONACC] 2013). Mrs. A was subsequently sentenced by the Supreme Court for charges of trespassing and disturbing, possession of a private immovable, and causing a filthy object to dirty or likely to dirty a person or thing, which were punishable under the Penal Code. Hence, the Supreme Court sentenced Mrs. A to four months imprisonment without suspension of punishment in a decision dated December 20, 2010 (Supreme Court case no. 13005/2010 cited in Office of National Anti-Corruption Commission [ONACC] 2013). Subsequently on December 8, 2011, Mrs. A was released from Prachuap Khirikhan Prison, because of the Royal Pardon on December 5, 2011 (totally serving four months imprisonment) (Asian Human Rights Commission 2011).

Mrs. A filed a complaint against the Power Plant Construction Project at Ban Krut, Amphoe Bang Saphan, Prachuap Khirikhan Province into the Plaint of Black No. 44410328/Red No. 01854553. In this regard, the Attorney General's Office ordered prosecution against Mr. X, Mr. Y, and Mr. Z, and subsequently lodged the prosecution to Prachuap Khirikhan Provincial Court on July 5, 2010 into the Case of Black No. 1942/2010 (Office of National Anti-Corruption Commission [ONACC] 2013).

Mrs. A and her fellow villagers got attention from the media and the public for their fights for community rights to keep its environment clean (Promoting and Protecting Human Rights Foundation 2011; Bangkok Post Opinion 2011; Prachatai 2011; Asian Human Right Commission 2011). However, some criticized whether her action was wrongdoing or environmental crusading for community rights (PornChokchai 2011).

With regard to Mrs. A's case, the NACC in its Session 329-2011 on October 13, 2011 resolved that it should investigate the Plaint against Ban Hin Krut Power Plant Construction Project at Amphoe Mueang, Prachuap Khirikhan Province to find out whether and how the public attorney at that time proceeded with the case. Subsequently after the resolution, the Secretary of the NACC ordered the Director of Intelligence and Special Affairs Office to coordinate with the Department of Correction to provide care and protection for Mrs. A as a Witness of the NACC during her four

months' imprisonment without suspension of punishment, which had been sentenced by the Supreme Court. Then, Mr. M, the Secretary Assistant and Acting Director of Intelligence and Special Affairs Office (the official title at that time) contacted the Deputy Director General of Department of Correction to inquire about the detention of Mrs. A in Prachuap Khirikhan Prison. Mr. M, along with officials of Intelligence and Special Affairs Office traveled to pay a supportive visit to Mrs. A at Prachuap Khirikhan Prison on the November 21–22, 2011 (Office of National Anti-Corruption Commission [ONACC] 2013).

While Mrs. A was in prison, the NACC in its Session 34-087/2011, on December 6, 2011, resolved that it should follow up the case where Mrs. A had complained against Ban Hin Krut Power Plant Construction Project and had been sentenced by the Supreme Court to imprisonment, to find out whether the witness had been subject to release due to Royal Pardon or not. If the witness had been released, it should expeditiously implement a witness protection program. The Intelligence and Special Affairs Office conducted the investigation and found that Mrs. A was scheduled to be released from the prison on December 8, 2011 (Office of National Anti-Corruption Commission [ONACC] 2013).

Mrs. A submitted an application for the witness protection program to NACC on December 15, 2011 (Office of National Anti-Corruption Commission [ONACC] 2013).

In its meeting on December 20, 2011, the NACC resolved to approve implementation of the witness protection program for Mrs. A and for the witness in the Plaint against Ban Hin Krut Power Plant Construction Project, the Chairperson of Ban Krut Natural and Environmental Preservation Group, Amphoe Bang Saphan, Prachuap Khirikhan Province. The NACC issued a written notification to Rights and Liberties Protection Department, Ministry of Justice to proceed with the program (Office of National Anti-Corruption Commission [ONACC] 2013).

On the December 21, 2011, the Intelligence and Special Affairs Office issued a written notification to the Rights and Liberties Protection Department, Ministry of Justice, requesting implementation of the witness protection program by ordinary measures outlined in the Witness Protection Act B.E. 2546 (The Witness Protection Act, B.E. 2546 [2003)]).

The Intelligence and Special Affairs Office in collaboration with the Witness Protection Office of Rights and Liberties Protection Department, Ministry of Justice coordinated with the Commander of Prachuap Khirikhan Provincial Police to provide with two police officers: from

Crime Suppression Squad Leader, Investigation Sub-Division, Prachuap Khirikhan Provincial Police; and Crime Suppression Squad Leader, Tong Chai Provincial Police Station, Amphoe Bang Saphan, Prachuap Khirikhan Province, for safety protection of a witness as requested by Mrs. A. They have been providing witness protection by ordinary measures from December 28, 2011 until the present (Office of National Anti-Corruption Commission [ONACC] 2013).

4.2 Analysis of Whistleblowing Measures for Practical Application

In general, there are still many weaknesses in Thai whistleblowing measures, namely:

First, there is not any specific law in Thailand directly prescribed for whistleblowing measures. Even though we have the Organic Act on Counter Corruption B.E. 2542 amended in 2011 and the law on protection for witnesses in criminal cases, measures under such laws failed to integrate operations of several competent governmental agencies (aiming to achieve the highest efficiency). Thus, a specific law concerning whistleblowing is required.

Second, Thailand's information provision or whistleblowing can be described as suppression measures focusing on a case where an offense has been committed. Thus, information provision or whistleblowing should be prescribed as preventive measures, thereby prescribing that a case, in which an offense is likely to be committed, enable information provision or whistleblowing measures to be conducted to the competent agency, in order to further proceed with the case.

Third, the ONACC is not able to implement a witness protection program on its own but needs to rely on competent agencies, including: the Royal Thai Police; or the Witness Protection Office, Rights and Liberties Protection Department, potentially resulting in failure to accomplish the mission of the NACC because each agency is established for different purposes.

Fourth, there is a lack of public relation and encouragement to the society for participating in information provision or whistleblowing on commission of an offense.

Fifth, there is no law on protection for mass media, which blows the whistle or provides information concerning commission of an offense. As a result, the mass media are exposed to the risk of legal action.

Thus, an approach to advance the strategy for prevention and suppression of corruption is recommended, especially preventive whistleblowing

measures, to the ONACC in order to achieve more efficiency in prevention and suppression of corruption. That is to say:

4.2.1 Legal Measures

The NACC should formulate a strategy for prevention of corruption, thereby providing a law on whistleblowing and information provision concerning the commission of offenses of corruption and misconduct or other offenses. That law could be used as a standard law for competent agencies responsible for prevention and suppression of crimes. Such law should prescribe measures and criteria for practices concerning whistleblowing and information provision, covering matters as follows:

- Whistleblowing information under protection

A whistleblower or informant, who shall be subject to protection, must provide information concerning an offense, which has been committed or is likely to be committed, and must be of the following nature: (1) information concerns commission of a criminal offense or corruption and misconduct; (2) information concerns a case where a public official omits to perform his or her lawful performance or unlawfully exercises his or her function; (3) information concerns commission of an offense related to narcotics and money laundering; (4) information concerns commission of an offense which is related to human rights; (5) information concerning unlawful exercise of functions in the justice system; (6) information concerning a danger which may affect health and safety of a person; (7) information concerns possible damage to the environment and natural resources; (8) information which conceals the primary fact.

A proof of the aforementioned information must be clear enough to indicate that the offense has been committed or is likely to be committed and possibly damage the state, and the whistleblower must provide the information in good faith and a reasonable course.

- Channel of Whistleblowing

A channel which is provided for whistleblowing, must be accessible, convenient and expeditious, including an intra-organizational channel for whistleblowing in both the public and private sectors, but such channel must be provided with a system of effective protection for confidentiality of the information and the whistleblower.

Moreover, if a whistleblower wishes not to reveal his or her identity, a code name for a secret person may be assigned to him or her, and the whistleblower should be notified of the rights, which he or she may enjoy after the completion of the prosecution.

- Protection Measures for Whistleblowers

The law must provide protection measures for whistleblowers or witnesses, or witness immunity for the accomplices, which must at least comprise the following measures: (1) identity of the whistleblower must be retained as confidential, except where the whistleblower consents to reveal it. If it is revealed without the whistleblower's consent, the revealing person must be imposed with a punishment under the law; (2) the whistleblower or the informant must be treated as a person acting in good faith. If the whistleblower or the informant has reason to believe that the information which he provides is true, even though the offense is not subsequently committed; (3) measures are needed for preventing revenge or retaliation against the whistleblower. There should be a punishment prescribed against a person, who retaliates or prosecutes the whistleblower for slander or defamation; (4) legal measures must cover an employee in the private sector, who conducts whistleblowing or provides information to the public official; (5) measures should be provided for preventing obstruction of justice at any level, which may result in failing to prosecute and convict the offender under the law; (6) legal measures must protect a public official who is a whistleblower or informant, thereby providing definite, effective and reliable protection measures for the official, in order to prevent the official from being mistreated by a politician or commanding official, or sued, or unfairly rotated; (7) protection for a whistleblower or witness does not require any request from such person, the responsible party or organization may exercise its discretion to implement protection measures for the whistleblower or witness subject to consent of such person. If circumstances of the whistleblowing concern a serious matter or highly influential person, protection measures for the whistleblower, or witness, including his or her family, must be implemented promptly; (8) legal measures must protect a mass media professional, who is a whistleblower or informant; (9) in a case where a person is required to be a whistleblower or informant, there must be legal measures to provide protection for such person, in order to

prevent such person from being damaged, and there must be measures to properly relieve or compensate for the damage; (10) there should be measures for a critical witness to testify at the preliminary stage, because the witness may be tampered with or prevented from testifying in the subsequent stages; and (11) the agency which provides protection for whistleblowers or witnesses, should be independent from control of the executive branch.

- Responsible Organization

The organization, which is responsible for investigation and inquiry of the offender in accordance with whistleblowing, must have the following features: (1) being an independent organization, free of intervention by politicians or politically influential people; (2) being provided with a budget sufficient to exercise its authority and mission to protect the whistleblowers or witnesses so as to achieve the purposes of the law; (3) information, which is obtained from performing duties concerning whistleblowing, must not be subject to the law on official information; and (4) being subject to inspection and evaluation.

In performing duties of investigation and inquiry, the responsible organization must be subject to inspection and evaluation by a third party or independent institution in order to be worthy of trust of the people.

4.2.2 Social Measures

Social measures are a kind of measure other than legal. Cooperation from all sectors in the society is required to achieve the purpose of the proposed strategy for prevention and suppression of corruption. Social measures related to whistleblowing or provision of information on commission of offenses must consider: (1) establishing value and culture in the society so that it will participate in prevention and suppression of the commission of all types of offenses, thus enjoying peaceful and happy living in the society; (2) encouraging and motivating the public and private sectors to continuously provide with measures for whistleblowing and information revelation; and (3) establishing or supporting a network of alliance in whistleblowing or information revelation, as well as developing and strengthening the network of alliance, because, if the network is strong, information revelation shall be efficient in achieving the goal of prevention and suppression of corruption.

5 Conclusion and Recommendations

Even though Thailand has issued both the Witness Protection Program under the Organic Act on Counter Corruption B.E. 2542 (1999) amended in 2011, and the Witness Protection Law (The Witness Protection Act, B.E. 2546 (2003), the term "whistleblower" has not been clearly provided in Thai law. The Witness Protection Program only provide means to treat the witness, protect the witness' safety and grant the witness immunity so that the State shall acquire information or evidence for prosecution. In this regard, the Court shall only admit evidence that is furnished and produced in a legitimate manner. That is to say, even an informant in a sting operation or a whistleblower shall be granted witness immunity under Organic Act on Counter Corruption B.E. 2542. But if the evidence is obtained or produced in any illegitimate manner, it is likely that the Court will not admit it.

This study finds that even though the NACC has measures to receive whistleblowers, the actual implementation of these measures is rather new. Thus, identification of a practical approach for law implementation is still needed. However, lessons can be learned from other nations where whistleblowing laws are being implemented.

This research has also found that risk of corruption increases significantly in an environment where reporting of corruption is not encouraged or protected. Therefore, it is important to assure protection to whistleblowers in the public as well as in the private sector. In the public sector, especially in cases of bribery, misuse of public funds, waste, and fraud, protection for whistleblowers should be encouraged.

Support or facilitation for provision of information on commission of offenses can help the government to monitor compliance of the law and detect transgressions. Moreover, providing protection to persons who give information on corruption may encourage an open organizational culture, in which public officials or employees do not only assess how they work, but also trust in the reporting procedures, and help the organization to prevent and detect bribery in commercial activities. Thus, protection for whistleblowers in both the public and private sectors from being retaliated against reporting cases of potential corruption or commission of other offenses is an attempt to counter corruption and promote transparency and trustworthiness in the public and private sectors (Table 4.1).

To sum up, the need for a whistleblowers protection law should be presented at an international event organized on occasion of the yearly International Anti-Corruption Day on December 9. At the national level,

Table 4.1 Summary table of the case

Initial whistleblowing:	Mrs. A protested publicly against the construction of the Ban Hin Krut Power Plant because of environmental issues. Initial disclosure through institutional procedure (filed a complaint) followed by mass media coverage.
Resulting reforms:	Considering Mrs. A's protest, the NACC decided to investigate the plaint against the Ban Hin Krut Power Plant Construction Project.
Type of whistleblowing:	External by public protest.
Documentation of evidence:	Complaint filed against the Ban Hin Krut Power Plant Construction Project; and documentation from the respective juridical processes.
Legal Protection:	There is no a specific law for whistleblowing. However, a witness protection program for whistleblowers has been implemented.

Table 4.2 Effectiveness indicators of the case

Reforms of wrongdoing:	Provision of Protection of witnesses and granting the witness immunity.
External whistleblowing:	through public protest.
Extensive mass media coverage:	through newspapers.
Strong evidence:	A complaint filed against the Ban Hin Krut Power Plant Construction Project.
Legal Protection:	None.

even though Thailand does not have a specific law on whistleblowing a proposal should be discussed in events organized by the NACC. Finally, research on identifying approaches to enhance the measures further for whistleblowing in order to achieve their full efficiency should be supported (Table 4.2).

References

Asian Human Right Commission. (2011) THAILAND: Supreme Court affirms illegality of defending human rights. Retrieved January 20, 2014 from http://www.humanrights.asia/news/ahrcnews/AHRC-STM-146-2011.

Bangkok Post Opinion. (2011). Imprisoned for fighting a just cause. Retrieved January 20, 2014 from www.bangkokpost.com/…/imprisoned-for-fighting-a-just-ca.

Bunnag, D. (2012). Granting the witness immunity in Thailand. Unpublished paper.
Chokprajakchat, S. (2011). *Anti-corruption policy in Thailand*. Bangkok: Pumtong.
Constitution of the Kingdom of Thailand, B.E. 2540. (1997). Royal Thai Government. Gazette, Book 114, Chapter 55, A (October 11).
Criminal procedure Code, B.E. 2477. (1934). Government Gazette, Vol. 52, p. 598, June 10, 1935.
Mancill, D., & Suthisarnsuntorn, W. (2012). Price Sanond Prabhas & Wynne Ltd "Thailand" In H. E. Moyer Jr. (Ed), *Anti-Corruption Regulation in 54 jurisdictions worldwide. Getting the deal through* (pp. 249–255). Retrieved on January 2, 2013 from www.gettingthedealthrough.com.
Narcotics Act 2522, B.E. (1979). Government Gazette, Vol. 96, Part 63 A, dated April 27, 2011.
National Anti-Corruption Commission. (2012). History Retrieved January 2013 from http://www.iaaca.org/AntiCorruptionAuthorities/ByCountriesandRegions/T/Thailand/201202/t20120215_805343.shtml.
National Counter Corruption Commission. (1999). *Annual report 1999*. Bangkok: Amarin Printing and Publishing.
National Counter Corruption Commission. (2002). *Annual report 2002*. Bangkok: Bangkok Block.
National News Bureau of Thailand, NNT. (2007). Conservation Group rally dispersed after submitting letter to Industry Ministry. Retrieved January 20, 2014 from http://202.47.224.92/en/news.php?id=255002070040.
Office of National Anti-Corruption Commission (ONACC). (2013). Whistle Blower case study. Unpublished paper.
Organic Act on Counter Corruption No. 2. B.E. 2554. (2011). Government Gazette Vol. 128 Part 226a, dated 18th April 2012.
Organic Act on Counter Corruption. B.E. 2558. (2015). Government Gazette. Vol. 132 Part 60a, p. 1, dated 9th July 2015.
PornChokchai, S. (2011). Academic opinion: Jintana Kaewkao and crusade http://prachatai.com/journal/2011/10/37640.
Prachatai Newspaper. (2011). Retrieved January 20, 2014 from http://prachatai.com/journal/2011/10/37392.
Promoting and Protection Human Rights Foundation. (2011). Retrieved January 20, 2014 from http://www.prachatai3.info/journal/2011/10/37509 <2>.
Rathamarit, U. (1987). Some problems relating to the law governing the prevention and suppression of corruption. (Thesis submitted to Faculty of Law, Thammasat University).
The National Anti-Corruption Rules, Procedures and Conditions in Acquisition of a Witness Immunity from Prosecution B.E. 2554. (2011). Royal Thai Government Gazette. Vol. 128 Part 50, dated 18th June 2011.
The Witness Protection Act, B.E. 2546. (2003). Government Gazette Vol. 120 Part 58a, dated 20th June 2003.

Tilleke & Gibbins. n.d. *Thailand: Strengthening anti-corruption measures and the public procurement process*. Retrieved October 9, 2014 from http://www.tilleke.com/resources/thailand-strengthening-anti-corruption-measures-and-public-procurement-process

Srisombat Chokprajakchat is an associate professor at Mahidol University. She was Program Director in Criminology, Justice Administration and Society during 2005 to 2011 and served as a committee member of the Mahidol University Institutional Review Board. She received her Ph.D. degree in public policy from George Mason University. Her research obtained an honorable dissertation in political science from the National Research Council, Thailand.

CHAPTER 5

Whistleblowing in the United States of America: "Irrefragable Proof" and the Next Generation of U.S. Government Whistleblower Rights

Thomas Devine

Abstract Devine analyzes a whistleblowing case that influenced the passing of the Whistleblowing Protection Enhancement Act (WPEA) in the United States. The author addresses the case of John White, a GS-13 Supervisory Education Services Specialist for the United States Air Force, who warned his supervisors about a costly and counterproductive program that would undermine the Air Force's training goals. It sparked a widely publicized legislative reform campaign. The chapter draws attention to the role of mass media (i.e. a public meeting for the disclosure, and all forms of media for the legislative campaign) and strong evidence (i.e. consistent professional corroboration and consensus in support of disclosure).

Keywords Whistleblowing Protection Enhancement Act · WPEA · John White · United States Air Force · Role of mass media · Support of disclosure

T. Devine (✉)
Government Accountability Project, DC School of Law,
Washington, DC, United States
e-mail: tomd@whistleblower.org

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_5

1 Introduction

The US magnet for waste, fraud, and other corruption long has been Department of Defense military spending (Weiner 1990). Since the 1960s, Pentagon employees like whistleblower patriarch Ernest Fitzgerald have exposed multi-billion dollar cost overruns, as well as purchases of the world's most expensive hammers, nuts, bolts, toilet seats, coffee pots, and similar products at costs hundreds of times higher than the same goods at hardware stores.

The Pentagon's troubled history of anti-cost control has mirrored the birth pains of statutory whistleblower rights for US government employees, first unanimously approved as part of the Civil Service Reform Act of 1978.[1] While passed with high hopes, the new free speech rights did not take root, and there were only four reversals of retaliation on record out of some 2,000 complaints in the law's first decade (Devine and Aplin 1986). In 1989 Congress responded by unanimously passing the Whistleblower Protection Act ("WPA"). But in 1994 Congress had to unanimously reinforce it with further amendments. The administrative forum for all hearings, the Merit Systems Protection Board ("Board" or "MSPB"); and the court with a monopoly on judicial review, the Federal Circuit Court of Appeals, consistently were disregarding or overruling statutory language on non-constitutional grounds, normally a court's only basis to veto the legislative process. The result was to reverse the reform's mandate. As the House Post Office and Civil Service Committee concluded, "Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA is creating new reprisal victims at a far greater pace than it is protecting them."[2] Just before adjourning on October 8, 1994, Congress unanimously restored its original free speech boundaries and further tightened legislative language.[3]

Most observers thought three unanimous approvals would be sufficient to respect the legislative mandate, and it appeared to work at the administrative level as MSPB decisions began steadily conforming to statutory language. To the surprise and frustration of many, however, the Federal Circuit stepped up activist judicial attacks on key WPA provisions. Throughout the 1990s there appeared to be an intensifying test of wills between the legislature and this one court over the free speech rights of federal employees. From October 1994, when WPA strengthening amendments made it the strongest free speech law in history, through June 2013 in final actions, the court ruled against whistleblowers in 226

out of 229 decisions on the merits.[4] It did so through almost audacious, hostile judicial activism to the statute it had unique authority to interpret.

To illustrate, due to judicially created loopholes in protected speech, in 1989 Congress edited the law from protecting “a” credible, lawful disclosure of government misconduct, to protecting “any” such disclosure. Frustrated by continuing loopholes, in legislative history for the 1994 amendments Congress emphasized, “Perhaps the most troubling precedents involve the inability to understand that ‘any’ means ‘any.’”[5] As emphasized in the Senate committee report for the amendments, “[T]he plain language of the Whistleblower Protection Act extends to retaliation for ‘any disclosure’, regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.”[6] Undaunted, beginning in 1995 the Federal Circuit began a series of precedents holding that “any” disclosure does not include those to co-workers, potential wrongdoers, supervisors, any connected with job duties, any concerning policy, whenever the worker waits too long to bear witness, or any about alleged misconduct challenged previously.[7] Within six years, “any” become virtually “nothing.”

It took a new attack on the law, however, to spark a 13-year legislative campaign that in 2012 restored credible whistleblower rights for federal government workers. In a 1999 decision, *Lachance v. White*,[8] the Federal Circuit vacated a Pentagon whistleblower’s administrative victory on grounds the MSPB improperly found he had engaged in protected speech, even though the consensus of professional colleagues inside and outside government, an independent management review, and the Secretary of the Air Force agreed with his challenge to a wasteful, mismanaged program, and canceled it. The WPA bans actions taken because employees lawfully disclose any information that they “reasonably believe ‘evidence[s]” government misconduct. The modest requirement was designed to create a broad safety net. But the Federal Circuit replaced that standard with a requirement for “irrefragable proof,” which by definition is impossible to attain. While the precedent’s negative effects never fully took root, the backlash against it led to an unprecedented solidarity coalition for American whistleblowers and a breakthrough to restore, strengthen, and expand their rights.

2 The Facts

In 1991 a US Air Force base outside Las Vegas, Nevada, began planning a new program called the Bright Flag Quality Education System to train personnel in advanced computer skills. John White, A GS-13 Supervisory

Education Services specialist assigned to implement the project, became increasingly concerned as he reviewed the proposal. He found that it was developed without notice and academic input from the universities already providing these courses for Air Force personnel; imposed academically unsound requirements; was prohibitively costly for universities to implement; appeared to require duplicative accreditation and services; and generally had the symptoms of a costly pork barrel program that would make money for "buddy system" contractors but undermine the Air Force's training goals. White met with relevant universities, who not only agreed with his concerns but threatened to withdraw from Air Force contracts. He warned his supervisors of the dangers, but they were not open-minded. At a May 4, 1992, public meeting, the universities openly attacked the plan, and White explained why he agreed with them. In the end, the controversy sparked an independent management review that agreed with White, and the Secretary of the Air Force canceled the program entirely in 1995.[9] While not an issue of national significance *per se*, this is a case where the whistleblower ultimately received complete vindication, including all the corrective action he sought from his disclosures.

But Mr. White had burned his bridges with the Air Force bureaucracy. His supervisor "lost confidence" in his continued work on Bright Flag, because he was pressing internally to address the program's problems and had been publicly disloyal. On June 1, 1992, less than a month after his public dissent, Mr. White was demoted to a GS-12 administrative position without supervisory responsibilities, moved to a temporary office in the desert, and given no assignments. Basically, his new job was to sweat.[10]

3 Analysis

That began a 13 year campaign legal roller coaster that finished off any legitimacy for the existing whistleblower law, while sparking a 13 campaign for its revival. The first test in any WPA case is whether the whistleblower engaged in legally protected activity. In 1992 a MSPB Administrative Judge initially ruled against Mr. White on grounds that he did not reasonably believe he was disclosing information evidencing "gross mismanagement," one of the protected speech categories. The full MSPB reversed, finding that Mr. White's speech was protected, because he was qualified to make that professional judgment and his concerns were widely shared by other qualified professionals.[11] The government's Office

of Personnel Management ("OPM") sought review on grounds that Mr. White's concerns reflected "fear," an improper basis for whistleblowing; and that widespread agreement by other professionals was akin to mob rule, another invalid basis for protection.[12] When the MSPB reaffirmed its initial ruling, OPM sought review by the Federal Circuit.

The case climaxed in a May 14, 1999 decision that reversed the Board's favorable ruling and remanded the case for further proceedings. In the decision, the Federal Circuit created the new whistleblower requirement of "irrefragable proof," as well as three other barriers that could have the effect of silencing whistleblowers.[13]

The opinion created two significant premises for the "reasonable belief" test. The first was a definition of the term:

> We conclude that the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions by the government evidence gross mismanagement?[14]

It emphasized that "a purely subjective perspective of an employee is not sufficient even if shared by other employees."[15] This definition has not proved controversial and indeed was subsequently codified in section 103 of the Whistleblower Protection Enhancement Act ("WPEA").

The primary controversy in *White 3* was a preliminary hurdle not in the WPA as passed by Congress, which the court imposed as a prerequisite to consider reasonable belief. "[T]his review starts with a 'presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the laws and governing regulations'... And this presumption stands unless there is 'irrefragable proof to the contrary.'"[16] "Irrefragable" means "uncontestable, undeniable, incontrovertible, or incapable of being overthrown."[17] It can be traced to King George's authority over its American colonies prior to the American Revolution.[18]

The presumption created two unrealistic requirements for protection not in the WPA: (1) a requirement for proof when the statute only requires evidence; and (2) a test that by its own terms is impossible to pass if there is any disagreement. In the absence of a confession by the individual wrongdoer, a whistleblower would be unprotected and could be fired without rights for speaking out. If there is no disagreement, however, there is no need for a whistleblower. The presumption disqualified employees from any protection except when the statute is irrelevant.

The court was not finished. First, it disqualified policy dissent, explaining that "the WPA is not a weapon in arguments over policy. . . . "[19] However, legislative history for 1994 amendments to the Whistleblower Protection Act had specified that a "[protected disclosure may concern policy or individual misconduct."[20]

Second, it created a new duty of loyalty to those with authority. "Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility."[21] However, under the Code of Ethics for Government Service,[22] a federal employee's primary duty is to the public, not the agency where employed or its personnel. In 1978, Congress initially created statutory whistleblower rights so that employees could pursue their duties under the code without fear of retaliation.[23]

Third, the decision invited illegal retaliatory investigations through a backhanded revival of whistleblowers' motives as a factor to consider. "Without imputing the motives of the putative whistleblower, we also would expect the board to consider personal bias or self-interest in the matter."[24] This restored a hurdle originally created by a 1985 Federal Circuit decision, *Fiorillo v. Department of Justice*.[25] However, in key legislative history for the WPA, the Senate Committee Report had explained in detail that that Congress rejected *Fiorillo* and that an employee's motives are not relevant.[26] Further, the requirement to consider motives or possible self-interest was a mandate for agencies and the MSPB to open retaliatory investigations on why an employee blew the whistle. Historically, those probes often have become open-ended fishing expeditions to find any misconduct for which the whistleblower could be held liable. In legislative history for 1994 amendments to the WPA, Congress had outlawed them as part of an umbrella provision on threatened personnel actions that violate the Act.[27]

The 1999 decision did not become final until 2005. On remand, the Administrative Judge again found that Mr. White engaged in protected speech and reaffirmed the earlier reversal of Air Force actions. But when the appeal reached the MSPB in 2003, President George W. Bush had appointed new Board members. This time the Board upheld the Air Force actions on grounds that Mr. White did not have a reasonable belief. In 2005, the Federal Circuit upheld the Board's ruling. It is noteworthy that both opinions rejected the irrefragable proof test rhetorically, but maintained it through a synonym. The Board said that a disclosure is unprotected if "reasonable people could disagree."[28] The Federal Circuit's final word was

that protection does not exist unless an agency's error "is not debatable among reasonable people." The court did add, however, that the heightened standard would not apply to disclosures alleging illegality.[29]

The rhetorical strategic retreat was understandable. By 2005 Congress was well into a 13-year process to reject the Federal Circuit doctrines and enact the next generation of free speech rights for US government employees. Whistleblower rights advocates immediately began searching for a champion to legislatively restore the WPA, and Senator Daniel Akaka (D.-Hawaii) took the lead. He would remain the primary advocate for the legislation until its 2013 passage. On October 12, 2000 Senator Akaka first introduced legislation, with support from 72 citizen organizations.[30]

The congressional counterattack began in earnest the next year with active support from two pioneer sponsors of the WPA, Senators Charles Grassley (R-Iowa) and Carl Levin (D.-Mich). Senator Levin attacked the "irrefragable proof" test as an impossible requirement, with no support in the statutory language or legislative history.[31] Senator Grassley was even more aggressive. He charged that the Whistleblower Protection Act had become a "Trojan horse.... That is unacceptable." With respect to "irrefragable proof," he reaffirmed that ultimate proof of misconduct had never been a considered as a prerequisite for protection. In terms of impact, he succinctly summarized:

> In the absence of a confession, there is no such thing as a reasonable belief. If there is no disagreement about alleged misconduct, there is no need for whistleblowers.... The *White* Case is a decisive reason for those who witness fraud, waste and abuse to remain silent, instead of speaking out. Profiles in Courage are the exception, rather than the rule.

Senator Grassley explained that part of the solution needed to be structural reform ending the Federal Circuit's monopoly on appellate review.

> This is the third time Congress had had to reenact a unanimous good government mandate thrown out by the Federal Circuit. This is also three strikes for the Federal Circuit's monopoly authority to interpret and repeatedly veto this law. It is time to end the broken record syndrome.[32]

The roller coaster campaign to revive the WPA began a roller coaster process of derailment after national crises and near misses due to procedural

sabotage. Initially, the reform appeared headed toward quick passage. Identical House legislation was introduced, and there was little opposition at August 2001 Senate hearings. Committee approval was anticipated within a few months. But then the September 11, 2001 terrorist attack occurred, followed by anthrax-laced letters sent to Congress. It took intense advocacy by whistleblower rights activists not to have pre-existing rights legislatively erased in the ensuing wave of secrecy and security laws.

By 2003 the legislation again was active, with renewed Senate hearings and subsequent House and Senate committee approvals. Finally the bill, eventually named the Whistleblower Protection Enhancement Act (WPEA), had six hearings, received eight unanimous committee approvals, and eight approvals by the full House or Senate chambers of which seven were unanimous—all before it was enacted.

How did that happen? Although the WPEA consistently received unanimous bi-partisan support on the public record, individual senators threatened or placed secret "holds" that blocked votes for final passage. That happened in 2004, 2006, 2008, and 2010. The most frustrating instance occurred in December 2010, when the legislation came within an hour of unanimous approval. After earlier unanimous Senate approval, on the last day of session the House unanimously approved the bill after removing certain sections. Due to the change, the Senate had to reapprove the shrunken but otherwise identical version of its earlier work. An hour before adjournment, however, a secret hold procedurally blocked what should have been a *pro forma* final vote, and the bill died.[33]

The campaign was sustained by intense public advocacy, through the media and grass roots participation. A coalition of 50 NGOs ranging from far right to far left ideologies formed a good government Make It Safe Campaign ("MISC") that held annual national whistleblower conferences, inviting legislators and staff to address the community with progress reports on legislation to restore their rights. MISC increased initial grass roots support from 72 groups, to 400 NGOs and companies with some 80 million members.[34] It engaged in sustained outreach to President Barack Obama, beginning during his campaign, and won the administration's active support —for passage, for stronger due process of structural rights through jury trials and appellate court access; for broader protection against retaliation from gag orders, research censorship, or security clearance actions; and to expand coverage including intelligence community employees like those at the Central Intelligence Agency—all reforms that were included or seriously considered for S. 743, the final WPEA vehicle.

A media spotlight was integral to the campaign. Whistleblower support groups like the Government Accountability Project ("GAP") made their clients in high profile poster children for restoration of the WPEA through media campaigns that spotlighted both the whistleblower and the lack of legal rights. Advocates wrote op-eds relentlessly, appeared on radio call-in programs, and even teamed up with National Public Radio (NPR) in a "hunt for the secret killer" campaign to find out who had killed the Whistleblower Protection Act. Listeners of the "On the Media" program called their senators to demand an answer whether that legislator had killed the Whistleblower Protection Enhancement Act. They turned out to be Senators John Kyl (R.-Az.) and Jeff Sessions (R.-Ala.), senior Senate Judiciary Committee members who had several times previously placed holds at the request of the Justice Department to block WPEA votes.[35] In 2010, however, they did it at the request of incoming House Speaker John Boehner, who opposed the legislation but did not want blame after just prevailing in the 2010 elections on a campaign to cut unnecessary government spending.[36] The sustained public microscope finally overcame the secret procedural and back room obstacles. On November 13, 2012 Congress passed the Whistleblower Protection Enhancement Act, signed into law by President Obama on November 27 as P.L. 112–199.[37]

The WPEA directly addresses the obstacles to protection created by *Lachance v. White*. First, the legislation neutralizes the threat from generic legal presumptions that could obstruct its provisions. As the Senate Committee on Homeland Security and Governmental Affairs, which jurisdiction over the legislation, emphasized, "[T] he Committee wants to make sure that no court ever again adopts this test, and so section 103 of S. 743 (the WPEA) would codify the removal of the 'irrefragable proof' requirement from whistleblower jurisprudence." It specifies that any relevant presumption can be successfully rebutted by "substantial evidence."[38] "Substantial evidence is the lowest burden in the legal system, and is satisfied by offering 'more than a scintilla' of proof."[39] Rejecting both irrefragable proof and the later substitute phrase that reasonable people may not disagree, the WPEA Senate Committee Report explained:

> [A] cornerstone of 5 USC 2302(b)(8) since its initial passage in 1978 has been that an employee need not *prove* any misconduct to qualify for whistleblower protection. All that is necessary is for the employee to have a *reasonable belief* that the information disclosed *evidences* the type of misconduct listed in section 2302(b)(8).

> The Committee emphasizes there should be no additional burdens imposed on the employee beyond those provided by the statute, and that this test . . . must be applied consistently to each kind of speech covered under section 2302(b)(8). (emphasis in original)[40]

Second, the WPEA imposes a creative "win-win" resolution for the policy loophole. While not protecting disputes solely about what is the "best" policy, it protects the *consequences* from policies.[41] In other words, an employee is still protected for disclosing evidence of illegality, gross waste, or public health and safety threat connected with a policy decision.

Third, the bill demolishes the "duty speech loophole" for job-related disclosures. WPEA provisions closing loopholes specify that protection applies to disclosures connected with an employee's "normal course of duties. . . ."[42]

The WPEA also reinforced protection against retaliatory investigations, which previously had been referenced only in legislative history to the 1994 amendments. The law now explicitly provides attorney fees connected with retaliatory investigations that lead to other personnel actions.[43] For the first time, agencies will have an accountability price to pay when relying on open-ended witch hunts on whistleblowers that continue until some evidentiary dirt is found to remove them.

Consistent with Senator Grassley's threat, the WPEA also removes the Federal Circuit's monopoly on appellate review—for the time being. After nearly hysterical opposition from agency managers and threats of another hold, House and Senate staff agreed on a two-year experiment in normal choice of forum either to the Federal Circuit, or to an appeals court where the employee normally would have jurisdiction based on residence, place of employment, or location of the alleged retaliatory act. This structural reform was a necessity for whistleblower advocates who had seen the Federal Circuit judicially erase unanimously enacted statutory free speech rights three times with impunity.[44]

Lachance v. White sparked systematic reforms far broader than mere reversal of its own holdings, however. In addition to provisions summarized previously, the WPEA:

- Closes judicially-created loopholes that had removed protection for the most common whistleblowing scenarios and left only token rights (e.g. only providing rights when whistleblowers are the first

to report misconduct, and denying rights for disclosures to supervisors, co-workers or potential wrongdoers). (Sec. 101, 102)

- Protects government scientists who challenge censorship. (Sec. 110)
- Codifies and provides a remedy for the "Anti-Gag" Statute—a rider in the Appropriations bill for the past 24 years—that requires a statement notifying employees that agency restrictions on disclosures are superseded by statutory rights to communicate with Congress, whistleblower rights, and other statutory rights and obligations. (Sec. 104(a), (b) and 115)
- Clarifies that protection of critical infrastructure information does not override WPA protection. (Sec. 111)
- Establishes explicit whistleblower protections for Transportation Security Administration employees. (Sec. 109)
- Overturns an unusual Merit Systems Protection Board (MSPB) practice that allows agencies in some cases to present their defense first and allows the MSPB to rule on the case prior to the whistleblowers' presenting their evidence of retaliation. (Sec. 114)
- Requires that the President's exercise of his discretionary power to impose national security exemptions that deprive employees of Title 5 whistleblower rights must be done prior to the challenged personnel action. (Sec. 105)
- Provides compensatory damages for prevailing whistleblowers under WPA cases that prevail after an administrative hearing, (Sec. 107(b)), including retaliatory investigations (Sec. 104(c))
- Provides the Office of Special Counsel (OSC) with authority to file friend-of-the-court briefs to support employees appealing MSPB rulings. (Sec. 113)
- Makes it easier for OSC to discipline those responsible for illegal retaliation by modifying the burdens of proof (Sec. 106(b)), and by ending OSC liability for attorney fees of government managers, if the OSC does not prevail in a disciplinary action (Sec. 107(a)).
- Requires the designation of Whistleblower Protection Ombudsmen in Inspectors General Offices to educate agency personnel about whistleblower rights. (Sec. 117)
- Requires the MSPB to report on the outcomes of whistleblower cases, from the administrative judge through the Board appeal, in its annual reports. (Sec. 116(b))
- Requires the Government Accountability Office (GAO) to study the impact and feasibility of changes in the number and outcome of cases

> before the MSPB, the Federal Circuit, or any other court; and to provide recommendations to Congress regarding whether the MSPB should be granted summary judgment authority and whether district courts should have jurisdiction over some WPA cases. (Sec. 116)

As seen previously, the makeover is not finished. In addition to "all circuits" appellate review, Congress put off two other issues for final resolution—whether federal government whistleblowers should have access to district court jury trials to enforce their rights, as is available to nearly all corporate whistleblowers; and whether the MSPB should have expanded authority to dismiss cases without hearing through motions for summary judgment.

Further, the WPEA sparked a still incomplete breakthrough creating institutional free speech rights for intelligence community employees at the CIA, and banning whistleblower retaliation in actions on security clearances to see classified information that are job prerequisites for millions of government employees and contractors. President Obama deserves the lion's share of credit here. Those provisions were added to the WPEA at his Administration's proposal, and removed only after the House Permanent Select Committee on Intelligence threatened otherwise to kill the bill in September 2012. Undaunted, in October the Administration issued a Presidential Policy Directive establishing those rights through executive authority.[45]

Comparing the whistleblower's advocacy against mismanagement with public interest activists' advocacy for free speech rights, this case study reviews sharply contrasting styles. Mr. White primarily engaged in internal whistleblowing within institutional and professional channels. While he spoke out at a public meeting, it was a forum sponsored by the Air Force and public participants were Air Force contractors. The legislative campaign, however, was directed at anyone who would listen—whether politicians, journalists, citizen stakeholder leader or activists of all ideologies—to reinforce lobbying within Congress.

The media had little relevance for Mr. White's successful campaign for corrective action. He made a difference almost solely through hard work and partnerships with professional experts to challenge a hostile military bureaucracy. By contrast, the media played a highly significant, indispensable role in keeping the WPEA campaign alive for 12 years. The back rooms would have won, were it not for the spotlights that would not turn off—regular opinion articles by activists, masthead editorials from conservative and liberal newspapers, steady appearances on radio call-in

programs, television and features that lionized whistleblower poster children, and especially NPR's successful inter-active campaign with its listeners to find out who killed legislation through secret procedures.

For Mr. White, retaliation was swift. Within a month, he was reassigned to temporary facilities in the desert without duties. It is disappointing that his supervisors "lost confidence" in him because he issued well-taken, vindicated warnings about problems that ended up haunting the Air force for years. The case dramatically illustrated the fragility of whistleblowers' legal rights: he was not entitled to protection, despite being stripped of duties and exiled within a month after warnings about a program that an independent management review agreed was fatally flawed and was canceled by the agency chief. In other words, Mr. White could not defend himself successfully despite consensus that he was right by all except those who created the mess. The reaction to his case, however, was just as inspiring as his treatment was disillusioning. The Federal Circuit went too far abusing its power, and the result was unprecedented legislative action that overturned virtually all the court's hostile precedents over an 18-year span, dramatically increased the scope of rights and remedies, and began structural reform to curtail the court's sweeping authority.

4 Conclusions and Recommendations

The primary lesson learned from *Lachance v. White* is that passing statutory whistleblower protection laws, even with a unanimous legislative mandate, is only the first step toward freedom of speech. In this case, it was frustrated three times, because a single court functionally had monopoly authority to interpret its provisions. In 1999 it climaxed a five year campaign against the third unanimous mandate with the "irrefragable proof" test, making it literally impossible to qualify for protection. Fortunately, the court's abuse of power sparked a systematic overhaul of whistleblower law for US government employees. Ironically, the "irrefragable proof" test sparked a campaign that left US government whistleblowers with their strongest employment rights in history.

In the short term, the most obvious recommendations concern the three issues under study and review during the next two years: (1) make permanent the two-year pilot program permitting normal access to appeal courts for Whistleblower Protection Act appeals. The Federal Circuit's monopoly cannot be restored, or unanimously enacted rights

again will be vulnerable to judicial veto—for a fourth time; (2) provide whistleblowers access to jury trials for a genuine day in court that is structurally free of political influence, the same as available for nearly all corporate workers; (3) do not permit the Merit Systems Protection Board to reduce due process access to administrative hearings through summary judgment authority. As soon as politically feasible, the rights in Presidential Policy Directive 19 should be codified, with enforcement independent of the intelligence community control. It is inadequate that institutional freedom of speech for the highest stakes issues should be at the mercy of the next Presidential election, or that the intelligence community will set the rules for protection of those challenging its own abuses of power (Table 5.1).

Globally, two lessons learned may help prevent the frustrating birth and growing pains of US whistleblower rights from being repeated: (1) be clear about the boundaries for protection. Rights must be written unambiguously and without discretion for unstated exceptions; (2) provide

Table 5.1 Summary table of the case

Initial whistleblowing:	Dissent by an Air Force Education Specialist that a proposed new program would result in gross mismanagement of advanced computer training.
Resulting reforms:	Mr. White's disclosures led to vindication and cancelation of the program. His legal case sparked the successful 13-year campaign to pass the Whistleblower Protection Enhancement Act.
Type of whistleblowing:	Mr. White made his disclosures through institutional and professional channels, climaxed by dissent at a public meeting. He did not engage in media disclosures. The legislative campaign, by contrast, actively participated in all available outlets for advocacy, including the media on a steady basis.
Documentation of evidence:	Professional analyses and judgment, interviews with other experts, and active support from the professional community. The disclosures were not based on exposure of secret records, but rather enforcement of professional standards.
Retaliation:	Within a month of speaking out publicly, the whistleblower was reassigned an administrative job without duties to a temporary offices in the desert.
Legal Protection:	In his case Mr. White was found ineligible for legal protection on grounds that his disclosures did not evidence a reasonable belief of gross mismanagement. The WPEA legislatively overturned the basis for the ruling against Mr. White.

Table 5.2 Effectiveness indicators of the case

Reforms of wrongdoing:	Counterproductive program canceled, and federal government whistleblower law systematically restored, strengthened, and expanded in landmark legislation.
External whistleblowing:	One public meeting for the disclosure; all forms of media for the legislative campaign,
Extensive mass media coverage:	none for whistleblowing disclosure; modest but steady coverage for legislation.
Strong evidence:	Consistent professional corroboration and consensus in support of disclosure; the indefensible track record for existing whistleblower rights.
Legal Protection:	After 13 years of struggle, none for Mr. White. After a 13-year legislative campaign, the strongest in history for US government whistleblowers.

multiple avenues for interpretation and enforcement of the law, with full access to the legal system's due process channels. In the United States, monopoly enforcement has been the Achilles' heel of the Whistleblower Protection Act (Table 5.2).

Notes

1. Pub. Law No. 95-454, 92 Stat. 1111 (1978) The law's free speech right is at 5 USC 2302(b)(8). In terms of subject matter, it protects disclosures of illegality, gross waste, gross mismanagement, abuse of authority, and a substantial and specific danger to public health or safety.
2. H.R. Rep. No. 103-769, at 12 (1994) ("1994 House Report")
3. 140 *Cong. Rec.* 29,048–53 (1994)
4. Memorandum from Thomas Devine analyzing and citing all Federal Circuit precedents during that time frame (July 2, 2012), available at www.whistleblower.org
5. 1994 House Report, at 14.
6. S. Rep. No. 103-358, at 11 (1994).
7. S. Rep. 112-155 at 4–6 (2012) ("Senate Report").
8. 174 F.3d 1378 (Fed. Cir. 1999) ("White 3").
9. *Id.;* 147 Cong. Rec. S5974 (daily ed. June 7, 2001, remarks of Senator Grassley).
10. *White v. Air Force*, 63 MSPR 90, 92 (1994) ("White 1"); Senate Hearing 107–60 on S. 995, Whistleblower Protection Act Amendments, 107th Cong., 1st Sess. 62 (July 25, 2001).
11. White 1, *supra*.

12. *White v. Air Force*, 78 MSPR 38 (1998) ("White 2").
13. White 3, *supra*. The opinion was authored by Chief Judge Robert Mayer, a controversial figure. In 1981 and 1982, he had served as Deputy Special Counsel at the US Office of Special Counsel, which is charged with investigating retaliation and protecting whistleblowers or other victims of merit system abuses. But Mr. Mayer and Special Counsel Alex Kozinski turned the office into a trap that teamed up with agency managers to retaliate successfully. To illustrate the abuses, they taught classes to federal managers in how to fire whistleblowers without getting caught and found guilty by OSC's own investigators. At the time, both Kozinski and Mayer were forced to resign, and the scandal started a campaign resulting in passage of the Whistleblower Protection Act of 1989. Devine and Vaughn, "The Whistleblower Protection Act: Foundation for the Modern Law of Dissent," 51 *Admin. L.R.*n.65. (Spring 1999); *See also* S. Rep. No. 100-413, at 5 (1988) In a real sense, Judge Mayer was ruling on eligibility to benefit from a law passed in response to his own abuses of power.
14. *Supra*, 174 F.3d at 1381.
15. Id.
16. *Id*., (citations omitted)
17. *The New Webster's Comprehensive Dictionary of the English Language*,(New York, Deluxe Ed. 1985); 147 Cong. Rec. S5973 (daily ed. June 7, 2001, remarks of Senator Levin).
18. Available at: http://www.whistleblower.org/blog/31–2010/1585-judicial-accountability-and-stare-decisis-should-the-us-be-learning-from-the-uk
19. 174 F.3d at 1381.
20. 47 Cong. Rec. S5974 (daily ed. June 7, 2001).
21. *White 3, supra*, 174 F.3d at 1381.
22. PL 96-303, 94 Stat. 855 (July 3, 1980).
23. 124 *Cong. Rec.* S14302-03 (daily ed., Aug. 24, 1978)
24. *White 3, supra*, 174 F.3d at 1381
25. 795 F.2d 1544, 1549-50 (Fed. Cir. 1986).
26. S. Rep. No. 100-413, at 13 (1988).
27. H.R. Rep. No. 103-769, at 15 (1994); 140 *Cong. Rec.* 29,353 (1994) (remarks of Rep. McCloskey).
28. *White v. Air Force*, 95 MSPR 1, 14 (2003).
29. *White v. Department of the Air Force*, 391 F.3d 1377, 1382, *rehearing denied* 2005 U.S. App. LEXIS 3826.
30. 87 *Cong. Rec.* S10414 (daily ed. Oct. 12, 2000) (remarks of Sen. Akaka).
31. 147 *Cong. Rec.* S5973 (daily ed. June 7, 2001) (remarks of Senator Levin)
32. *Id*., at S5973-74 (remarks of Sen. Grassley)
33. http://www.whistleblower.org/press/press-release-archive/2011/1037-house-republican-leadership-asked-senator-to-place-qsecret-holdq-on-federal-whistleblower-bill

34. www.facebook.com/ . . . /Make-It-Safe-Campaign . . . /892253636
35. *Id*., http://www.wnyc.org/blowthewhistle
36. http://www.whistleblower.org/press/press-release-archive/2011/1037-house-republican-leadership-asked-senator-to-place-qsecret-holdq-on-federal-whistleblower-bill
37. http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00743:@@@L&summ2=m&
38. WPEA, sec. 103.
39. *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990, quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966); WPEA Senate Report, at 10.
40. WPEA Senate Report, at 11.
41. WPEA, sec. 103.
42. WPEA, Section 101(b). A year before creating an on-the-job duty of loyalty, in 1998 the Federal Circuit had removed protection for any whistleblowing disclosures in the course of job duties. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).
43. WPEA, section 103(c).
44. WPEA, Section 108. Although the Supreme Court technically could consider a WPA appeal, it never has. Normally the court intervenes when there is confusion about the law due to a split between the various circuit courts. By definition that could not occur for the WPA since all Board's appeals go to the Federal Circuit.
45. Presideential Policy Directive 19 (October 10, 2012), http://www.fas.org/irp/offdocs/ppd/

References

Devine, T. (2012, July 2). Memorandum analyzing and citing all Federal Circuit precedents. Available at www.whistleblower.org

Devine and Aplin. (1986). Abuse of authority: The office of special counsel and whistleblower protection. *Antioch Law of Journal*, *5*, 4.

Department of the air Force v. White 795 F.2d 1544, 1549-50 (Fed. Cir. 1986).

Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990, quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966); WPEA Senate Report, at 10.

PL 96–303, 94 Stat. 855 (July 3, 1980).

Pub. Law No. 95-454, 92 Stat. 1111 (1978) Civil Service Reform Act of 1978.

Presideential Policy Directive 19 (October 10, 2012), http://www.fas.org/irp/offdocs/ppd/

USA Congress 140 *Cong. Rec.* 29,048–53 (1994).

H.R. Rep. No. 103–769, at 12 (1994) ("1994 House Report").

H.R. Rep. No. 103–769, at 15 (1994); 140 *Cong. Rec.* 29,353 (1994) (remarks of Rep. McCloskey).

S. Rep. No. 100–413, at 13 (1988).
S. Rep. No. 103–358, at 11 (1994).
S. Rep. 112-155 at 4–6 (2012).
47 Cong. Rec. S5974 (daily ed. June 7, 2001).
87 *Cong. Rec.* S10414 (daily ed. Oct. 12, 2000) (remarks of Sen. Akaka).
124 *Cong. Rec.* S14302-03 (daily ed., Aug. 24, 1978).
147 *Cong. Rec.* S5973 (daily ed. June 7, 2001) (remarks of Senator Levin).
174 F.3d 1378 (Fed. Cir. 1999) ("White 3").
147 Cong. Rec. S5974 (daily ed. June 7, 2001, remarks of Senator Grassley).
147 Cong. Rec. S5973 (daily ed. June 7, 2001, remarks of Senator Levin).
WPEA Senate Report, at 11 112th Congress (2011–2012) S. 743. Bill Summary and Status (Whistleblower Protection Enhancement Act of 2012. Retrieved on May 29, 2013 from http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00743:@@@L&summ2=m&
Weiner, T (1990). *Blank check*. NY: Warner Books.
White v. Air Force, 63 MSPR 90, 92 (1994) ("White 1"); Senate Hearing 107–60 on S. 995.
Whistleblower Protection Act Amendments, 107th Cong., 1st Sess. 62 (July 25, 2001).
White v. Air Force, 78 MSPR 38 (1998) ("White 2").
White 3, supra, 174 F.3d at 1381.
White v. Air *Force*, 95 MSPR 1, 14 (2003).
White v. Department of the Air Force, 391 F.3d 1377, 1382, *rehearing denied* 2005 U.S. App. LEXIS 3826.

Thomas Devine has been the Government Accountability Project's legal director since 1979. Since then, he has assisted over 7,000 whistleblowers defending themselves against retaliation, and making a difference. He has been a leader in campaigns to pass or defend 33 major national or international whistleblower laws. Tom has also served as "Whistleblower Ambassador" in over a dozen nations on trips sponsored by the US State Department, and authored or co-authored numerous books, including 2011's *The Corporate Whistleblowers Survival Guide: A Handbook for Committing the Truth.*

CHAPTER 6

Summary and Conclusions

Carmen R. Apaza, Yongjin Chang, Srisombat Chokprajakchat and Thomas Devine

Abstract The authors conclude that all whistleblowing cases analyzed in this study were effective with regard to the five factors: (1) type of whistleblowing; (2) role of mass media; (3) documentation of evidence; (4) retaliation; and (5) legal protection. The chapter highlights all cases as ones that inspired and led to great institutional and legal reforms. Finally, the results also suggest that Peru and Thailand should enact a whistle-blower protection law; South Korea should broaden protection for

C.R. Apaza (✉)
Facultad de Ciencias Administrativas y Recursos Humanos, Universidad de San Martín de Porres, Lima, Peru
e-mail: capaza1@yahoo.com

Y. Chang
Department of Public Management and Policy Analysis Program, Graduate School of International Relations, International University of Japan, Niigata, Japan
e-mail: yjc2015@iuj.ac.jp

S. Chokprajakchat
Department of Social Sciences, Mahodol University, Nakhon Prathom, Thailand
e-mail: srisom88@yahoo.comsrisombat.cho@mahidol.ac.th

T. Devine
Government Accountability Project, DC School of Law, NW, United States
e-mail: tomd@whistleblower.org

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5_6

whistleblowers; and the United States should provide multiple avenues for interpretation and enforcement of the law, with full access to the legal system's due process channels. Each country should establish a better whistleblower system in order to discover and deter corruption and fraud.

Keywords Effective whistleblowing factors · Type of whistleblowing · Role of mass media · Documentation of evidence · Retaliation · Legal protection

1 Summary

1.1 Summary of the Peruvian Case

In this case, the whistleblower, a former Minister of Labor and Chief of the National Commission Against Customs Fraud and Contraband during the Fujimori administration, revealed allegedly expensive public corruption in customs through a very popular TV political program called *Panorama*. He provided *Panorama* a video showing a Customs Head of Division receiving money from an importer. Allegedly, the public official received the money from the importer in order to avoid extremely harmful customs fraud. The denunciation created a big political scandal and caused uncertainty in the whole Peruvian society. Moreover it had the effect of a bomb inside the executive office of President Fujimori. In the end, the whistleblowing caused structural and organizational changes in the customs service; it also affected the entire executive branch as many officials lost their jobs, including the whistleblower.

1.2 Summary of the South Korean Case

In this case, the whistleblowers revealed Hwang's academic misconduct through an external channel, a social investigation TV program. Even though they did not have strong evidence to verify the misconduct in the beginning of the whistleblowing process, the TV program's team actively cooperated with the whistleblowers to find convincing evidence of the wrongdoing. After the TV program went on air, the Seoul National university committee investigated Hwang's research and fired Hwang

from his position at the university. In Korea, the Anti-corruption law protects whistleblowers from 2001; however, the law could not protect the whistleblowers due to the limitation of the law.

1.3 Summary of the Thai Case

In this case, Mrs. A is deemed to be the first whistleblower who the National Anti-Corruption Commission (NACC) had provided with protection for informing of misconduct or whistleblowing. Mrs. A has fought against coal-fired power and other environmentally destructive development projects and she began her crusade for the community's right to protect the environment in 2000 when Union Power Development Company, one of Thailand's largest electric companies, planned to build a coal power plant. Mrs. A tried to stop the construction of the power plant. She was threatened numerous times but she was not about to let corrupt government officials or greedy businesspersons ruin her village. Thus, Mrs. A filed a complaint against the Power Plant Construction Project at Ban Krut, Amphoe Bang Saphan, Prachuap Khirikhan Province into the Plaint of Black No. 44410328/Red No. 01854553. However, Mrs. A was accused of trespassing on land belonging to Union Power Development Co. and her action was considered wrong and disturbing. Mrs. A's case drew public and media attention and raised a series of significant issues in the movement for environmental and community rights in Thailand. Mrs. A was charged in 1997.

In 2005 the lower court acquitted her and its verdict noted that Mrs. A's alleged act was done with a purpose to protect the community's right. However, the Appeal Court overturned the lower court's ruling. Also the Supreme Court upheld the verdict and sentenced Mrs. A to four months in jail for trespassing on land belonging to Union Power Development Company. The final decision of the Supreme Court indicates "how the right of people in Thailand to protest and defend their communities from harmful environmental consequences has effectively been made illegal".

While Mrs. A was in prison, the NACC in collaboration with the National Police Office and the Ministry of Justice (Department of Correction and Department of Rights and Liberty Protection) considered her case. On December 8, 2011, Mrs. A was released from prison. Immediately after that, on December 15, 2011, she submitted to the NACC an application for a witness protection program. Since then, Mrs. A has been under the

ordinary measures of a witness protection program under Witness Protection Act B.E. 2546. At that time the NACC had not yet implemented its measures for whistle-blowing because implementation of such measures were new, even though the NACC had measures to receive whistleblowers. In this regard, a practical approach for a whistleblowing law is still needed.

1.4 Summary of the American Case

In this case, the whistleblower, John White, a GS-13 Supervisory Education Services Specialist for the Air Force, initially warned his supervisors about a costly and counterproductive program that would undermine the Air Force's training goals. But they were not open-minded. In May 1992 in a public meeting, the professional community openly attacked the program and White explained why he agreed with them. In the end, the controversy sparked an independent management review that agreed with White, and so the Secretary of the Air Force canceled the program entirely in 1995. But White experienced retaliation after the disclosure.

In June 1992, a month after the dissent, he was demoted to a GS-12 administrative position without supervisory responsibilities, and moved to a temporary office in the desert, and given no assignments. Mr. White's case then went to court. It began a 13-year court and legal battle. In 1992 an administrative judge initially ruled against White on grounds that he did not reasonably believe he was disclosing information evidencing "gross mismanagement," one of the WPA protected speech categories. The Merit System Protection Board (MSPB) reversed, finding that Mr. White's speech was protected, because he was qualified to make that professional judgment and his concerns were widely agreed to by other qualified professionals.

In May 1999 the MSPB's favorable ruling was reversed and the case was remanded for further proceedings. In this decision the Federal Circuit created the new whistleblower requirement of "irrefragable proof." The 1999 decision, *Lachance v. White*, did not become final until 2005 when the Administrative Judge again found that Mr. White engaged in protected speech and reaffirmed the earlier reversal of Air Force actions. *Lachance v. White* sparked systematic legislative reforms in regard to whistleblowers' rights. For instance, in November 2012, after an extensive campaign where the media played a highly significant role, the Whistleblower Protection Enhancement Act (WPEA) was signed into law.

2 Conclusion

All whistleblowing cases in this study were effective with regard to the five factors: (1) type of whistleblowing; (2) role of mass media; (3) documentation of evidence; (4) retaliation; and (5) legal protection.

2.1 Type of Whistleblowing

According to the theory discussed in Chapter 1 external whistleblowing works better than internal whistleblowing especially when there is no a whistleblower legal protection system and/or it is weak. For example, in the Peruvian case the whistleblower did not have other option than going public due to a then allegedly corrupt judiciary and no legal protection for whistleblowers.

In the South Korean case, the whistleblower went public because there was no a strong whistleblower protection system in place. The whistleblowers left a post about Dr. Hwang's wrongdoing on the program's Internet discussion board instead of going to a government office.

However, in the American case, Mr. White made his disclosures through institutional and professional channels. Perhaps one might think that the American whistleblowing protection system would be an ideal environment for choosing internal whistleblowing. Nevertheless, Mr. White case proved that it was not so. He did not obtain initial protection but his case went to a long 13-year court battle. Fortunately, his brave disclosure sparked a long but successful campaign to reform the WPEA.

In the Thai case, the external whistleblower was faced with danger. Although the whistleblower, Mrs. A, obtained initial protection from the police, it was not a formal witness protection program. She should be considered as a human rights defender not as a troublemaker or wrongdoing. She had to confront with the ordeal of a four-month jail sentence with a 10-year court battle.

2.2 Role of Mass Media

The role of the media was crucial in all the study cases. For instance, in the Peruvian case the whistleblower blew the whistle on a popular TV program. Consequently, the investigations were followed by the media (e.g. TV, radio, and newspapers) almost daily until the investigations were finally completed.

In the Korean case, the TV program was very important. It caused the release of Dr. Hwang's wrongdoings and uncovered the evidence. The television producers actively participated in finding the evidence. Because of the power of media, the incident became a nationally recognized issue immediately.

In contrast to the Peruvian and South Korean case, in the American case the whistleblower, Mr. White, primarily engaged in internal whistleblowing within the institutional and professional channels. However, the legislative campaign sparked by Mr. White's case used all available media channels (e.g. regular opinion articles by activists, masthead editorials from conservative and liberal newspapers, steady appearances on radio, TV, among others). The media played a highly significant role in keeping the WPEA campaign alive for 12 years.

In the Thai case, Mrs. A drew serious attention from media coverage (i.e. newspapers and human rights organizations). The media played an important role by pushing community rights and human rights issues.

2.3 Documentation of Evidence

All cases show that the quality of evidence affects the whistleblowing process. Strong evidence was crucial in the Peruvian case. The whistleblower's disclosure was the first of its type to be disclosed on a widely popular TV program. If notable government whistleblowing cases were disclosed before, the public was not aware of them. The whistleblower's disclosure of allegedly gross contraband and fraud in customs shocked the public and caused political uncertainty in Peruvian society. The media pressed the government to take drastic measures leading to customs' institutional reform and change within the Executive Department.

In the Korean case, the evidence was very important too, because Dr. Hwang was recognized as a national hero and he had strong credentials, the whistleblowers could show strong evidence of Dr. Hwang's wrongdoing. At the beginning, the whistleblowers did not have substantial evidence to prove Dr. Hwang's wrongdoing. The whistleblowers and the TV programs producers, however, found one by one to present violations of academic integrity and fabrication of research results.

In the Thai case, Mrs. A and her fellow citizens successfully prevented the construction of a coal-fired power plant by means of protest. They defended their community from harmful environmental damage. She also filed a complaint against the Power Plant Construction Project.

2.4 *Retaliation*

In all cases retaliation happened remarkably swift even though in some of the cases there was whistleblowing protection laws in place. In the Peruvian case, the whistleblower resigned a few days after blowing the whistle. In the Korean case, the whistleblowers lost their jobs immediately even though they were not working in the same research institute as Dr. Hwang. For a while, they could not get jobs in a similar area. In the American case, within a month the whistleblower was reassigned to temporary facilities in the desert without duties.

2.5 *Legal Protection*

The cases dramatically illustrated the fragility of whistleblowers' legal rights. In the Peruvian, Korean, and Thailand cases the situation is more critical since no actual whistleblower protection act exists and/or no actual law implementation exists. But the existence of legal protection does not guarantee actual/real protection either. For instance, in the case of the American whistleblowing case, by the time Mr. White blew the whistle the Whistleblowing Protection Act (WPA) was in place. But it did not work for him. He was not entitled to protection despite the fact that he was right.

The Thai case is particularly interesting. The whistleblower Mrs. A fought for environmental and community rights and she was charged while the 1997 Constitution (supporting human rights) was still in effect. However, Thai Supreme Court asserted illegality of defending human rights. While some considered Mrs. A a human rights defender, others deemed her a troublemaker because she trespassed at the lunch party of the construction company for the coal-fired power plant. This made her serve her sentence to four months in prison.

To sum up, the Peruvian, Korean, Thai, and American cases inspired and led to great institutional and legal reforms. For instance, in Peru, the whistleblowing disclosure not only led to crucial institutional reforms but it also had the impact of a bomb within the Executive branch, causing the resignation of 6 ministers and overall national political tumult. In the United States, the whistleblowing case not only led to the cancelation of a program that was fatally flawed but it also led to an unprecedented legislative action that overturned virtually all the court's hostile precedents. It sparked the successful 13-year campaign to pass the Whistleblower Protection Enhancement Act (WPEA).

Table 6.1 Effectiveness indicators in the study whistleblowing cases

Indicators	*Peru*	*South Korea*	*Thailand*	*United States*
Reforms of wrongdoing	Suspension of accused managers Launching of Congressional commission Resignation of cabinet ministers Many successful prosecutions for corruption	Public renunciation of falsified results Firing of accused scientists Investigation by internal committee of Seoul National University Dr. Woo Suk Hwang charged with fraud	Protection of witnesses and granting the witness immunity (the witness protection program under Organic Act on Counter Corruption B.E. 2542 (1999) amended in 2011)	Counterproductive program canceled Federal government whistleblowers law systematically restored, strengthened and expanded in landmark legislation (i.e. the passing of the Whistleblower Protection Enhancement Act [WPEA])
External whistleblowing	Through television	Through Internet and television	Initial disclosure through internal channels (i.e. institutional procedure) followed by mass media coverage.	Initial disclosure through institutional channels, including a dissent at a public meeting. But it sparked a widely publicized legislative reform campaign
Extensive mass media coverage	Initial revelations on television; broadcasting of video evidence; extensive coverage by newspapers	Initial contact to television program; active participation of TV journalists in gathering and documenting evidence; public revelation on television	Public and newspaper Extensive coverage	A public meeting for the disclosure; all forms of media for the legislative reform campaign

(*continued*)

Table 6.1 (continued)

Indicators	*Peru*	*South Korea*	*Thailand*	*United States*
Strong evidence	Videos of illegal activity Thousands of pages of documents submitted to Congress and public prosecutor	Supervised replication of research to prove photos were fabricated Personal testimony of participants who admitted guilt	Filed a complaint against the company	Consistent professional corroboration and consensus in support of disclosure (e.g. interviews with experts, enforcement of professional standards, among other professional support).
Legal protection against retaliation	None	Protection limited to cases of internal whistleblowing where financial damage can be proved	None	After 13 years of struggle none for the whistleblower; but the strongest in history for U.S. government whistleblowers

Table 6.1 adds these factors to the benchmarks for reform. The result is a more accurate and comprehensive picture of how well the process worked in each country.

Table 6.2 summarizes how these benchmarks can be a useful assessment tool. The assessment indicates that effectiveness in whistleblowing may not be that simple to achieve. While it may be relatively easy to dismiss officials, pass laws, form investigative committees, and prosecute corruption, it is more difficult to gather documented evidence and protect whistleblowers from retaliation.

These case studies have additional implications. The South Korean case helps prove the need for more rigorous review of scientific research. The Peruvian case helps demonstrate the need for transparency and accountability in government and thus for strong anti-corruption laws. The American case shows that passing statutory whistleblower protection laws is only the first step toward freedom of speech. In contrast to all the other cases, in the American case, by the time the whistleblowing disclosure protection law existed (i.e. the 1989 Whistleblower Protection Act (WPA), for WPA's

Table 6.2 Assessment of effectiveness in the study whistleblowing cases

Indicators	*Peru*	*South Korea*	*United States*	*Thailand*
Reforms of wrongdoing	Yes	Yes	Yes	Yes
External whistleblowing	Yes	Yes	Initially No but then it sparked a public campaign	Yes
Extensive mass media coverage	Yes	Yes	None for the disclosure; but yes for reform	Yes
Strong evidence	Yes	No	Yes	Yes
Legal protection against retaliation	No	No	No	No

protection, it had to firstly determine whether the whistleblower engaged in legally protected activity. Despite the fact that Mr. White's disclosure was supported by reasonable evidence, the administrative judge initially ruled against Mr. White stating that he did not reasonably believe that Mr. White was disclosing information evidencing "gross mismanagement" (one of the WPA protected speech categories). Eventually, after 13 years of court battle, the administrative judge found that Mr. White engaged in protected speech. Thus, the existence of whistleblowing protection laws do not necessarily mean a whistleblower will obtain protection. First, he/she must be sure the whistleblowing disclosure is within the legally protected speech categories.

Finally, the results also suggest that Peru and Thailand should enact a whistleblower protection law; South Korea should broaden protection for whistleblowers; and the United States should provide multiple avenues for interpretation and enforcement of the law, with full access to the legal system's due process channels. Each country should establish a better whistleblower system in order to discover and deter corruption and fraud.

Carmen R. Apaza is a professor at Universidad de San Martin de Porres. Her research interests include corruption in government, public sector reforms, and development. She has held managerial positions in Peru's public sector and served as Principal Expert in Public Administration for the Organization of American States. She has taught at American University, City University of New York, and Eastern Washington University.

Yongjin Chang is an assistant professor at the Graduate School of International Relations of the International University of Japan. He received his Ph.D. in public administration from the School of Public Affairs at American University in 2008 and worked as a research professor at Korea University from 2010 to 2015.

Srisombat Chokprajakchat is an associate professor at Mahidol University. She was Program Director in Criminology, Justice Administration and Society during and served as a committee member of the Mahidol University Institutional Review Board. She received her Ph.D. degree in public policy from George Mason University. Her research obtained an honorable dissertation in political science from the National Research Council, Thailand.

Thomas Devine has been the Government Accountability Project's legal director since 1979. Since that time, he has assisted over 7,000 whistleblowers defending themselves against retaliation, and making a difference. He has been a leader in campaigns to pass or defend 33 major national or international whistleblower laws, Tom has also served as "Whistleblower Ambassador" in over a dozen nations on trips sponsored by the US State Department, and authored or co-authored numerous books, including 2011's *The Corporate Whistleblowers Survival Guide: A Handbook for Committing the Truth.*

Index

A
Academic misconduct, 24, 32, 78
Accountability, v, 1, 18, 33, 68, 74n18, 85, 74n18
Audit, 12, 15

C
Case study, 6
Cell cloning, 25
Civil servants, 10
Comparative, v, vi, 2
Congress, 13, 15, 17, 60, 61, 63, 64, 65, 66, 67, 69, 70, 75, 76, 85
Constitution, 16, 38, 39, 42, 49, 57, 83
Contraband, 12, 14, 82
Corrective action, 62, 70
Corruption, v, 2, 5, 10, 11, 12, 13, 14, 15, 16, 18, 21, 30, 33, 38, 39–40, 41, 42, 43, 44, 47, 51, 52, 54, 55, 57, 58, 60, 78, 79, 84, 85, 86
Customs, 11, 12, 13, 14, 15, 16, 18, 20, 78, 82

D
Democratization, v
Denunciation, 13
Disclosure, 1, 4, 56, 61, 64, 73, 80, 81, 82, 83, 84, 85, 86

E
Effectiveness, v, vi, 2, 3, 18, 42, 85
Ethnicity, v
Evaluation, 3, 13, 54
Evidence, v, 4, 11, 14, 17, 18, 25, 26, 28, 29, 30, 31, 32, 40, 41, 45, 46, 55, 56, 63, 67, 68, 69, 72, 73, 78, 81, 82, 84, 85, 86
External whistleblower, 4, 81
External whistleblowing, 4

F
Fraud, 5, 12, 14, 18, 31, 32, 34, 55, 60, 65, 78, 82, 84, 86

G
Government, 16, 24

H
Human cloning, 24

© The Author(s) 2017

C.R. Apaza, Y. Chang (eds.), *Whistleblowing in the World*,
DOI 10.1007/978-3-319-48481-5

I
Inspection, 12, 38, 54
Internal whistleblower, 4
Investigation, 3, 12, 13, 14, 15, 16, 26, 28, 30, 32, 40, 41, 45, 50, 54, 78

L
Law enforcement, 5
Legal protection, v, 3, 4, 5, 16, 17, 24, 30, 32, 72, 81, 83, 85, 86

M
Mass media, v, 3, 4, 15, 17, 28, 33, 51, 53, 56, 73, 77, 81, 84, 86

N
The NACC Commission, 50, 52

O
Organization, 1, 3, 4, 11, 16, 53, 54, 55
Organizational practices, 18

P
Peru, v, 21, 83
Photo fabrications, 25, 27, 28
Policies, 2, 3, 68
President Fujimori, 10, 11, 12, 16, 18, 78
prevention, 38, 39, 42, 43, 44, 52, 54
public pressure, 15, 16

R
Reform(s), v, vi, 2, 3, 11, 16, 17, 32, 56, 60, 65, 66, 68, 71, 72, 80, 81, 82, 83, 84, 85, 86
Religion, v
Retaliation, v, 3, 4, 5, 6, 16, 17, 18, 30, 32, 53, 60, 61, 64, 66, 69, 70, 71, 72, 74n13, 80, 81, 83, 85

S
Scientific misconducts, 25, 29
South Korea, v, 1, 6, 23, 24, 25, 28, 29, 32, 33, 34, 35, 84, 86
Supreme Court, 14, 40, 42, 46, 47, 49, 50, 56, 79, 83, 75n44

T
Transparency, 1, 18, 19n1, 21, 33, 34n4, 55, 85

U
Union Power Development Co, 48, 79
United States, v, 2, 3, 5, 6, 83, 84, 86

W
Whistleblower protection, vi, 2, 3, 5, 18, 31, 33, 71, 81, 83, 85, 86
Whistleblower Protection Act, 5, 60, 61, 64, 65, 67, 71, 73, 73n10, 74n13, 85
Whistleblower Protection Enhancement Act, 63, 66, 67, 72, 76, 80, 83, 84
Whistleblowers protection, 55
Whistleblowing, v, vi, 1, 2, 3, 4, 5, 6, 10, 13, 14, 15, 16, 17, 18, 20, 24, 25, 28, 30, 32, 33, 38, 40, 47, 51, 52, 54, 55, 56, 63, 68, 70, 72, 74n33, 78, 79, 80, 81, 82, 83, 84, 85, 86
Witness protection, 43, 44, 50, 51, 56, 79, 81, 84
Witness Protection Law, 55
Wrongdoing, 3, 4, 15, 16, 18, 28, 32, 33, 41, 49, 56, 73, 78, 81, 82, 84