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## Protecting the Insider

By **Jessica Centers**

*Four whistleblower attorneys tell their stories*

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Times have changed for whistleblowers. Once dismissed as troublemakers who threaten jobs and industries, today's whistleblowers are more often seen as people of conscience who risk career and reputation to expose corporate and government incompetence or corruption. Witness Time magazine naming three whistleblowers—who called out Enron, Worldcom and the FBI—its Persons of the Year for 2002.

Still, the court of public opinion is very different from a court of law. Whistleblower law, with its short 25-year history, is still a new phenomenon. The law is wrought with loopholes, inconsistencies and entire classes of employees with few protections. Attorneys like Stephen M. Kohn, John R. Phillips, Mark Zaid and Debra Katz are working to change that.

### Stephen Kohn: Shaping the law

Stephen Kohn was a law student when, during an internship with the Government Accountability Project (GAP), he was asked to determine how to defend whistleblowers at the Comanche Peak nuclear power plant in Texas. It was 1982 and whistleblowing was still an obscure concept and certainly not a recognized area of law. In his research, however, Kohn found that whistleblower protections did exist. Over the previous 10 years, Congress had enacted seven whistleblower laws, one of which covered atomic energy, but all of which had rarely if ever been used. Indeed, when he tried to determine what actions were protected based on case history, he hit a roadblock. There was no case history.

So Kohn wrote it himself. In 1985, after graduating from law school and being hired by GAP, he dug through unpublished decisions that were only available in the offices of the Department of Labor, and wrote what would be the first legal treatise on whistleblowing: Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual. "We collected a body of decisions better than anybody else had and used those to hammer out what in fact were the case precedents interpreting these seven, very early whistleblower laws," he says.

Kohn started training colleagues on how to use this fledgling area of the law, and, in 1988, he co-founded the National Whistleblower Center and started his own firm, Kohn, Kohn & Colapinto. While the Center focused on advocacy and education, Kohn set precedent. In Sanjour v. EPA, the U.S. Court of Appeals for D.C. ruled that William Sanjour, an EPA employee, had the right to speak before environmental community groups and expose wrongdoing. As part of its decision, the court ordered a nationwide injunction upholding the First Amendment rights of federal employees to criticize their agencies, especially in regard to environmental violations.

Kohn also represented the country's first successful national security whistleblower, Frederic Whitehurst, who exposed falsified reports and evidence contamination at the FBI crime lab. As



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a result, the FBI was not only forced to pay Whitehurst more than \$1 million and allow him to go on national TV with his revelations, it was subjected to outside oversight for the first time in its history. The case spurred an executive order by President Clinton that established whistleblower protections for FBI employees.

As Kohn became one of the nation's leading experts in whistleblower law, he quickly learned that the most demonstrably effective cases were those brought under the False Claims Act. For that, he had John Phillips to thank.

#### **John R. Phillips: Teaming with Lincoln to save half a trillion dollars**

About the time Kohn was digging through early labor department whistleblower decisions, Phillips—who founded the Center for the Law and the Public Interest back in 1971—came across a Civil War-era law, dubbed the Lincoln Law, with unusual characteristics.

"It gave any citizen the right to bring an action on behalf of the government against any company engaged in defrauding the government, and it gave you a recovery if successful," Phillips says. As a public interest lawyer whose clients didn't pay regular attorney's fees, Phillips was constantly fundraising and looking for ways to support his center's works, so the recovery aspect of the Lincoln Law caught his attention. "Abe Lincoln himself pushed to get it passed because of rampant fraud against the Union army," Phillips says. "It was used for a while in the late part of the 1800s, but since about 1940 it hadn't been used at all. I felt if it could be modified, changed, modernized, it had the potential to be a powerful tool—especially at the time."

The 1980s, he explains, were a time of widespread defense contractor fraud—the government was being charged for \$500 hammers and \$800 coffee pots—and Phillips thought this law would allow him, both legally and financially, to take those kinds of cases. He prepared amendments to the law, took them to Sen. Chuck Grassley (R-Iowa) and Rep. Howard Berman (D-California) for their consideration, and attended subsequent hearings that were held largely under the radar. "We got it passed before the defense industry really understood what this was going to do," he says. In 1986, President Reagan signed the amended False Claims Act and a whole new area of law was born.

Other whistleblowers were often stigmatized as troublemakers; False Claims Act cases were different. "It's designed to go after fraud against the government," Phillips says. "Anytime you have the government being fleeced, as they are routinely by unscrupulous contractors, that's bad for the taxpayer."

Cases under the new law were thus viewed as more credible than other whistleblower claims, especially when the U.S. Justice Department joined the actions—as it did in most of Phillips' cases.

One case, against HCA Inc.—Hospital Corporation of America, at the time the country's largest for-profit health care provider—lasted 10 years and involved 70 lawyers from multiple firms on Phillips' side alone. It ended in 2002 with the company paying the government \$1.7 billion to resolve all the cases of the company over-billing Medicare. It also helped clean up fraudulent, industry-wide Medicare billing practices.

In a similar case against National Health Laboratories (NHL), Phillips represented a whistleblower who exposed the practice of bundling tests: labs would encourage doctors to order medically unnecessary tests to bill the government more. NHL wound up paying \$111 million to the government, and, after the government collected almost \$1 billion from labs engaged in similar practices, another industry-wide fraud was stopped.

More recently, Phillips, with co-counsels, brought a False Claims action case against Wall Street financier Mario Gabelli, who created a group of frontmen to buy wireless licenses for him at auction so he could get the government's small-business discount. He settled for \$130 million.

Over the last 20 years, Phillips has resolved some 100 cases in which the U.S. Treasury recovered \$3 billion. Overall, the federal government has recovered close to \$25 billion from actions brought under the False Claims Act. "And that's only the actual recovery," Phillips adds. "The benefit and savings have been estimated in excess of half a trillion dollars because so much has been deterred."

Phillips and Kohn argue that the reason the False Claims Act has been so effective is because it gives whistleblowers a financial incentive to come forward.

For other whistleblowers, the risk is far greater and the reward far less.

#### **Mark Zaid: Fighting national insecurity**

As a kid, Mark Zaid incessantly researched the Kennedy assassination. In college, he chose it

immigration law with a global touch

#### **Citizen Cohn**

Joseph Cohn has made a career out of arguing ferociously for the disadvantaged

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as the subject of his honors research, and during law school he attended conferences on the topic. This early interest led directly to the creation of his current national security law practice.

One of his earliest clients was Michael Scott, whose father, Winston, had served for 13 years as the CIA's station chief in Mexico City, where Lee Harvey Oswald had visited two months prior to the assassination. When Winston died in 1971, an autobiographical manuscript he had written was seized by the CIA and sealed away. Even his son, Michael, was denied access. Zaid, introduced through a mutual acquaintance in the early 1990s, helped Michael attain the access he wanted following the filing of a Freedom of Information Act lawsuit.

Concurrently, in November 1992, Zaid spoke at a conference on the 29th anniversary of the assassination, where he was introduced to a DIA intelligence officer who later became his client in an age discrimination case.

Both cases, Zaid says, set the stage for his entire career, for he soon became a known commodity in the intelligence community. He founded the James Madison Project, a nonprofit that promotes government accountability and the reduction of secrecy, and much of his work revolved around fighting government secrecy on behalf of intelligence officers, journalists and media organizations.

It hasn't been easy.

"There is no legitimate protection for national security whistleblowers," he says. "Intelligence agencies do whatever they can to undercut any effort to obtain accountability or demonstrate incompetence or culpability on their part.

"I would never want to be a whistleblower in the national security field," he adds. "I know what they go through. It's terrible. They feel abandoned, pressured, attacked."

That's why Zaid often finds himself, as in the case of Patrick and Robin Eddington, trying cases in the media or on Capitol Hill. "[The Eddingtons] were employees of the CIA, analysts, and they believed that the government, primarily the defense department, was covering up what was causing Gulf War Syndrome," Zaid explains. "There was evidence indicating it was being caused by some sort of exposure to chemical weapons. They believed the defense department was the problem and not CIA, and they thought they were doing the right thing to help their agency, to get their agency to extricate themselves from DOD on that issue.

"Unfortunately, good intentions, with respect to national security whistleblowers, often don't work out. They found their promising careers suddenly derailed."

When the Eddingtons tried to speak out, they learned what a small town Washington, D.C., is. At a House Armed Services Committee hearing, Patrick Eddington didn't get through more than a few sentences before a staffer, a retired Army colonel, interrupted him, saying he knew the people Eddington was talking about and he couldn't believe they would do such a thing.

Patrick Eddington wound up finding accountability not through the courts but through a book deal. In fact, representing military and intelligence whistleblowers' manuscripts through the pre-publication review process, which includes challenging what should and shouldn't be classified, has since become a routine service Zaid offers.

"In the federal field, it is usually not necessarily about obtaining a windfall judgment of 'Yes, we've vindicated your rights. You're entitled to \$3 million.' That is rare if not unheard of. We're trying to get the person back to the status quo of the day before they became a whistleblower. So they can get back on track with their career."

#### **Debra Katz: Counsel v. Special Counsel**

Debra Katz, who founded the employment law firm Katz, Marshall & Banks and has been representing whistleblowers for more than 20 years, spent the past few years exposing retaliation for whistleblowing within the Office of Special Counsel (OSC). The office exists, ironically, to protect federal employees from such reprisals.

Scott Bloch, who had previously worked on President George W. Bush's Task Force for Faith-Based and Community Initiatives, was appointed special counsel in 2004. Quickly, and in a departure from 35 years of precedent, he interpreted that gay and lesbian employees were not protected under the Civil Service Reform Act. When an employee leaked that change in policy to The Washington Post, Bloch began a witch hunt of his office, ordering people thought to disagree with his policies—including the only two openly gay employees—to transfer out of state or lose their jobs. Katz filed a complaint on behalf of OSC employees who felt they'd been retaliated against.

The case resulted in an investigation in which the FBI raided the Office of Special Counsel and Bloch's home, and—because Bloch had deleted office records—the case also sparked a grand jury investigation to determine if he violated criminal law by obstructing justice.

In October 2008, Bloch resigned.

Though Katz considers that a vindication, the federal employees who brought Bloch's actions to light haven't been compensated. The most she can hope to win for them under the law is backpay. "There are a number of industries where there still is no protection [for whistleblowers]," she says. "The federal government is the largest employer in the country and their remedy is extremely limited. If we are going to try to encourage people to do the right thing by raising issues that are of vital importance to public health and safety and to the soundness of our financial institutions, we have to provide [compensation] to them when they suffer adverse actions."

### **Whistleblowing after Sept. 11**

Two events this decade have had a deep effect on the direction of whistleblower law. The first was Sept. 11. The second was the collapse of Enron.

For attorneys like Phillips, "The only impact from 9/11 is that it's taken so many government investigators away from [False Claims]," he says. "So it's had the effect of slowing down pursuing these cases because government resources are diverted elsewhere."

Zaid, meanwhile, sees Sept. 11 as a kind of trade-off. Because of the importance of national security issues, more insiders are willing to risk their careers by coming forward, and the media and Capitol Hill are more likely to pay attention, and the public, or at least a segment of the public, has a greater appreciation for their effort; but none of this has translated into greater legal protections. Instead, after Sept. 11, the notoriously secretive Bush administration slowed the flow of information considerably on any matter that could be connected to national security. "Pre-9/11, these cases were always incredibly difficult," Zaid says. "Now they're incredibly super-difficult. Without a doubt, things have become more troublesome."

These days, when Zaid files a complaint, the government often claims that the pertinent information is classified—and the courts rarely intervene. "That means national security trumps any concerns you have. Case dismissed," he says.

That's what happened to Sibel Edmonds. The FBI linguist told her supervisor her belief that evidence related to Sept. 11 was being covered up through the mistranslation of information. She was fired. Zaid sued on her behalf but her case fell victim to the state-secrets privilege.

Same story for Jeffrey Sterling, an African-American CIA case officer, assigned to recruit foreign spies, who was told by a supervisor he could not get certain jobs in the agency because of his skin color. A federal appeals court agreed with the CIA that there was no way for Sterling to prove his claim without exposing classified information.

In cases like these, Zaid says, all he can hope to do is embarrass the agencies enough in the media that they'll do the right thing. "Direct frontal attacks are not the best strategy in challenging the intelligence community," he says. "You have to surround the enemy and hit them with everything you got in almost a guerilla-like attack."

For Kohn, there has actually been a positive change since Sept. 11, 2001. "Before that day," he says, "whistleblowers were often held in disdain and were not understood. It was still a foreign concept, one you had to spend a lot of time explaining and justifying. After Sept. 11, all of a sudden these employees, many in intelligence, started coming forward, saying, 'Hey, I complained about this. I identified the terrorist who was on one of those airplanes and sent my memo up and nobody listened to me.' The American people could see how this impacted them."

Kohn represents a man whom he considers the most important national security whistleblower of our time: Bassem Youssef.

At the time of the attack, Youssef was the FBI's leading expert on Middle East counterterrorism. Born in Egypt, he spoke fluent Arabic and understood the region's culture and history. In 1994 he won the intelligence community's most prestigious award, the National Intelligence Distinguished Service Medal, for his counterterrorism work involving an Islamic group that was a predecessor to al-Qaida. FBI director Louis Freeh chose Youssef to establish an FBI office in Saudi Arabia, which was the first and only Western agency that had full cooperation from the Saudis.

Then came Sept. 11, and Youssef was completely frozen out and removed from Middle East counterterrorism. "People held it against him that he was Arab-American," Kohn says.

Youssef—"pursuant to his own patriotic sense of duty," Kohn says—complained to his congressman that he had these skills that were not being used. He was trying to address the situation discreetly, but the FBI deemed it an act of intolerable misjudgment. He was retaliated against, and through the subsequent case Kohn filed, the American public was able to learn just how little the FBI knew about the enemy. In a deposition, Kohn asked the head of counterterrorism for the difference between a Shiite and a Sunni. He didn't know. He didn't know much about Islam, either, and didn't think it important that he should. "How can

leadership in this war on terror not know such basic things when you are trying to infiltrate and understand the motives behind this organization?" Kohn says. "Think about Germany in 1939 and not understanding the difference between a German Jew and another German who might be supporting the Nazi party."

Youssef v. Mukasey is an ongoing case. In the meantime, Youssef still works for the FBI in a management position. "That's part of our success," Kohn says.

### **Whistleblowing after Enron**

After the Enron collapse, Kohn and the former executive director of the National Whistleblower Center, Kris Kolesnik, sat down with the chief of staff to Sen. Patrick Leahy (D-Vermont). Kohn told him that they had just represented whistleblowers from a Wall Street firm and discovered there were no protections for corporate whistleblowers exposing fraud to shareholders—meaning no protections for people like Sherron Watkins, who tried to blow the whistle internally on Enron. The meeting fueled support for the corporate whistleblower protections that Kohn helped draft, with Senate Judiciary Committee staff, into the larger Sarbanes-Oxley Act, the 2002 law that changed the regulation of financial practice and corporate governance.

In the years since, Katz has become an expert on Sarbanes-Oxley whistleblower complaints. In 2004, she filed one on behalf of Roger Barnes, the first person to raise accounting issues at Fannie Mae. As a result, the firm had to undergo a management overhaul along with the largest restatement of earnings in U.S. history. "Unfortunately, Fannie Mae did not do enough to clean house and we're left with debacles like we're seeing in 2008," Katz says.

The Barnes case was resolved with a settlement, but overall Katz has been disappointed by the way in which the Bush administration has interpreted Sarbanes-Oxley. The law allows whistleblowers to file a complaint with the U.S. Department of Labor alleging unlawful retaliation, but the Department of Labor has dismissed a majority of those complaints, asserting that employees of subsidiaries of publicly traded companies are not protected under the act. Sens. Chuck Grassley (R-Iowa) and Leahy have called on the department to stop rejecting such claims, arguing that it violates the "spirit and goals" of the law. "Administrative law judges are giving this law a very cramped and narrow view," Katz says. And the resource imbalance between lone whistleblowers and multibillion-dollar corporations makes it hard to challenge those decisions.

Still, Kohn sees opportunity to define Sarbanes-Oxley in the courtroom.

"You find that in almost all whistleblower laws, these are still relatively new legal protections and because of that, very few Supreme Court cases interpreting laws," he says. "There have been none under Sarbanes-Oxley, and the Courts of Appeal often have differing opinions."

That means every case is a chance to set a new precedent or correct a bad one.

"Whistleblowers are the link between misconduct and reform," Kohn says. "The worker on the inside always knows where the skeletons lie. ... It's proven under the False Claims Act that whistleblowers are more effective than all the auditors, inspectors general and layers of bureaucracy paid for by the taxpayers to find this fraud. The whistleblower on the inside knows where it is and can come forward."

### **Whistleblowing after Lehman Bros.**

In the wake of Wall Street scandals, and with a new administration in office, the political climate might be right for a national whistleblower law that would expand protections of the False Claims Act to all areas of whistleblowing. During his transition, President Obama signed a pledge to support that expansion. "This is going to be the first time a president has committed to the types of whistleblower reforms that are needed," Kohn says

Zaid, for one, isn't holding his breath. "The difficulties in representing whistleblowers is very institutional in nature and does not necessarily shift, at least significantly, from administration to administration," he says. "Some Republicans, such as Sen. Charles Grassley or Rep. Chris Shays, have been staunch supporters of whistleblowers. Some Democratic representatives have been nothing but obstructionist. ... The proof is in the pudding, so to speak, and actions speak much, much louder than words."

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