

United States of America - Submission to the UN Universal Periodic Review
Ninth Session of the UPR Working Group of the Human Rights Council
22 November - 3 December 2010 (Submission dated 19 April 2010)

1. The National Whistleblowers Center submits the following concerns that the United States of America has failed to fulfill its obligations to protect whistleblowers. These obligations arise under the following international documents, relevant portions of which are in Attachment 1:

1. Universal Declaration of Human Rights (Articles 2, 7, 8, 20(1), 23(1))
2. International Covenant on Civil and Political Rights (Articles 2, 17 (with respect to correspondence), 18, 19, 22, 25, 26)
3. The United Nations Convention Against Corruption (Article 32(1)).
4. 1967 Protocol Relating to the Status of Refugees (Refugee Protocol) (Article 33-1).
5. International Covenant on Economic Social and Cultural Rights (Articles 2, 6, 7)

I. Executive Summary

2. This submission is made under Sections B, C, and D of the General Guidelines for the Preparation of Information under the Universal Periodic Review regarding failures of domestic legislation, policy, and practice, to appropriately and effectively protect whistleblower rights, and specifically the rights to protection from retaliation, adequate compensation and political asylum.

3. The United States fails to provide effective remedies for all whistleblowers under its customary law. It has failed to enact necessary legislation, and has taken regressive steps in violation of Article 2 of International Covenant on Economic Social and Cultural Rights. The United States has even selected whistleblowers for prosecution and imprisonment, including Jon Grand and Brad Birkenfeld. It has failed to provide effective protection of federal employee whistleblowers, private sector whistleblowers and whistleblowers from other countries.

II. Whistleblowers play a vital role in detecting corruption, and providing whistleblowers with adequate and effective remedies is necessary to encourage employees to report corruption.

4. Employees play an important role in protecting the public from dangers to the environment, nuclear and workplace safety, and the integrity of public and private institutions. They keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters employee efforts on behalf of public purposes.

5. A 2008 University of Chicago study determined that whistleblowers are the best tool for fighting corporate fraud. One unfortunate, but not surprising, finding was that of whistleblowers whose identity was revealed, 82% of them were either forced from their position or quit under duress. In 2009, the accounting firm of PriceWaterhouseCoopers issued its Global Economic Crime Survey.¹ It confirmed that the most effective way to detect corporate fraud is through whistleblowers. PWC concluded that fraud detection depends on protecting those whistleblowers and punishing those who commit fraud, “regardless of their position in the company.” Attachment 2 has more information on whistleblower effectiveness. Adoption of best practices in establishing and enforcing whistleblower protections is the most effective way to route out corruption and protect the public.

¹ Available at:
www.pwc.com/gx/en/economic-crime-survey/download-economic-crime-people-culture-controls.jhtml

III. The United States has unfairly selected whistleblowers for prosecution and imprisonment, including Bradley Birkenfeld, who remains in prison.

6. Bradley Birkenfeld entered federal prison on 8 January 2010 to begin a 40 month sentence. He is the most significant tax whistleblower in history who helped the U.S. Government recover over \$20 billion in tax revenue. Information he provided broke the historic secrecy of Swiss banks, and revealed 14,700 taxpayers who evaded their obligations. His information caused UBS to be fined \$780 million for helping customers evade taxes. US law provides for a reward for tax whistleblowers. Section 7623 of the Internal Revenue Code. The policy of encouraging whistleblowers to come forward is undercut by prosecuting the world's most prominent tax whistleblower. Birkenfeld recently filed a petition for clemency. Until it is granted, it would be appropriate to consider him a political prisoner, imprisoned in violation of international rights.

7. Jon Grand served as a witness in the 2000 race and sex discrimination trial of Dr. Marsha Coleman-Adebayo. She prevailed in her trial, proving that the U.S. Environmental Protection Agency (EPA) discriminated. The EPA then subjected Grand's wage and expense payments to close scrutiny, and commenced prosecution of him for errors he was unaware of. He was sentenced to four months in prison, which he served. Together, the Birkenfeld and Grand cases show that U.S. authorities need to refrain from prosecutions motivated by animus against whistleblowing.

IV. The United States fails to provide effective remedies for retaliation against federal employee whistleblowers, and has taken regressive steps depriving such whistleblowers of their customary rights.

8. The United States has failed to protect whistleblowers who are employees of its own federal government. The U.S. Supreme Court has recognized an individual right to sue the federal government for certain violations of constitutional rights. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). This right applied naturally to federal employee whistleblowers who were subjected to retaliation by their supervisors. For a short time, they had access to customary jury trials for their claims of retaliation, subject to defenses of qualified or absolute immunity. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), footnote 27; *Harlow v. Fitzgerald*, 457 U.S. 731 (1982).

9. In 1989, Congress enacted the Whistleblower Protection Act (WPA) and required federal employee whistleblowers to bring retaliation claims only to the Merit System Protection Board (MSPB). One effect of the WPA was that whistleblowers lost their right to direct court action under *Bivens*. All the members of the MSPB are appointed by the administration – typically the very administration about whom the whistleblower has reported corruption. Appeals from the MSPB are allowed only to a “Federal Circuit” Court of Appeals. The MSPB and Federal Circuit routes deprived whistleblowers of the customary remedies and procedures, specifically jury trials for “make whole” compensatory damages. The MSPB and the Federal Circuit have ruled against whistleblowers with such regularity that the remedy can no longer be considered “effective” as required by Article 32(1). Charlotte Yee recently posted² the official MSPB 2008 statistics for all its non-benefit cases. The results show a strong bias for federal employers. The MSPB judges ruled in favor of employees a total of 1.7% of the time out of 4,698 cases nationwide. On average, 16 whistleblowers a month lost initial MSPB decisions. Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the full MSPB. The Federal Circuit has consistently ruled against whistleblowers, with whistleblowers winning only three out of 209 cases since 1994. In Attachment 3, the Ethics Resource Center concludes that 90% of federal employees think their agencies have an ethics program that is less than strong. The WPA was a huge backward step for whistleblower rights. It was a deliberately regressive measure against realizing economic, social and

² <http://www.civilservicechange.org/?p=2347>

cultural progress. It is thus a violation of the obligation of progressive realization under Article 2 of International Covenant on Economic Social and Cultural Rights. It also renders ineffective the remedies for whistleblowers, in violation of The United Nations Convention Against Corruption, Article 32(1).

10. Some representatives in Congress, of both major political parties, have proposed a Whistleblower Protection Enhancement Act (WPEA), HR 1507, that would fully remedy the shortcomings of the current Whistleblower Protection Act. It would allow federal employee whistleblowers to bring their claims to U.S. District Courts and receive jury trials under customary law. The current administration and Senate allies, have proposed S. 372. It would not use customary legal procedures, and would continue the denial of effective remedies.³ National security whistleblowers would be worse off. NWC calls on the United States to fulfill its obligation to provide effective remedies for its federal employee whistleblowers under its customary law.

V. The United States fails to provide effective remedies for retaliation against private sector whistleblowers.

11. Beyond the federal employee sector, protection of whistleblowers is uneven. In enacting the 2002 Sarbanes-Oxley Act, Congress was aware that private sector whistleblowers were vulnerable. The Senate Judiciary Committee found that whistleblower protections were dependent on a “patchwork and vagaries” of varying state statutes, even though most publicly traded companies do business internationally. It noted, “companies with a corporate culture that punishes whistleblowers for being 'disloyal' and 'litigation risks' often transcend state lines. As a result, most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law.” Congress acted to protect employees who report securities violation that could harm investors. S. Rep. No. 107-146, 107 th Cong., 2d Session 19 (2002). Sarbanes-Oxley Act of 2002 (Title VIII), 18 U.S.C. §1514A (“Sarbanes-Oxley”) enacted on July 30, 2002. Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002.

12. Many categories of whistleblowers have no effective remedies for retaliation in the United States. The First Amendment to the U.S. Constitution guarantees rights to speak, associate and petition for redress of grievances. Yet this guarantee has no force or effect on private sector employers. Only a few states have enacted legislation to protect all private sector employees when they blow the whistle on any type of corruption. See the New Jersey Conscientious Employee Protection Act (CEPA), NJSA 34:19, for a good example. Some states explicitly deny any protection for employees who suffer retaliation for raising concerns of public interest. *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (1981) (Georgia gives no protection); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W. 2D 723 (1990) (Texas protects only refusing to obey illegal orders). Even state and local employees have no protection under the First Amendment for reporting corruption if making such reports is part of their regular job duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). It is ironic that the very public employees whose job it is to detect and report corruption are the very ones denied protection when they suffer retaliation for doing their jobs too well. Other entire industries have no law protecting employees who raise public safety concerns. For example, employees working in the food or pharmaceutical industries have no legal protection for reporting violations of the health and safety rules of the Food and Drug Administration.

13. NWC objects to the thirty (30) day statute of limitations for health, safety and environmental whistleblowers. Water Pollution Control Act (WPCA, commonly called the Clear Water Act or CWA), 33 U.S.C. 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); Toxic Substances

³ NWC has listed 12 deficiencies with S. 372 at:
http://www.whistleblowers.org/index.php?option=com_content&task=view&id=955

Control Act (TSCA), 15 U.S.C. § 2622; Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Clear Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law"), 42 U.S.C. § 9610; 29 CFR § 24.103(d)(1); Occupational Safety and Health Act, 29 U.S.C. § 660(c) ("OSHA 11(c)"). Thirty days is unrealistic for newly unemployed people to recover from emergent needs, find legal counsel, follow a referral to one of the few attorneys in this limited area, negotiate representation, complete the initial stages of pre-filing investigation and file a complaint. Numerous whistleblowers have lost their cases solely because of this very short time limit. *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981); *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991); *Lahoti v. Brown & Root*, 90-ERA-3 (Sec'y Oct. 26, 1992) (being unaware of the 30-day time limit does not excuse late filing); *Deveraux v. Wyoming Association of Rural Water*, 93-ERA-18 (Sec'y Oct. 1, 1993).

14. OSHA Section 11(c) is ineffective for another reason. The statute has no private right of action, and whistleblowers are completely at the mercy of the Occupational Safety and Health Administration (OSHA) to initiate enforcement action. Out of over 3,000 complaints OSHA receives each year, it takes enforcement action only in about twenty (20). The others have no rights at all under federal law. *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980). Also, several states will deny relief to health and safety whistleblowers under their customary law precisely because the state courts believe that Section 11(c) provides a remedy. *Walsh v. Consolidated Freightways*, 278 Or. 347, 563 P.2d 1205 (1977); *Grant v. Butler*, 590 So. 2d 254 (Ala. 1991); *Miles v. Martin Marietta Corp.*, 861 F. Supp. 73 (D. Colo. 1994).

15. On January 27, 2009, the U.S. Government Accountability Office (GAO) issued its Report GAO-09-106, called, "Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency." The report says what many whistleblower practitioners have long known: the Department of Labor's whistleblower program needs more resources and better quality. Investigators do not have the equipment, training, legal counsel or oversight needed to assure quality investigations. The GAO discovered that OSHA does not have the systems in place to assure the accuracy of case statistics, the agency's processing time, reasons for screening out complaints, and the outcomes of settlements. GAO found that the Office of Administrative Law Judges (OALJ) did have reliable and verifiable case tracking data, and its average processing time for a whistleblower appeal was nine (9) months. The Administrative Review Board (ARB) considers appeals from ALJ decisions, and its processing time can range from thirty (30) days to five (5) years. GAO found that the ARB does not have reliable data of its docket flow and lacks oversight of its data quality. Overall, the GAO found that whistleblower caseloads are increasing, and the cases themselves are becoming more complex. GAO found that OSHA has not even established a minimum equipment list saying what investigators should have. Some, but not all, have laptop computers and portable printers to take written statements in the field. This equipment is necessary for investigators to make an accurate written record of a witness' first statement about a complaint. GAO found that OSHA's report of a 21 percent success rate for whistleblowers could be misleading. OSHA includes all settled cases in the "successful" category. As a result, "nearly all" of the successful cases were settlements, rather than OSHA decisions on the merits. In appeals to OALJ, whistleblowers win less than a third of the contested cases.

16. The U.S. Department of Labor made another regressive step in 2007 when it adopted 24 CFR 24.107(b) ("Administrative law judges have broad discretion to limit discovery in order to expedite the hearing."). It had previously allowed time for the completion of discovery. *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994) ("the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted."). Adequate time is necessary to accomplish customary discovery.

VI. The United States fails to protect whistleblowers from other countries.

17. The 1967 Protocol Relating to the Status of Refugees, Article 33-1, prohibits *refoulement* – the return of refugees to countries where their “life or freedom would be threatened.” In the landmark case on this issue, *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000), a U.S. court held that, “Whistleblowing against one’s supervisors at work is not, as a matter of law, always an exercise of political opinion. However, where the whistle blows against corrupt government officials, it may constitute political activity sufficient to form the basis of persecution...” Under the Protocol, refugees can be returned only if they are a “danger to security” or if they have been convicted of a “particularly serious crime.” Article 33-2. Yet the United States violates the prohibition on *refoulement* by imposing an arbitrary deadline for asylum applications and by failing to provide adequate due process protections to asylum seekers. In 1996, the United States enacted another regressive step by requiring asylum seekers to apply within one year of arriving in the country. 8 U.S.C. § 1158(a)(2). The particular hardships of escaping one's native country and resettling in a new land with a new language make the one-year time limit a significant impediment on immigrant whistleblowers. Failure to qualify for legal admission subjects millions of immigrants in the United States to a denial of permission to work. These immigrants, and the whistleblowers among them, are predominantly from racial and ethnic minorities. Immigrants are forced by economic necessity to work using another person's identity. If they make claims for retaliation, they are denied the customary remedies of back pay and reinstatement. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

18. Additionally, the U.S. Department of Labor has refused to provide protection for international employees of companies trading their securities here and subject to U.S. law. *Ede v. The Swatch Group*, ARB No. 05-053, ALJ Nos. 2004-SOX-068, -069 (ARB June 27, 2007); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006). This holding is contrary to our customary law of applying our securities laws throughout the world for companies that choose to avail themselves of stock exchanges within our borders. *Schoenbaum v. Firstbrook*. 405 F.2d 200 (2d Cir. 1968), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). It is ironic that the U.S. Congress would enact the SOX Act because of the way that Enron⁴ abused overseas subsidiaries, and then have our courts deny protections for the whistleblowers there who report corruption that could lead to the next fiscal disaster.

VII. Actions needed for the United States fails to protect whistleblowers.

19. To comply with obligations under pertinent international instruments it is necessary for the United States to:

- (1) Grant clemency to Bradley Birkenfeld and stop prosecuting whistleblowers.
- (2) Enact the pending HR 1507 bill to ensure all federal employee whistleblowers have access to the customary legal procedures (jury trials) for their retaliation claims.
- (3) Enact legislation that provides effective remedies against employer coercion and retaliation for private sector employees with a statute of limitations of at least 180 days.
- (4) Provide the resources necessary for the Department of Labor to properly investigate and adjudicate whistleblower cases.
- (5) Reform immigration laws that allow immigrants access to all labor laws and remedies, and permit all immigrants to submit applications for political asylum at any time.
- (6) Enforce its laws consistent with its customary law to provide all whistleblowers with full “make whole” remedies and jury trials.

⁴ See House Committee Report, 107-414.

20. If there are ways that I or anyone at the National Whistleblowers Center can be helpful in consideration of the concerns raised in this submission, please feel free to call on me.

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