SOFT WHISTLEBLOWING

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I. INTRODUCTION

> [In late 1981, Public Citizen Health Research Group (Public Citizen) was engaged in litigation with the Occupational Safety and Health Administration (OSHA) over the adequacy of the agency's standards for workplace exposure to a widely-used mutagenic chemical, ethylene oxide. Over the course of the lawsuit, Public Citizen had obtained numerous documents from OSHA, but the agency had withheld one potentially important internal memorandum. Public Citizen filed a motion to compel release, but a few days later, that motion proved unnecessary. The group's lead litigator] got to work early and found a manila envelope on [his] desk, with no postage, no return address, and no markings, other than [his] name, misspelled. . . . [He] thought it might be an early Christmas present. Curious, [he] opened the envelope and found a present of a different sort—a copy of the . . . memo, or something that met its description. No cover letter, no card, just the memo. [He] read the memo, and then . . . read it again. It was dynamite.[1]

People talk. In the administrative law context, this means that agencies have trouble keeping secrets.[2] Virtually every administrative lawyer, agency professional, and government journalist has a story to tell—of privileged documents like the OSHA memorandum, which somehow find their way into opposing

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[1] David C. Vladeck, *Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, *in* ADMINISTRATIVE LAW STORIES 191, 191–92, 199–200 (Peter L. Strauss ed., 2006).

[2] *See, e.g.*, Linton Weeks, *In Washington, Leaking as a Way of Life*, NAT'L PUB. RADIO (June 15, 2012, 12:34 PM), http://www.npr.org/2012/06/15/155068581/in-washington-leaking-as-a-way-of-life?sc=17&f=1001 (discussing the prevalence of leaks in Washington); Max Frankel, *The Washington Back Channel*, N.Y. TIMES, Mar. 25, 2007, at E42 ("[T]he ultimate secret about secrets in Washington [is] that practically everything that our government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret — and then unraveled by that same government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information." (internal quotation marks omitted)).

counsel's hands at a key moment in the lead-up to litigation;[3] of newspaper articles that discuss formerly secret agency personnel changes,[4] or cite anonymous insiders who question whether their agency is adequately staffed to fulfill its mandate;[5] of congressional oversight hearings at which the questioners plainly had access to background documents that senior agency administrators had chosen *not* to share with Congress.[6] The overall volume of information flow is so large that "Washington insiders have the sense of participating in a 'government by leak.' "[7] Indeed, some twenty-five years ago, "42% of the federal officials responding to a survey stated that they had leaked [information] during their government careers."[8]

Considered individually, many of these leaks appear unimportant—just an agency employee's attempt to score professional (or social) points by sharing inside-the-Beltway gossip.[9] If the leak evinces no criminal or otherwise serious misconduct by agency officials, the source can expect no protection from the Whistleblower Protection Act (WPA)[10] or state

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[3] Vladeck, *supra* note 1, at 200.

[4] *See, e.g.*, Richard A. Serrano & Kim Murphy, *ATF Director to Resign, Agency Sources Say*, L.A. TIMES, June 21, 2011, http://articles.latimes.com/2011/jun/21/nation/la-na-atf-20110621 (discussing leaks related to the resignation of the director of the ATF following the agency's controversial Fast and Furious operation).

[5] *See, e.g.*, Ryan Witt, *Exclusive: Inside Source Claims FEMA Understaffed for Future Disasters*, EXAMINER.COM, June 14, 2011, http://www.examiner.com/article/exclusive-inside-source-claims-fema-understaffed-for-future-disasters (noting that an inside source at FEMA claims the agency is "ill-prepared to deal with future disaste[r] [due to a] 'desperate shortage of qualified staff' ").

[6] Interview with Marshall J. Breger, Professor, Catholic University Columbus School of Law (June 22, 2011) (discussing Professor Breger's time as Solicitor of Labor during the George H.W. Bush Administration).

[7] Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 622 (1991); *see also, e.g.*, Weeks, *supra* note 2 (noting that leaking is a "way of life" in Washington); Frankel, *supra* note 2 ("[T]he ultimate secret about secrets in Washington [is] that practically everything that our government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret — and then unraveled by that same government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information." (internal quotation marks omitted)).

[8] Levi, *supra* note 7, at 623–24 n.43 (citing MARTIN LINSKY, IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING 172 (1986)).

[9] This Article focuses on the implications of soft whistleblowing for federal agency operations, but state governments almost certainly house their share of soft whistleblowers as well.

[10] 5 U.S.C. § 1213(a)(1) (2012).

whistleblower laws. He could, therefore, be disciplined or fired for his loose tongue if his disclosure came to light.[11] On the other hand, the employee likely breaks no law in passing on this kind of information,[12] provided that none of the information relates to national security[13] or trade secrets,[14] or violates the Anti-Lobbying Act.[15]

If the laws governing the conduct of agency employees neither protect nor condemn most of these disclosures, why should administrative law scholars care about the activity? As this Article explains, deliberately leaking information that is policy-relevant but evinces no agency malfeasance—a practice this Article dubs "soft whistleblowing"—enables individual agency employees who disagree with their agency's policy choices to use their expertise and inside information to generate outside pressure on their agency to shift direction.[16] The soft whistleblowers' disclosures can influence

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[11] *Id.* § 2302(b)(8). Most other whistleblower protection statutes, too, protect only the disclosure of illegal acts or comparably gross misconduct. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 n.15 (2007) (citing MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 260–73 tbl.6-2 (1992)).

[12] The employee may, however, violate government ethics rules. *See* 5 C.F.R. § 2635.704(a) (2012) ("An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes."); *id.* § 2635.705(a) ("Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties.").

[13] *See generally* 18 U.S.C. §§ 793–798 (2012) (protecting information related to the national defense); National Security Act of 1947 § 606, 50 U.S.C. § 426(1) (2012) (defining "classified information"). *But cf.* William E. Lee, *Deep Background: Journalists, Sources and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1477, 1529 (2008) (noting that as of 2008, "[o]nly three cases ha[d] been brought under the Espionage Act against those in positions of trust who leaked information to the press").

[14] Trade Secret Act, 18 U.S.C. § 1905 (2012) (making it a crime for government employees to disclose trade secret information); Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2012) (exempting trade secret information from Freedom of Information Act disclosure requirements).

[15] 18 U.S.C. § 1913 (2012) (prohibiting federal executive branch employees from "pay[ing] for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation").

[16] *Cf.* DEENA WEINSTEIN, BUREAUCRATIC OPPOSITION: CHALLENGING ABUSES AT THE WORKPLACE 2 (1979) (characterizing whistleblowing as an "attempt[ ] to change a

the direction and efficacy of congressional, presidential, and judicial oversight of agency activities, and also affect the agency's image in the all-important court of public opinion. In other words, the fact of soft whistleblowing, and its ubiquity, mean that agency *insiders* play a substantial and, as of yet, largely unexamined role in shaping the *outside* forces that keep "agency officials . . . answerable to the people for their decisions" and ensure that those decisions are "rational and otherwise effective."[17]

Soft whistleblowing is only one of many types of off-the-record communication between agencies and outsiders. Thirty-six years ago, in the context of reviewing a Federal Communications Commission rule developed with considerable "ex parte" input from interested outside parties, the D.C. Circuit observed that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review."[18] A few years later, the same court revisited the issue in reviewing an EPA pollution rule that had been the subject of both an alleged " 'ex parte blitz' by coal industry advocates"[19] and "numerous post-comment period meetings with personnel of other agencies, members of Congress . . ., the President . . . and representatives of private interests."[20] Again, the court refused to condemn the various off-the-record communications, opining instead that "the very legitimacy of [agency] policymaking . . . depends in no small part upon the openness, accessibility, and amenability of [agency] officials to the needs and ideas of the public from whom their

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bureaucracy by those who work within the organization but who do not have any authority").

[17] Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 52 (2006); *see also* Daniel P. Carpenter & Keith E. Whittington, *Executive Power in American Institutional Development*, 1 PERSPECTIVES ON POL. 495, 499–501 (2003) (analyzing how former U.S. Department of Agriculture Chief Forester, Gifford Pinchot, used ties with organized citizens and the press to engage in autonomous policy building). For more information on the extensive use of outside influence for internal agency policy building in the U.S. Department of Agriculture, see DANIEL P. CARPENTER, FORGING BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 179–325 (2001).

[18] Home Box Office, Inc. v. FCC, 567 F.2d 9, 53–57 (D.C. Cir. 1977).

[19] Sierra Club v. Costle, 657 F.2d 298, 386 (D.C. Cir. 1981).

[20] Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 132 (2006).

ultimate authority derives, and upon whom their commands must fall."[21]

Scholars have discussed the general category of back-channel communications between agencies and interested outsiders. Jack M. Beermann, for example, argues that "informal contacts" between Congress and agencies are integral to congressional oversight of the administrative state, with members of Congress "attempt[ing] to influence the execution of the law by communicating directly with agency personnel."[22] Thomas O. McGarity discusses off-the-record conversations between " 'informationally endowed stakeholders and agency staff,' " stating that, in the current, highly partisan regulatory climate, these parties "negotiate regulatory policies in the shadows, where they are typically free of mandatory docket and recordkeeping requirements."[23] He continues, "Shadow conversations are not limited to technical staff and economists. High- and mid-level officials at most agencies are also generally willing to meet with lobbyists from beneficiary groups and affected industries [during] rulemaking to receive information, hear legal and policy arguments, and entertain suggestions for change."[24] Such off-the-record contacts are a familiar piece of the broader puzzle of agency "capture"—the concern that well-organized or well-funded interest groups have greater (formal and informal) input into the regulatory process than other agency constituents.[25]

To date, however, no one has given soft whistleblowing any sustained attention.[26] Instead, the discussion of back-channel

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[21] *Costle*, 657 F.2d at 400–01.

[22] Beermann, *supra* note 20, at 130.

[23] Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1705 (2012) (quoting Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1366 (2010)) (internal quotation marks omitted).

[24] *Id.*

[25] *See generally, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050–52 (1997) (explaining capture theory); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975) (discussing various reasons, other than overt "capture," why one might generally expect agencies to take a pro-industry stance).

[26] Many administrative law scholars have begun to explore internal agency structure and governance to explain broader themes of agency governance, legitimacy, and separation of powers. *See, e.g.*, Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 469–71 (2012) (discussing

communications between agency employees and outsiders has focused on four categories of information exchange: (1) traditional or "hard" whistleblowing—that is, disclosures that concern (alleged) agency wrongdoing;[27] (2) "inward" communications of the sort that Beermann and McGarity principally discuss—nonpublic information and policy recommendations that "ex parte" outsiders bring *to the agency*;[28] (3) "outward" leaks *to the press*, often of national security information, and the "role [of such leaks] in keeping the public informed about the operations of government";[29] and (4) the constitutional dimension—what First Amendment protections (if any) are available to a government employee who breaks the law by leaking, for example, national security information, or to the journalist who rebroadcasts that information to a larger audience.[30]

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the effects of "inside-out accountability" on agency legitimacy). None, however, has focused on agency employees' instrumental policy leaks like those this Article discusses.

[27] *See infra* Part II (discussing the difference between "hard" and "soft" whistleblowing); *see also, e.g.*, Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 422–23 (2010) (discussing disclosures by kgovernment lawyers); Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 944–45 (2009) (recommending improved protections for government whistleblowers); *cf.* Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 26–28 (2005) (discussing the role of corporate whistleblowers in disclosing abuses by government contractors).

[28] Examples might include suggestions of names for key vacancies or rationales for adopting or refusing to adopt a new rule. *See* Beermann, *supra* note 20, at 70 (discussing informal supervision given by Congress to various agencies); McGarity, *supra* note 23, at 1745 (noting the incentive for companies and trade associations to flood agencies with information and analysis during high-stakes rulemaking).

[29] ELIE ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 6 (1987); *see also* Bruce Ackerman, Op-Ed, *Protect, Don't Prosecute, Patriotic Leakers*, N.Y. TIMES (June 12, 2012), http://www.nytimes.com/2012/06/13/opinion/dont-prosecute-leakers-who-defend-our-constitution.html (arguing that leaks regarding the executive's unconstitutional behavior in the national security context actually promote national security "by preserving our constitutional integrity").

[30] *See, e.g.*, Lee, *supra* note 13, at 1477, 1529 (noting the Supreme Court's refusal to create a "First Amendment-based reporter privilege," but also remarking on the proper role courts could play in protecting outsiders who receive leaks); Mark Gomsak, *The Free Flow of Information Act of 2006: Settling the Journalist's Privilege Debate*, 45 BRANDEIS L.J. 597, 603–06 (2007) (discussing the need to recognize a journalist's privilege); Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality*, 1795–2005, 43 SAN DIEGO L. REV. 425, 484 (2006) (commenting on the Supreme Court's preferred use of the freedom theory under the First Amendment to strike down governmental restraints on the press).

Soft whistleblowing is different. It concerns not agency malfeasance but internal dissent about an agency's policy course. Further, the study of soft whistleblowing focuses not on the role that agency *outsiders* play in manipulating agency policy development, via the ex parte communications that the D.C. Circuit deemed "the 'bread and butter' of the process of administration,"[31] but on the surprisingly large role that senior, mid-level, and even low-level agency *insiders* can play in manipulating that same development. Specifically, soft whistleblowing enables agency insiders to use their inside information, their expertise, and their connections with outsiders both to shift the balance of power at their employer agencies and to change the tenor and outcome of agency policy discussions. Moreover, the prevalence of soft whistleblowing means that considerable non-public, policy-relevant information flows from agency employees to journalists, public watchdog groups, congressional staff, and even staff at other agencies. This high-volume flow of information has profound consequences for the central conundrums of administrative law: agency governance, efficient development of sound regulatory policy, and constitutional control of the administrative state.[32]

Because soft whistleblowing is new to the literature, Part II begins by defining the term and explaining the distinctions between these sources' disclosures and conventional or "hard" whistleblowing. Part III is similarly descriptive. To illustrate and analyze the soft whistleblowing phenomenon, Part III provides three case studies: the role of soft whistleblowers in the formation of the National Organization for Women (NOW); the effectiveness of soft whistleblowing in Public Citizen's litigation campaign to force OSHA to strengthen its regulation of ethylene oxide; and the saga of the Department of Justice Civil Rights Division's controversial 2009 voter-intimidation lawsuit against members of the New Black Panther Party. Part III also details the findings from a series of interviews conducted with Capitol Hill staffers, environmental lobbyists (on both sides of the aisle), and journalists, each of whom has received and acted on information

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[31] Home Box Office, Inc. v. FCC, 567 F.2d 9, 53–57 (D.C. Cir. 1977).

[32] *See* discussion *infra* Part IV.

from a soft whistleblower at one of the environmental agencies. This background provides material for a taxonomy of common modes and consequences of soft whistleblowing.

Part IV then explores the implications of soft whistleblowing for agency policy development, for congressional, presidential, and judicial oversight of agency activities, and for agencies' public image. As Part IV explains, our understanding of the forces that help to ensure sound policy development, and that keep agencies in check, is significantly underdeveloped in two key ways. First, contributors to the literature on administrative policymaking have tended to treat agencies as "unitary entities"[33]—hives whose busy employees' task is to serve the agency and, in so doing, to speak with one public voice. Soft whistleblowing illustrates that such an understanding is at best incomplete: agency insiders regularly (if softly) express their dissent to outsiders who may be in a position to help the insiders effect change. Moreover, soft whistleblowing affects the power dynamic within an agency, because stark differences among professional ethics rules mean that some agency professionals (notably engineers) are likely to be more willing than others (notably lawyers) to wield their inside information in this way.

A second deficiency in the existing literature is the failure to appreciate the important role that even mid- and low-level agency insiders can play in facilitating and directing—or in some cases thwarting—congressional, presidential, judicial, and public oversight of their employer agencies. As this Article explains, soft whistleblowers' disclosures tend to improve agency transparency and augment congressional oversight. On the other hand, these increases in agency accountability may come at considerable

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[33] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011). Recently a few authors have begun to look inside the hive. *See, e.g.*, *id.* at 1035 (discussing how power is allocated 'both horizontally and vertically within agencies"); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 360–61 (2013) (discussing a variety of triggering events, or "interpretation catalysts," that shape the executive decisionmaking process); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 454 (2009) (noting that internal constraints on executive power may undermine political accountability and the unitary structure of the executive).

expense to what has come to be known as "presidential administration."[34]

II. DEFINING THE CONCEPT: WHAT SOFT WHISTLEBLOWING IS, AND WHAT IT ISN'T

To explore the implications of soft whistleblowing for agency governance and accountability, it is first necessary to define the term. Many agency leaks (particularly those that make the front pages of national newspapers)[35] fit the traditional understanding of "whistleblowing." While there is no universal definition of that term, it is generally understood to refer to " 'the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.' "[36] The WPA[37] suggests an alternative, narrower definition: the "disclosure of information . . . which the employee reasonably believes evidences—(i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[38] For its part, the House Ethics Manual encourages government employees to disclose evidence of "corruption wherever discovered."[39] The unifying feature of these various definitions is their focus on the disclosure of misconduct or malfeasance—"illegal, immoral, or illegitimate practices," violations of laws or rules, gross mismanagement, waste, or corruption. These kinds of disclosures have important and well-

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[34] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

[35] *See, e.g.*, Seth Cline, *Leaked Memo Outlines Policy for Killing Americans With Drones*, U.S. NEWS & WORLD REP., Feb. 5, 2013, http://www.usnews.com/news/articles/2013/02/05/leaked-memo-outlines-policy-for-killing-americans-with-drones (discussing a well-publicized leak regarding drone strikes).

[36] Dworkin, *supra* note 11, at 1760 (quoting MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 15 (1992)).

[37] Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

[38] 5 U.S.C. § 2302(b)(8) (2012).

[39] Code of Ethics for Government Service, 72 Stat., Part 2, B12 (1958), H. Con. Res. 175, 85th Cong. (passed July 11, 1958), *as reprinted in* HOUSE ETHICS MANUAL 355 (2008).

explored implications for agency function and democratic accountability.[40]

I focus on a very different kind of disclosure that is subtler, more ubiquitous, and even more consequential for agencies: low-level, mid-level, and even senior employees' disclosure of inside information about decisions, policies, or practices that are presumptively *legal* and *moral*, but are nonetheless open to debate or controversy. "Soft whistleblowing" thus refers to an agency employee's *deliberate*, *unsanctioned*, *substantive*, and *instrumental* disclosure of *non-public* and *policy-relevant* information, in the *absence* of evidence of malfeasance.[41]

To put the distinction in more general terms, traditional or hard whistleblowing often involves leaked evidence, or at least allegations, of a legal or ethical lapse at an agency.[42] Soft whistleblowing, by contrast, refers to disclosures about agency actions that may seem arbitrary or ill-advised but are neither illegal nor immoral—for example, an agency's adoption of a policy that, in the soft whistleblower's view, lacks scientific support or exceeds (or falls impermissibly short of) the agency's statutory mandate. The narratives in Part III provide concrete examples. The line between "hard" and "soft" whistleblowing may sometimes be difficult to draw, of course, because "illegal" and "immoral" can be imprecise terms. That said, the fact that some leaks cannot

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[40] *See generally, e.g.*, Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1073–91 (2007) (discussing the scope of government lawyers' confidentiality obligations); Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N.U. L. REV. 17, 18 (1996) ("A basic tension exists between the government's right to operate effectively and efficiently and the right of some 18 million federal, state and local government employees to disclose what they perceive is government wrongdoing, graft, corruption, or simply inefficiency."); Morse, *supra* note 27, at 422–23 (discussing the "imbalance" between (1) the "basic tenet[s] that an informed public is essential to a functioning democracy [and that] leaks are an essential part of informing the public" and (2) the fact that "the leaker herself is still subject to sanction"); James L. Perry, *Whistleblowing, Organizational Performance, and Organizational Control*, *in* ETHICS & PUBLIC ADMINISTRATION 79, 82, 86 (H. George Frederickson ed., 1993) (discussing the "organizational consequences of whistleblowing," and surveying whistleblowing cases from federal government agencies).

[41] *See* Levi, *supra* note 7, at 628–30 (discussing "plants" and "trial balloon leaks"); *see also, e.g.*, Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 251 (2008) ("Almost all presidents since Roosevelt have used leaks as part of their efforts to promote their agendas and persuade the public.").

[42] *See supra* notes 35–40 and accompanying text.

easily be categorized as hard or soft does not undermine the importance of the underlying distinction for understanding the causes and consequences of each type of disclosure.

Before turning to my case studies, it is important to distinguish the subject of this Article from some neighboring areas. First, the Article is not about White House or agency efforts to "test[ ] the political waters for a policy"[43] by planting news of the policy prior to its official release. Nor does it address accidental leaks. Finally, and most significantly, the Article reserves important questions about the legality and ethics of soft whistleblowing. Any discussion of leaks by government employees provokes widely divergent reactions. Some consider the behavior inherently disloyal or unethical;[44] others argue that stringent protection of government whistleblowers is critical to a functioning democracy;[45] and still others view government whistleblowing as a necessary evil, with benefits for democratic accountability that must be weighed against costs to workplace morale and national security.[46] Reflecting these divisions, "U.S. senators, depending on their perspective of citizenship and organizational citizenship, have described government informants as either 'patriotic' and 'citizen crime-fighters' or 'snitches' and 'rats' "—comments that expose deep national "ambivalence . . . about the role of individuals in resisting illegality in their group settings."[47]

Soft whistleblowing seems likely to provoke a similar range of reactions, depending on one's views about the relative importance of public accountability, on the one hand, and loyalty, confidentiality, and administrative efficiency on the other.

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[43] Levi, *supra* note 7, at 629.

[44] For example, "President Ronald Reagan said during his first term that he had 'thought of the guillotine' for government employees who leaked classified information to the press." David Wise, *Leaks Make the Political World Go Round*, L.A. TIMES, Feb. 15, 1998, *available at* 1998 WLNR 6432775.

[45] *See, e.g.*, Morse, *supra* note 27, at 422–23 (asserting that "an informed public is essential to a functioning democracy" and "leaks are an essential part of informing the public").

[46] *See, e.g.*, James S. Bowman, *Whistle-Blowing in the Public Service: an Overview of the Issues*, 1 REV. PUB. PERS. ADMIN. 15, 16, 19 (1980) ("[W]histle-blowers have kept alive the bond of trust between the American government and its citizens. . . . Effective methods need to be discovered to balance an individual's duty to his or her employer with his or her duty to the public.").

[47] Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 434 (2009).

Whatever one thinks of the ethical choices of individual soft whistleblowers, though, their actions are too easy and too free of personal consequences to be easily quashed.[48] This Article therefore reserves questions about soft whistleblowing ethics, the potential civil or criminal liability of individual soft whistleblowers, and constitutional protections for the journalists who receive soft whistleblowers' disclosures, and focuses instead on the central governance questions: how to expand our understanding of agency structure and function, and of congressional, presidential, judicial, and public oversight of agencies, to take better account of the undeniable fact that people—including agency personnel—are prone to talk.

III. DOCUMENTING SOFT WHISTLEBLOWING

Soft whistleblowing is, for obvious reasons, very difficult to document. We may never have hard data about how widespread the phenomenon is, who does it, or what subjects it concerns. The best evidence of the phenomenon necessarily derives from the study of well-documented examples, as well as the knowledge of soft whistleblowing sources and recipients.

This Part uses both methods. First, it provides three case studies of soft whistleblowing, chosen to illustrate different forms that the disclosures can take. Second, it reports the results of the author's interviews with agency personnel, journalists, and Hill Staff, who agreed to share their practical knowledge of the role of soft whistleblowing in their respective professional spheres. Together, the case studies and interview results provide a basic picture of how soft whistleblowing operates, the methods and motives of those who engage in it, and its effects on agency policymaking.

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[48] *See generally* Levi, *supra* note 7 (describing the ease of divulging information to the press anonymously).

A. TITLE VII, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND THE FORMATION OF THE NATIONAL ORGANIZATION FOR WOMEN[49]

In 1965, Sonia Pressman Fuentes was a lawyer at the then-fledgling Equal Employment Opportunity Commission (EEOC).[50] The EEOC enforces Title VII of the Civil Rights Act of 1964,[51] which prohibits employer discrimination on account of race or sex, among other categories.[52] As of 1965, however, the Commission showed "very little interest in pursuing" claims of sex discrimination, choosing instead to focus its attention on problems of race.[53] For example, the Commission opted not to seek invalidation of state protective laws, common at the time, that "limited women to working a certain number of hours [per] day, limited the amount of weight they could lift [on the job], and otherwise restricted [their] working conditions."[54] Moreover, in August 1965, the Commissioners voted 3–2 to continue to allow newspapers to run "sex-segregated [job] advertisement[s],"[55] under headings like "'Help Wanted, Female,' or 'Help Wanted, Male,' "[56] even though Title VII specifically prohibits "discriminatory advertising."[57] As Fuentes later described the situation, "most of

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[49] For NOW's take on its own formation, which also credits Sonia Pressman Fuentes, see *The Founding of NOW*, NATIONAL ORGANIZATION FOR WOMEN, http://www.now.org/history/the_founding.html (last updated July 2011).

[50] History of the Equal Employment Opportunity Commission (EEOC): Interview by Sylvia Danovitch with Sonia Pressman Fuentes (Dec. 27, 1990) [hereinafter Fuentes Interview], http://www.utoronto.ca/wjudaism/contemporary/articles/history_eeoc.htm.

[51] 42 U.S.C. §§ 2000e–2000e-17 (2012).

[52] *Id.* § 2000e-2(a)(1).

[53] LEE ANN BANASZAK, THE WOMEN'S MOVEMENT INSIDE AND OUTSIDE THE STATE 94–95 (2010).

[54] Fuentes Interview, *supra* note 50. For an example of state protective legislation, see *Muller v. Oregon*, 208 U.S. 412, 416 (1908), which upheld an Oregon statute that provided, in part, "no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day." *See also Protective Legislation*, LAW LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/awhhtml/awlaw3/protective.html (providing an overview of state employment laws that "protected" women prior to the passage of the Civil Rights Act of 1964).

[55] BANASZAK, *supra* note 53, at 95.

[56] Fuentes Interview, *supra* note 50.

[57] BETTY FRIEDAN, IT CHANGED MY LIFE: WRITINGS ON THE WOMEN'S MOVEMENT 99 (1998). Friedan presumably refers to 42 U.S.C. § 2000e-3(b), which in relevant part prohibits any employer from "print[ing] or publish[ing] or caus[ing] to be printed or published any notice or advertisement relating to employment . . . indicating any

the people at the Commission . . . had come there to fight racial discrimination; they did not want the Commission's time and money sidetracked into sex discrimination."[58]

Fuentes joined the EEOC General Counsel's office in October 1965, four months after the agency opened for business.[59] She did not consider herself an ardent feminist,[60] but she "read [the language of Title VII] and thought it prohibited sex discrimination in employment."[61] She therefore became frustrated by the Commission's evident reluctance to pursue the many sex discrimination claims that women regularly filed with the agency.[62] She later described her feelings as follows:

> I used to leave the office . . . and the tears would be rolling down my face because I felt like I was in such a difficult position. Basically, I was battling the whole [C]ommission, except for the few people who felt as I did. I didn't know how I got into that spot. . . . I used to feel terrible about it, but that's the position in which I found myself.[63]

As an outlet, Fuentes engaged in soft whistleblowing. She and other like-minded "midlevel staffers" at government agencies formed a network to support each other[64]—a "feminist underground in Washington spreading from government agencies to Capitol Hill."[65] Other members included Catherine East, Executive Secretary to the Citizens' Advisory Council on the Status of Women (CACSW),[66] whom NOW founder and first

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preference, limitation, specification, or discrimination, based on . . . sex." 42 U.S.C. § 2000e-3(b) (2012).

[58] SONIA PRESSMAN FUENTES, EAT FIRST—YOU DON'T KNOW WHAT THEY'LL GIVE YOU: THE ADVENTURES OF AN IMMIGRANT FAMILY AND THEIR FEMINIST DAUGHTER 131 (1999).

[59] Fuentes Interview, *supra* note 50.

[60] FUENTES, *supra* note 58, at 134 ("I didn't know how I had gotten into this position…. No one had elected me to represent women."); FRIEDAN, *supra* note 57, at 100 ("Sonia Pressman shut her office door and said, 'I'm not a feminist.' ").

[61] FUENTES, *supra* note 58, at 132.

[62] *Id.* at 133–34; *see also id.* at 131 (noting that 37% of the complaints filed in the Commission's first fiscal year alleged sex discrimination).

[63] Fuentes Interview, *supra* note 50.

[64] FUENTES, *supra* note 58, at 134.

[65] FRIEDAN, *supra* note 57, at 95.

[66] Catherine East, *Papers, 1941–1995: A Finding Aid*, *available at* http://oasis.lib.

president Betty Friedan[67] later described as a "prime mover" in the birth of the organization,[68] and Mary Eastwood, a young lawyer in the Justice Department[69] and the co-author of a 1965 article titled *Jane Crown and the Law*, which "drew on analogies between race and sex in arguing for the application of civil rights law to discrimination against women."[70]

Fuentes gave her underground contacts inside information about "women's rights cases that were developing"—or failing to develop—at the EEOC.[71] Other members of the network then passed the information on to feminist attorneys willing to "represent the complaining parties in . . . sex discrimination lawsuits."[72]

Fuentes felt the need to do more, though, to shift the EEOC's posture on sex discrimination. In late 1965 or early 1966, an opportunity presented itself: Friedan came to the Commission to conduct research on Title VII.[73] Fuentes had declined to talk to Friedan on an earlier occasion,[74] fearing career consequences.[75] On Friedan's second visit, though, the dam broke. "[F]eeling particularly frustrated," Fuentes closed the door to her office and emphasized to Friedan the importance of forming an "organization to fight for women like the NAACP fought for African Americans."[76] Only such an organization, members of the feminist underground believed, could organize women to "march on

harvard.edu/oasis/deliver/~sch00251.

[67] *The Founding of NOW*, NATIONAL ORGANIZATION FOR WOMEN, http://www.now.org history/the_founding.html (last updated July 2011).

[68] Anthony Ramirez, Obituary, *Catherine East, 80, Inspiration For National Women's Group*, N.Y. TIMES, Aug. 20, 1996, at B6, *available at* http://www.nytimes.com/1996/08/20/nyregion/catherine-east-80-inspiration-for-national-women-s-group.html (internal quotation marks omitted).

[69] FRIEDAN, *supra* note 57, at 100.

[70] Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954 n.10 (2002) (citing Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965)).

[71] FUENTES, *supra* note 58, at 134.

[72] *Id.*

[73] *Id.*

[74] FRIEDAN, *supra* note 57, at 100.

[75] Fuentes Interview, *supra* note 54.

[76] FUENTES, *supra* note 58, at 135; FRIEDAN, *supra* note 57, at 100.

Washington" and convince the EEOC and other government agencies to take gender discrimination seriously.[77]

Friedan described this conversation and its connection to later events as follows:

> [T]hen a young "Assistant to the General Counsel" of the [EEOC] started to talk. . . . Sonia Pressman shut her office door and said, ". . . I don't want to keep realizing how this law could be used to get rid of discrimination against women, and have to keep shutting myself up, every day. I get so mad at the way they're not doing it. . . . But I'm not free to do anything about it. I'd lose my job. . . . At least a woman like me has to stay here and watch. But you can do what has to be done. Nobody can fire you. . . . You have to start a national organization to fight for women, like the civil rights movement for the blacks."
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> . . .
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> It was as if the whole female underground was maneuvering me to the point where I would do what they knew had to be done and weren't free to do themselves. After my research days in Washington, [East and Eastwood] would come up to my hotel room . . . and [suggest names of female contacts] needed to form a national organization of sufficient clout to get [Title VII] enforced.[78]

In June 1966, Friedan acted on these women's suggestions.[79] At a national meeting of state government commissions on the status of women, she invited to her hotel room "anyone [she] met who seemed likely to be interested in organizing women for action."[80] That first meeting ended without a decision, but by noon the following day—June 29, 1966—an agreement had been reached:

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[77] FRIEDAN, *supra* note 57, at 96, 100 (internal quotation marks omitted); *see also* BANASZAK, *supra* note 53, at 95 (noting the need to create a "new organization to pursue women's equality").

[78] FRIEDAN, *supra* note 57, at 99–100.

[79] *See id.* at 101, 104 (discussing Friedan's actions to create NOW).

[80] *Id.* at 101.

the women "took two tables at lunch to discuss forming the organization."[81] NOW was conceived.

The fledgling organization had no official ties to government—indeed, the organizers' very idea was to create a *non-governmental* group that could pressure government agencies to take on the problem of gender discrimination.[82] Yet the idea had come, at least in part, from women in the agencies themselves, and "the group photograph taken at the [NOW] organizing conference [in the fall of the same year] shows the strong initial influence of governmental employees": of the twenty-five women in the photograph, Fuentes, Eastwood, and three others worked for federal agencies, and another three worked for state government.[83]

Friedan's government "gadflies" did not cease their activism—nor their soft whistleblowing—once NOW came into being. Rather, they continued to furnish the organization with inside information vital to its mission. Fuentes recalls her continued soft whistleblowing in vivid terms:

> I took to meeting privately at night in [Eastwood's] Southwest Washington apartment . . ., with her and two other government lawyers. . . . At those evening meetings, I discussed the inaction of the Commission that I had witnessed . . ., and then we drafted letters from NOW to the Commission demanding that action be taken in those areas. To my amazement, no one at the Commission ever questioned how NOW had become privy to the Commission's deliberations.[84]

Friedan acknowledges the central importance of the information these women provided to NOW. For example, she describes the work of Catherine East as follows:

> Catherine East of the Women's Bureau of the Labor Department has been the pivot of the feminist

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[81] *Id.* at 103.

[82] *See* BANASZAK, *supra* note 53, at 96, 98 (noting that NOW was an organization intended to operate outside of government).

[83] *Id.* at 96.

[84] FUENTES, *supra* note 58, at 136.

> underground in Washington spreading from government agencies to Capitol Hill. Midwife to the birth of the women's movement, she has served its development with research, intelligence, and alerts to sabotage or strategic possibilities that the movement itself would never have been able to afford. She never violated any Government Secrets Act, but if it had been known by her superiors . . . how actively she was supporting and servicing the organization of an independent activist women's movement, she would have been fired.[85]

Fuentes and her contacts' underground feminist network, their impassioned pleas to Friedan to start an organization like NOW, and their subsequent work behind the scenes to promote NOW's agenda all constitute soft whistleblowing. The women's disclosures were clearly both deliberate and unsanctioned, and the information they relayed reflected no agency misdeeds. Rather, the information concerned only agency recalcitrance on a controversial issue of importance to the soft whistleblowers—the rights of women.

This last point bears repeating, because it is the essence of soft whistleblowing: a soft whistleblower uses her knowledge about internal politics and policies at her employer agency to foment and facilitate external pressure on that agency to change course. That is also, of course, the essence of hard whistleblowing, but in that context the understanding is that the agency (or some individual at the agency) is engaged in misconduct, and the whistleblower is enlisting the assistance of outsiders to hold the agency accountable to objective legal or moral standards.[86] In the context of soft whistleblowing, the agency employee seeks not to right a legal or moral wrong, but instead to influence the agency's *policy* choices. Soft whistleblowing therefore lies at the heart of the central questions of administrative law: how to ensure sound and rational administrative decisionmaking and how to hold agencies accountable not to objective moral or legal standards, but to the

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[85] FRIEDAN, *supra* note 57, at 95.

[86] *See supra* notes 35–40 and accompanying text.

public will and to the spirit (not just the letter) of the laws the agencies are charged with implementing.

Fuentes' own account of her disclosures adds helpful contours to the developing outline of soft whistleblowing. First, Fuentes did not accidentally violate a trust; rather, she sought out feminists at other agencies, and later at NOW, who could make good use of her information.[87] On the other hand, she notes repeatedly that she felt her conduct in this regard was "unethical," that she "was in . . . a difficult position," and that she "fe[lt] terrible" about being at odds with her employer agency.[88] Indeed, as a lawyer representing the EEOC, Fuentes violated not just her own moral code, but also the ethical norms then governing the attorney-client relationship.[89] In other words, Fuentes *chose* to be a soft whistleblower, and she did so in spite of serious and well-founded misgivings about the personal and professional ethics of that choice.[90]

Additionally, although Fuentes may not have originally considered herself an ardent feminist, she became quite passionate about her cause to reform the EEOC's Title VII enforcement, and her disclosures all related to that cause. That is, Fuentes does not appear to have been a general EEOC dissident, but rather someone who questioned a specific policy decision by her employer, and who used soft whistleblowing as both an outlet for her frustration and a tactic to shift that policy.

It is also worth noting the manner in which Fuentes passed on her inside information: she met in secret with individuals she knew, who shared her commitment to the cause of ending gender

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[87] *See generally* Fuentes Interview, *supra* note 50 (discussing Fuentes's deliberate acts to violate her ethical duties to the EEOC).

[88] *Id.*

[89] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 37 (1937), http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf (discussing duty of confidentiality owed to client).

[90] Interestingly, these facts suggest that Fuentes felt that she was acting out of loyalty to the EEOC's mission even as she took actions that she knew her individual superiors would view as disloyal. This puts Fuentes in good company with many traditional whistleblowers who, somewhat counterintuitively, "view themselves not as undermining their organization but as 'defending the true mission of [the] organization by resisting illicit practices.'" Amanda C. Leiter, *Whistle . . . and You've Got an Audience*, 36 FORDHAM URB. L.J. 747, 759 (2009) (alteration in original) (quoting MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY 6 (1989)).

discrimination. She could have passed on her information anonymously, or called journalist contacts and asked to be quoted "on background,"[91] but she instead chose to cultivate a network of people she trusted—including other soft whistleblowers—and then to share her information openly within that network. Soft whistleblowers need not be lone wolves, but can work together in networks to achieve the policy changes they seek.[92]

Lastly, it is important to note that Fuentes and her fellow soft whistleblowers were not whistling into the wind: they were an integral part of a women's movement that was ultimately successful in changing the federal government's attitude toward sex-discrimination in employment and in bringing about an end to gender-specific protective laws and want ads.[93] Catherine East describes her role in the movement as that of "catalyst, in furnishing information and knowing who knew what, and where you went for [additional] information."[94] It is impossible to say, of course, that any instance of soft whistleblowing led to any specific substantive improvement in gender equality, but overall, Professor Lee Ann Banaszak documents that government insiders' participation in the feminist movement "directly influenced the creation of movement organizations" like NOW, "affected the political opportunities that were available to the movement," and "furthered some policy outcomes."[95]

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[91] *See, e.g.*, *Background Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/background (last visited Aug. 8, 2011) ("— on background: with the understanding that information offered for publication will not be attributed to a specific source <an official speaking *on background*>.").

[92] For another example of a group of soft whistleblowers working together to shift the policies of their employer agencies, see Rosemary O'Leary, *The Bureaucratic Politics Paradox: The Case of Wetlands Legislation in Nevada*, 4 J. PUB. ADMIN. RES. & THEORY 443 (1994). O'Leary discusses the "clandestine effort" of four U.S. Department of Interior and Nevada Department of Wildlife employees to push new legislation, Public Law 101-618, which "empowered them to make changes in their [wetlands] programs against the wishes of their [agency] superiors." *Id.* at 443. She, too, reaches the conclusion that "bureaucrats strive to affect their environment from both inside and outside the[ir] organization," using their knowledge of internal politics and policies to increase external pressure on their agencies to change direction. *Id.* at 445.

[93] FUENTES, *supra* note 58, at 138–39.

[94] BANASZAK, *supra* note 53, at 99 (internal quotation marks omitted).

[95] *Id.* at 2. (Note that Banaszak argues the overlap between the government and the women's movement "constrained" other policy outcomes.)

B. THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S WORKPLACE STANDARDS FOR ETHYLENE OXIDE

OHSA sets workplace standards for exposure to hazardous chemicals, including ethylene oxide, a mutagenic chemical widely used as a sterilizing agent by hospitals and manufacturers of medical devices.[96] In 1971, acting on authority delegated by the Occupational Safety and Health Act of 1970,[97] OSHA set a relatively lenient ethylene oxide "permissible exposure limit."[98] The agency based that limit on then-current studies suggesting that the effects of exposure were relatively mild. Over the next decade, however, the Environmental Protection Agency (EPA) and the National Institute of Occupational Safety and Health conducted additional studies that indicated the chemical is a more dangerous carcinogen than previously thought.[99] In response to these studies, Public Citizen Health Research Group and a union of hospital workers (collectively, Public Citizen) filed a rulemaking petition in 1981, asking OSHA to implement a more protective exposure standard.[100]

The Reagan Administration quickly denied Public Citizen's petition.[101] The action then shifted to federal district court, where the group had filed suit seeking to compel OSHA to lower the permissible exposure limit.[102] In connection with that suit, Public Citizen requested that the agency produce all of its ethylene oxide-related documents.[103] OSHA largely complied, but declined to turn over a few items that it claimed were covered under the Freedom of Information Act's (FOIA) so-called "deliberative process" privilege, which exempts from disclosure documents that reflect internal agency deliberations.[104] Among the withheld documents was the memorandum mentioned above,[105] which OSHA senior scientists had sent to administrator Thorne Auchter. The

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[96] Vladeck, *supra* note 1, at 191.
[97] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651–678 (2012)).
[98] Vladeck, *supra* note 1, at 191.
[99] *Id.* at 192.
[100] *Id.*
[101] *Id.* at 199.
[102] *Id.* at 198.
[103] *Id.* at 199.
[104] *Id.* FOIA's deliberative process privilege is codified at 5 U.S.C. § 552(b)(5) (2012).
[105] *See supra* note 1 and accompanying text.

withheld memorandum "piqued [Public Citizen's] interest."[106] The group speculated that the scientist authors, concerned about the new evidence pointing to serious risks from workplace exposure to ethylene oxide, might have "urged" Auchter to take "swift action" to lower the permissible exposure limit.[107]

As noted above, Public Citizen moved to compel OSHA to produce the memorandum (a motion the judge ultimately denied),[108] but in the meantime a soft whistleblower came to Public Citizen's aid. The unidentified soft whistleblower left the memorandum in a brown envelope in the office of the group's lead counsel, David C. Vladeck.[109]

The contents of the leaked memorandum were much as Public Citizen had imagined them to be,[110] and they ultimately proved quite helpful to the group's case. For one thing, according to the memorandum, OSHA had conducted a quantitative risk assessment that revealed the effects of ethylene oxide to be even worse than the EPA studies had suggested.[111] Further, the memorandum "emphasized" that OSHA health scientists and technical staff had concluded (1) " 'that the . . . accumulated toxicity data on [ethylene oxide] exposure document[ed] a serious health hazard for workers,' " and (2) that the then-current exposure limit was " 'inadequate to protect [hospital workers'] health.' "[112] The memorandum recommended swift action to lower the exposure standard—a recommendation that Auchter had declined to follow.[113]

Significantly, Public Citizen decided not to disclose its possession of the senior scientists' memorandum, so as not to spawn a "witch-hunt" for the agency source.[114] As a result, the

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[106] Vladeck, *supra* note 1, at 199.

[107] *Id.*

[108] Pub. Citizen Health Research Grp. v. Auchter (*Auchter I*), 554 F. Supp. 242, 249 n.16 (D.D.C. 1983) (describing Public Citizen's unsuccessful motion to compel).

[109] Vladeck, *supra* note 1, at 200. Vladeck indicates that he assumed the source was "a senior official who disagreed with the OSHA's decision to deny [the rulemaking] petition." *Id.* at 201.

[110] *See id.* at 200 (stating that the leaked memorandum confirmed that ethylene oxide posed a danger to workers).

[111] *Id.* at 200–01.

[112] *Id.* at 201 (quoting the leaked memorandum).

[113] *Id.*

[114] *Id.*

group's court submissions could not refer expressly to the memorandum's contents.[115] Nevertheless, those contents informed the group's subsequent (ultimately successful) litigation tactics. In particular, Public Citizen urged the judge to review the document "in camera" before deciding on the motion to compel disclosure.[116] The purpose of this move was not to improve the odds of winning the motion to compel, which had become all but irrelevant after Public Citizen received the brown envelope. Rather, the group presumably hoped that the judge would be influenced by the contents and tone of the memorandum as he considered the substantive issues in the case.[117] The strategy proved effective: the decision ordering OSHA to "promulgate . . . an appropriate emergency temporary standard addressing worker exposure to ethylene oxide" specifically mentions the contents of the withheld memorandum, which the judge found to be "at odds with OSHA's denial of the plaintiffs' [rulemaking] petition."[118]

Advance the clock a few years. OSHA appealed the district court's order; Public Citizen won that appeal; and the D.C. Circuit ordered the agency to conduct an expedited rulemaking to lower the ethylene oxide exposure limit.[119] In April 1983, OSHA began that exercise, proposing a lower long-term exposure limit.[120] OSHA did not, however, propose to regulate *short*-term exposures, even though the science supported such a limit.[121] The issue of a short-term exposure limit, or STEL, quickly became the focus of the comment period for the new rule. In a July 1983 public hearing on that and other issues, Public Citizen played a key role in "coordinating . . . experts and workers affected by [ethylene oxide]" who testified in favor of a STEL.[122]

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[115] *Id.* ("The question was how to use [the memorandum] without revealing that [they] had a copy.").

[116] *Id.*; *see also* Pub. Citizen Health Research Grp. v. Auchter (*Auchter I*), 554 F. Supp. 242, 249 & n.16 (D.D.C. 1983) (noting that the court reviewed the memorandum in camera).

[117] Vladeck, *supra* note 1, at 203 (noting that even though the motion to compel was denied, the court now understood the significance of the memorandum).

[118] *Auchter I*, 554 F. Supp. at 249, 251.

[119] *See generally* Pub. Citizen Health Research Grp. v. Auchter (*Auchter II*), 702 F.2d 1150 (D.C. Cir. 1983) (per curiam) (detailing the procedural history of OSHA's appeal).

[120] Vladeck, *supra* note 1, at 208.

[121] *Id.* (noting that OSHA questioned the "necessity and feasibility of a STEL").

[122] *Id.* at 208–09.

On June 15, 1984, a soft whistleblower once again came to Public Citizen's aid, calling Vladeck to suggest that he go to the Federal Register office to view the new ethylene oxide rule, which OSHA had just submitted for publication. In these days of e-filing, the next scene would involve a Microsoft Word document that contained a hidden record of all edits made to the final saved file. When Vladeck reached the Federal Register office in 1984, though, what he found was a hard copy of the final rule that "reflect[ed] changes" to the rule "made at [the] behest" of the White House Office of Management and Budget (OMB).[123] Better yet, the edited hard copy "had a thin pencil mark drawn through the portions of the document to be deleted, so the text earmarked for excision could easily be read."[124] Plainly, the soft whistleblower had intended to call Public Citizen's attention to that soon-to-be-excised text.

Investigating further, Public Citizen was able to piece together a telling story. OSHA personnel had concluded that a STEL was necessary to "reduce the cancer risk posed by [ethylene oxide] to acceptable limits."[125] Accordingly, the agency planned to include such a limit in its final rule. Prior to issuance of the new rule, however, industry groups submitted comments to the agency and the White House, arguing that the STEL would be unjustifiably expensive.[126] The OMB then incorporated some of these negative comments "word-for-word" in a letter to OSHA that "object[ed] to the inclusion of a STEL on cost-effectiveness grounds."[127] Finally, OSHA "did what it was told"—it "dropped the STEL and sanitized (or tried to sanitize) all references to it in the final standard."[128] In other words, OSHA "suddenly changed a considered position in response to OMB pressure"[129]—a capitulation that might have been lost to history were it not for a soft whistleblower's well-timed phone call.

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[123] *Id.*
[124] *Id.* at 211–12.
[125] *Id.* at 212.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 572 (1989).

There is a longstanding debate about the reasonableness and legitimacy of an expert agency's about-face in response to political and White House pressure.[130] Regardless of one's views on that issue, the ethylene oxide story highlights the key role that soft whistleblowing can play in judicial oversight of agency action. Making quick use of information gleaned from the (line-edited) draft of the final ethylene oxide rule, Public Citizen filed a second lawsuit, this time challenging OSHA's decision to delete the STEL from that rule.[131] The deletion, Public Citizen argued, "was neither supported by the [scientific] evidence nor consistent with the agency's mandate to set the most worker-protective standard possible."[132] The D.C. Circuit agreed, finding OSHA's rationale for declining to include a STEL "insufficient to warrant affirmance."[133]

The ethylene oxide story reaffirms some of the aforementioned attributes of soft whistleblowers and soft whistleblowing. First, like Fuentes, the unidentified OSHA soft whistleblower (or possibly whistleblowers) acted deliberately, in the face of significant professional risks. Second, he or she appears to have had a normative objective: to increase pressure on OSHA to strengthen its workplace standards for ethylene oxide use. Finally, with the information provided by the soft whistleblower(s), Public Citizen's lawsuits were successful. Thus, the OSHA case affords another example of a soft whistleblower's

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[130] *Compare, e.g.*, Peter L. Strauss, *Foreword*; *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) ("[I]n ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role—like that of the Congress and the courts—is that of overseer and not decider. These oversight responsibilities, in my judgment, satisfy the undoubted constitutional specification of a unitary chief executive, while avoiding . . . executive tyranny."), *with* Kagan, *supra* note 34, at 2331–46 (arguing for a strong, expansive, and highly participatory role for the President and the Executive Office of the President (including OMB) in "address[ing] two core issues: [making] administration accountable to the public and [making] administration efficient or otherwise effective"); *see also* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 854–61 (2012) (reviewing case law and scholarly commentary on the validity of agency decisionmaking premised on political rather than technocratic realities); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 952–58 (1980) (assessing the constitutional and prudential limits on White House involvement in agency decisionmaking).

[131] Vladeck, *supra* note 1, at 213.

[132] *Id.*

[133] Pub. Citizen Health Research Grp. v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986).

ability to use his or her inside knowledge of agency operations and deliberations to create (or at least contribute to) outside pressure on an agency to rethink its policy choices on a controversial issue.

The OSHA soft whistleblower's modes of disclosure, though, stand in stark contrast to those of Fuentes. Fuentes regularly met in person with fellow feminists, and she passed her information orally.[134] The OSHA soft whistleblower instead chose to remain anonymous.[135] In the instance of the senior scientists' memorandum, that anonymity created a significant validation problem for the recipient, Public Citizen, which had to find some way to assess the authenticity and accuracy of the memorandum.[136]

The nature of that anonymous disclosure is also significant: the OSHA soft whistleblower passed on a *document*, which creates a paper trail in a way that oral information may not. Within an agency, a document has a chain of custody—some set of people who wrote or received it. If someone else obtains a copy, therefore, the list of possible leakers is often well defined. Thus, the recipient of a leaked document has to tread more carefully than the recipient of oral leaks, because any use of the document could implicate the soft whistleblower. Indeed, Public Citizen found itself in exactly that position, ultimately choosing not to acknowledge in court that it had obtained the scientists' memorandum—which in any event it could not offer into evidence because the group had no way to prove the document's authenticity—lest the group's public possession of the document land the OSHA soft whistleblower in hot water at the agency.[137]

A third point about the OSHA soft whistleblower's disclosures concerns the telephone call to Vladeck suggesting that he view the hard copy of the final ethylene oxide rule in the Federal Register office. The call is interesting because the soft whistleblower effectively directed Public Citizen's attention to information (the line edits to the final rule) that was readily available to anyone who happened to go to that office on June 15, 1984.[138] Yet the phone call nevertheless conveyed the important *non-public*

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[134] FUENTES, *supra* note 58, at 134–35.
[135] Vladeck, *supra* note 1, at 200.
[136] *See id.* at 201.
[137] *Id.*
[138] *Id.* at 212.

information that someone from Public Citizen *should* make the trip to the Federal Register office on that day. In other words, the caller helped direct Public Citizen to useful *public* information that the group might otherwise have missed.

In the telephone call, the soft whistleblower served what might be called a "signpost" function, pointing the way down a public side road. The road is open and free for travel, but the signpost at the corner nevertheless performs the invaluable service of calling the traveler's attention to the road. Similarly, a soft whistleblower may perform an important service by calling an outside party's attention to nonobvious or hidden *public* information, such as a visibly-edited hard copy of a final rule (as in the OSHA case), a noteworthy document in a voluminous public record, or a critical passage in a long rulemaking preamble.

In the latter instances, the soft whistleblower need not say very much to convey an enormous amount of information. "Check out Federal Register page 2,345, column 1," for example, could mean, "There is something on page 2,345, column 1 that may be of interest to you as you consider whether and how to support or challenge the agency's new policy on issue X." Given the huge volume of scientific and technical information that agencies must process in formulating policy, the correspondingly large volume of information public interest organizations and other outside groups must sort as they formulate a response to the agency's policy choices, and the limited resources of most such groups, it is difficult to overstate the significance of a signpost soft whistleblower who focuses the group's attention on the most noteworthy information in the public record.[139]

Moreover, the same signpost soft whistleblower may serve the additional function of revealing duplicity—or at least equivocation—in an otherwise innocuous-seeming statement in an agency document. Suppose, for example, that a signpost soft whistleblower calls an outside advocate's attention to a passage in a rulemaking preamble that states, "the agency believes the data support" a particular policy choice. On its face, that statement is unobjectionable and largely meaningless. If a soft whistleblower

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[139] *See* Leiter, *supra* note 90, at 752 (discussing the dilemma public rights litigators face in sifting through "vast quantities of public information for material that is useful").

calls an advocate's attention to the statement, however, the soft whistleblower may be communicating that agency personnel are not as unified in their beliefs as the preamble language would suggest. In other words, the soft whistleblower's communication serves as something of a poker "tell," signaling to the recipient of the communication that the agency's seemingly bland language masks a more intriguing and controversial reality—a reality that bears further investigation and perhaps even warrants litigation.[140]

C. THE JUSTICE DEPARTMENT VOTING RIGHTS SECTION'S HANDLING OF THE NEW BLACK PANTHER PARTY CASE

On election day 2008, Stephen Morse, a Republican videographer, videotaped two African American men standing outside a polling place in north Philadelphia.[141] The two men were members of Philadelphia's New Black Panther Party (NBPP or Party): the commander of the Party's Philadelphia Chapter, Minister King Samir Shabazz, and Shabazz's chief of staff, Jerry Jackson.[142] They had stationed themselves outside the polling facility and were wearing "paramilitary garb";[143] Shabazz was carrying a nightstick.[144] In the video, Morse and the men spar verbally. Morse suggests that the men's attire and the nightstick might be somewhat intimidating to the voters, and one of them replies, "Who are you to decide?"[145]

Someone uploaded Morse's video to various conservative blogs and news sites, and, soon thereafter, the video came to the attention of J. Christian Adams, then a lawyer in the Voting Rights Section (Section) of the Justice Department's Civil Rights

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[140] Interview with Anonymous Source at Agency Watchdog Group, in Wash., D.C. (May 12, 2010) (transcript on file with the author).

[141] Jerry Markon & Krissah Thompson, *Dispute over New Black Panthers Case Causes Deep Divisions*, WASH. POST (Oct. 22, 2010), http://www.washintonpost.com/wp-dyn/content/article/2010/AR20102203892.html.

[142] U.S. COMM'N ON CIVIL RIGHTS (USCCR), RACE NEUTRAL ENFORCEMENT OF THE LAW? THE U.S. DEPARTMENT OF JUSTICE AND THE NEW BLACK PANTHER PARTY LITIGATION: AN INTERIM REPORT 5 (2010), *available at* http://www.usccr.gov/NBPH/USCCR_NBPP_report.pdf [hereinafter USCCR INTERIM REPORT].

[143] William Yeomans, *Rebuilding Civil Rights Enforcement*, 37 HUM. RTS. Fall 2010, at 2–3.

[144] Markon & Thompson, *supra* note 141.

[145] ElectionJournal, YOUTUBE (Nov. 4, 2008), http://www.youtube.com/watch?v=neGbKHyGuHU.

Division (Division).[146] Adams remembers thinking, " 'There are armed men in front of a polling place, and I need to find out if they violated the [Voting Rights Act (VRA)], because in my mind there's a good chance that they did.' "[147] He and others in the Section began the process of building a case under VRA section 11(b),[148] which provides in relevant part, "No person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote."[149] The Justice Department attorneys interviewed several witnesses to evaluate whether the Party members' presence at the polling site had in fact intimidated potential voters.[150] On the basis of information obtained in those interviews, a trial team recommended that the Government bring a VRA suit against four defendants: Minister Shabazz, Jackson, the Party, and the Party's Chairman.[151]

In the waning days of the second George W. Bush Administration, the Department of Justice followed that recommendation, filing suit in the U.S. District Court for the Eastern District of Pennsylvania on January 8, 2009.[152] Although the Government served each of the defendants with its complaint, none filed a response.[153] Accordingly, Section attorneys filed a Request for Entry of Default against each defendant.[154] In April 2009, the court granted the requests, entering an order of default and granting the Government a few weeks to move for default judgment.[155]

At that point, however, the Government changed its course. Participants offer conflicting explanations for the shift, but all

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[146] Markon & Thompson, *supra* note 141.

[147] *Id.* (quoting Adams).

[148] *Id.*

[149] 42 U.S.C. § 1973i(b) (2012).

[150] USCCR INTERIM REPORT, *supra* note 142, at 7.

[151] *Id.* at 14.

[152] Complaint, United States v. New Black Panther Party for Self-Defense, No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

[153] USCCR INTERIM REPORT, *supra* note 142.

[154] *Id.* at 15; *see also New Black Panther Investigation*, UNITED STATES COMM'N ON CIVIL RIGHTS, http://www.usccr.gov/NBPH/NBPH.htm (last visited Feb. 3, 2014) (linking to all of the filings in the case, including the four Requests for Entry of Default).

[155] Order, United States v. New Black Panther Party for Self-Defense, No. 2:09-CV-065-SD (E.D. Pa. Apr. 17, 2009), *available at* http://www.usccr.gov/NBPH/OrderforGovernmenttofileMotionforDefaultJudgment.pdf.

seem to agree on the basic facts. On May 15, 2009, rather than moving for default judgments against all four defendants, the Department of Justice voluntarily dismissed the charges against three of the defendants—Jackson, the Party, and the Party Chairman—and sought only one, relatively narrow injunction against the fourth defendant, Minister Shabazz.[156] Three days later, the court granted that single injunction, enjoining Shabazz from "displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia."[157] The case then came to a close.

The controversy, however, was only beginning. Conservative newspapers and blogs decried the Justice Department's decision to dismiss its case against three of the four defendants, attributing the course-reversal to Obama Administration unease about filing a VRA action against African Americans.[158] The Administration was accused of "[r]everse discrimination"[159] and "taking us backward . . . [o]n ballot integrity."[160] Members of the U.S. Commission on Civil Rights sent letters to Loretta King, Acting Assistant Attorney General for the Civil Rights Division, asking her to "advise the Commission of the Division's rationale for dismissing the charges against defendants."[161] The Commission

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[156] Markon & Thompson, *supra* note 141; *see also* Rule 41(a)(1)(A) Notice of Dismissal, United States v. New Black Panther Party for Self-Defense No. 2:09-cv-0065 (E.D. Pa., undated), *available at* http://www.usccr.gov/NBPH/Rule41(a)(1)(A)NoticeofDismissalreNBPPMalikZuluShabazzandJerryJackson.pdf.

[157] Order, United States v. New Black Panther Party for Self-Defense, No. 2:09-CV-065-SD (E.D. Pa. May 18, 2009), *available at* http://www.usccr.gov/NBPH/OrdergrantingMotionforDefaultJudgmentandenjoinderreKingSamirShabazz.pdf.

[158] Peter Kirsanow, *DOJ's Dismissal of Voter Intimidation Charges*, NAT'L REV. ONLINE (June 18, 2009), http://www.nationalreview.com/corner/183542/dojs-dismissal-voter-intimidation-charges/peter-kirsanow; Editorial, *Protecting Black Panthers*, WASH. TIMES, May 29, 2009; Hans von Spakovsky, *Panther Politicization at Obama DoJ*, THE FOUNDRY (July 31, 2009, 9:55 AM), http://blog.heritage.org/2009/07/31/panther-politicization-at-obama-doj/; Jerry Seper, *Career Lawyers Overruled on Voting Case: Black Panthers Had Wielded Weapons, Blocked Polls*, WASH. TIMES, May 29, 2009, at A1.

[159] Editorial, *Reverse discrimination in New Black Panther case*, WASH. EXAMINER, July 7, 2010, http://washingtonexaminer.com/reverse-discrimination-new-black-panther-case/article/12406.

[160] Hans A. von Spakovsky, *Holder Winks at Voter Intimidation*, WALL ST. J., June 9, 2009, http://online.wsj.com/news/article/SB124451552193396877.

[161] Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice (June 16, 2009), *available at* http://www.usccr.gov/correspd/VoterIntimidation2008LetterDoJ.pdf; *see also* Letter from Abigail Thernstrom, Vice-Chairman, U.S. Comm'n on Civil Rights, and Ashley L.

then began a full-fledged investigation of the Department's handling of the entire NBPP prosecution.[162] Meanwhile, Republican Congressmen sought a "closed-door briefing" with senior Division personnel to explore the rationale for the dismissals.[163]

Responding to these various accusations, the Division repeatedly asserted its commitment to making " 'enforcement decisions based on the merits, not the race, gender or ethnicity of any party involved.' "[164] Supporters of the Administration, for their part, labeled the conservative outcry over the handling of the case, "Sound and Fury Signifying Nothing,"[165] and "a phony scandal."[166]

As is common with partisan disputes in Washington, the controversy faded with time but never came to a particularly satisfying conclusion. In early 2010, the House Judiciary Committee (then Democrat-controlled) rejected on a party-line vote a House Resolution that would have "direct[ed] the Attorney General to transmit to the House of Representatives all information in his possession relating to the decision to dismiss"

Taylor, Jr., Comm'r, to Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice (June 22, 2009), *available at* http://www.usccr.gov/correspd/Thernstrom_Taylor Letter2008.pdf (requesting additional information regarding the "Division's rationale for dismissing [the] case").

[162] *See generally New Black Panther Investigation*, UNITED STATES COMM'N ON CIVIL RIGHTS, http://www.usccr.gov/NBPH/NBPH.htm (last visited Feb. 3, 2014).

[163] Jerry Seper, *Senior Republican Wants Answers on Panther Case*, WASH. TIMES, July 31, 2009, http://www.washingtontimes.com/news/2009/jul/31/senior-republican-wants-answers-panther-party-case/; Jerry Seper, *Lawmakers Seek Refiling in Panther Case*, WASH. TIMES, July 31, 2009, http://www.washintontimes.com/news/2009/jul/31/lawmakers-seek-refiling-of-panther-case/; Jerry Seper, *House Panel Rejects Panther Resolution*, WASH. TIMES, Jan. 14, 2010, http://www.washingtontimes.com/news/2010/jan/14/house-panel-rejects-panther-resolution/.

[164] Jerry Markon & Krissah Thompson, *Bias Led to 'Gutting' of New Black Panthers Case, Justice Official Says*, WASH. POST, Sept. 25, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092403873.html (quoting Tracy Schmaler, a Justice Department spokeswoman).

[165] Michael Yaki, *GOP and New Black Panthers: Sound and Fury Signifying Nothing*, HUFFPOST (July 20, 2010), http://www.huffingtonpost.com/michael-yaki/gop-and-new-black-panther_b_652781.html.

[166] Eric Schroeck, *Bipartisan Agreement: Fox-hyped New Black Panthers Case is a Phony Scandal*, MEDIAMATTERS (July 17, 2010, 5:28 PM), http://mediamatters.org/mobile/research/201007170012.

charges against three of the four defendants in the NBPP case.[167] Later that year, the U.S. Commission on Civil Rights completed a series of hearings and interviews and issued an "Interim Report" titled "*Race Neutral Enforcement of the Law? The U.S. Department of Justice and the New Black Panther Party Litigation*" (USCCR Interim Report).[168] Approved by five of the seven Commissioners, the USCCR Interim Report reaches no final conclusions but details at length the testimony of certain former Justice Department officials, who leveled serious accusations of race-bias and misconduct against the Obama Civil Rights Division and individual Division attorneys.[169]

Meanwhile, the Department of Justice's Office of Professional Responsibility (OPR) conducted its own investigation of the NBPP case, ultimately reaching starkly different conclusions. Specifically, OPR's March 2011 report concludes that none of the Department employees involved in the decision to dismiss charges in the case "commit[ted] professional misconduct or exercise[d] poor judgment."[170] On the other hand, the OPR Report also vindicates Adams and the other attorneys who initiated the NBPP litigation, concluding that they did so "based upon a good-faith assessment of the facts and the law."[171]

Whistleblowers, both hard and soft, played a role in exposing and then fanning the flames of the controversy. To see the whistleblowers' role, one must pay close attention to the timing

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[167] Transcript, Markup of H. 994, H.R. 3190, and H.R. 569, Jan. 13, 2010, at 7, *available at* http://judiciary.house.gov/hearings/transcripts/transcript100113.pdf.

[168] USCCR INTERIM REPORT, *supra* note 142, at 1.

[169] *Id.* at 69–93. The Report states, for example, that those officials,

> presented testimony that both raises concerns about the current enforcement policies of the Department and provides a possible explanation for the reversal in the course of the NBPP litigation. In sum, they indicated that there is currently a conscious policy within the Department that voting rights laws should not be enforced in a race-neutral fashion. In their testimony, they gave numerous specific examples of open hostility and opposition to pursuing cases in which whites were the perceived victims and minorities the alleged wrongdoers.

Id. at 2–3.

[170] OFFICE OF PROF'L RESPONSIBILITY, No. 2:09CV00654, INVESTIGATION OF DISMISSAL OF DEFENDANTS IN UNITED STATES V. NEW BLACK PANTHER PARTY FOR SELF-DEFENSE 2 (2011), *available at* http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/OPR%20Report.pdf.

[171] *Id.*

and circumstances of news coverage. As noted above, the Justice Department filed its Notice of Dismissal of charges against Jackson, the Party, and the Party Chairman on May 15, 2009.[172] For the next two weeks, no local or national newspapers reported on the dismissals.[173] On May 29, 2009, however, the *Washington Times* wrote an incendiary piece alleging that "Justice Department political appointees overruled career lawyers" and "ordered" the dismissals.[174] As support for this provocative claim, the *Times* cited "interviews," "documents," and information provided by "[p]eople directly familiar with the case, who spoke only on the condition of anonymity because of fear of retribution."[175]

That same evening, conservative talk-show host Glenn Beck picked up the story, noting mainstream media's refusal to cover the Department's decision.[176] Interest swelled. Over the next three days, twenty-four conservative news sites, blogs, and television stations picked up the story,[177] expressing varying degrees of "outrage[ ]" over the Department's decision, and either linking to or citing the *Washington Times*' story.[178] In other words, the *Times* article sowed the seeds of controversy, based largely on information provided by unidentified "[p]eople directly familiar with the case, who spoke only on the condition of anonymity because of fear of retribution"[179]—that is, presumably, Justice Department whistleblowers.[180]

It is difficult to characterize the disclosures on which the *Washington Times* based its story without knowing what was said

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[172] Markon & Thompson, *supra* note 141; Rule 41(a)(1)(A) Notice of Dismissal, United States v. New Black Panther Party for Self Defense, No. 2:09-cv-0065 (E.D. Pa., undated), *available at* http://www.usccr.gov/NBPH/Rule41(a)(1)(A)NoticeofDismissalreNBPPMalikZuluShabazzandJerryJackson.pdf.

[173] Lexis News Database Search, LexisNexis, http://advance.lexis.com ("News, All" for "new black panther," date restriction 5/1/2009-5/28/2009) (search conducted Oct. 22, 2011).

[174] Seper, *supra* note 158.

[175] *Id.*

[176] Transcript of *The Glenn Beck Program*, FOX NEWS NETWORK (May 29, 2009), *available at* LexisNexis (TRANSCRIPT: 052901cb.258).

[177] Lexis Nexis Database Search, LexisNexis, http://advance.lexis.com (search "News, All" for "new black panther," date restriction 5/28/2009-5/31/2009) (search conducted Oct. 22, 2011).

[178] *See, e.g.*, Roy Eappen, *Dr. Roy's Thoughts*, NEWSTEX WEBLOGS, May 30, 2009, *available at* LexisNexis, Newstex ID: 35398567 (linking to the *Washington Times* story).

[179] Seper, *supra* note 158.

[180] Interview with Anonymous Advocate 3, in Wash., D.C., July 26, 2010.

or which documents were shared, but it is likely that both hard and soft whistleblowing occurred. If the sources made any suggestion that specific Department officials deliberately subverted enforcement of the VRA, or harassed or intimidated underlings in an effort to achieve that subversion, disclosures related to that conduct would certainly fit within the WPA's definition of traditional (hard) whistleblowing, which includes disclosure of violations of law or abuse of authority.[181] On the other hand, disclosures about policy disagreements within the Voting Rights Section over how strenuously to pursue particular enforcement actions would fall squarely into the *soft* whistleblowing category.[182] Such disagreements may be divisive, but they do not indicate misconduct or malfeasance, so a source who disclosed the disagreements to the press would likely fall outside of both WPA protections and the broader "common underst[anding]" of hard whistleblowing.[183]

The trail of both hard and soft whistleblowing in connection with the NBPP controversy continues after May 29, 2009, though its next few turns are less well documented. On June 9 of the same year, *The Wall Street Journal* op-ed page covered the story, in a piece authored by Hans A. von Spakovsky.[184] A Senior Legal Fellow at the Heritage Foundation and a former member of the Virginia Advisory Board to the U.S. Commission on Civil Rights, von Spakovsky had spent several years in the George W. Bush Justice Department, first as a trial attorney in the Voting Rights Section, and then as Counsel to the Assistant Attorney General for Civil Rights.[185] He had left government, however, when he published his *Wall Street Journal* op-ed.

Von Spakovsky's *Wall Street Journal* op-ed piece exacerbated the NBPP controversy: he cited the Department's "inexplicable

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[181] 5 U.S.C. § 2302(b)(8)(A) (2012).

[182] *See* discussion *infra* Part III.C (discussing disclosures related to disagreements within the Voting Rights Section).

[183] *See supra* note 36 and accompanying text (quoting the "commonly understood" definition of whistleblowing, which extends to " 'the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action' ").

[184] Von Spakovsky, *supra* note 160, at A19.

[185] Hans A. von Sparkovsky, THE HERITAGE FOUND., http://www.heritage.org/about/staff/v/hans-von-spakovsky (last visited Feb. 3, 2014).

dismissal" of charges in the case as "Exhibit A" for the proposition that under Obama, the Civil Rights Division was "misinterpreting key voting rights laws for nakedly political reasons."[186] Von Spakovsky does not identify his sources for this serious allegation. In an affidavit later filed with the U.S. Commission on Civil Rights as part of its NBPP investigation, however, he specifically documents his professional relationship with two Voting Rights Section attorneys who later left the Section and testified in the Commission's investigation: J. Christian Adams, the Section attorney who originally pursued the NBPP case, and Christopher Coates, a former Section Chief.[187] In particular, von Spakovsky's affidavit states that when all three men worked together at the Justice Department, Adams and Coates expressed to von Spakovsky their concern that some lawyers in the Voting Rights Section opposed enforcing the VRA against "black defendants, no matter how egregious their violations of the law."[188]

There is no direct evidence that von Spakovsky relied on soft whistleblowing in writing his *Wall Street Journal* op-ed, but the circumstances are suggestive: he had prior professional relationships with both men; during the time when they were colleagues at the Justice Department, they discussed their shared concern that the Voting Rights Section engaged in racially-selective enforcement of the VRA; at the start of the New Black Panther Party controversy, von Spakovsky was the only one of the three who could speak freely because he had left his government position; and finally, to characterize the Department's decisions in the case as "nakedly political," von Spakovsky likely had some inside information about the role that political appointees in the Department had allegedly played in getting some charges dismissed.

Adams and Coates eventually left the Voting Rights Section and went public with their (hard) whistleblowing. Their testimony in the U.S. Commission on Civil Rights investigation accuses various officials in the Obama Justice Department of relatively

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[186] *Id.*

[187] Affidavit of Hans A. von Spakovsky ¶¶ 9, 14, July 15, 2010, *available at* http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf.

[188] *Id.* ¶ 16.

serious misconduct in connection with the NBPP dismissals.[189] Even in the absence of Adams and Coates, though, others in the Section continued to act as *soft* whistleblowers, passing on inside information about the effects of the case on Section morale. In an October 2010 article about the controversy, for example, the *Washington Post* cites "[i]nterviews," "government documents," and four unnamed "Justice Department lawyers"—that is, four *other than* Adams and Coates, who had left the Section at that point and are named in the piece—for the proposition that "deep divisions" in the Voting Rights Section "persist today over whether the agency should focus on protecting historically oppressed minorities or enforce laws without regard to race."[190]

This story's lessons for the study of soft whistleblowing are quite different from those of the prior examples because, as the *Washington Times* and *Washington Post* articles demonstrate, the hard and soft whistleblowers in the Voting Rights Section initially, and perhaps primarily, conducted their whistleblowing through the press. They either reached out to or were contacted by reporters, providing sufficient information to allow the press to paint a very unflattering picture of political polarization and politically-charged decisionmaking in the Section.

That fact is important for a few reasons. First, a soft whistleblower who reaches out to a journalist likely has different motivations than one who solely contacts groups like NOW or Public Citizen. Speaking to a journalist is the first step in building a public relations campaign, not a legal campaign. The goal, therefore, must in part be to tarnish the agency's public image, rather than simply to create congressional or judicial pressure on the agency to change its approach to a particular issue. Of course, someone seeking to change an agency's policies may develop a broad campaign that includes a press angle, but a public relations campaign is far less direct, and its outcomes less predictable, than a targeted effort to garner congressional or judicial support for a specific policy change. Among other things, the former can result

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[189] *See* USCCR INTERIM REPORT, *supra* note 142, at 69–90 (detailing the testimony of Christopher Coates and J. Christian Adams).

[190] Markon & Thompson, *supra* note 141.

in a backlash of *support* for the agency and its approach—as happened, to a degree, in the NBPP context.[191]

Presumably, therefore, a soft whistleblower who speaks to journalists is different in kind from a soft whistleblower who speaks solely to congressional staff or advocacy groups. The latter wishes to incite legal action (oversight hearings, legal advocacy, or even litigation) targeting a specific agency policy with which she disagrees; the former, by contrast, may seek more generally to damage the public image of the agency and the administration of which it is a part.

That observation suggests another consideration relevant to soft whistleblowers who choose to speak principally to persons, like journalists and web-blog authors, whose role is to relay information to a broader audience: the possibility that the soft whistleblower is motivated not by substantive disagreement with something specific the agency has done, but instead by some deeper personally or politically motivated concern about the character of the agency. A question of motives arises for any hard or soft whistleblower, of course, and any recipient of inside information from any source must verify that the information is accurate and not merely the unsupported assertions of a disgruntled insider.[192] That risk may be at its peak, however, in the context of a soft whistleblower who chooses to speak primarily to the press or to a blog author, precisely because such a source need not build a case against a single agency decision or policy but can make broader claims about unreasoned agency decisionmaking. The burden then falls on the press or e-press recipient to ensure that all sides of the resulting news story or blog post are well researched, and any accusations fully supported.[193]

Another interesting aspect of soft whistleblowing to journalists and blog authors is that the soft whistleblower loses all control of the information she relays. She must, therefore, trust the recipient to keep her identity a secret and to report the

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[191] *See generally, e.g.*, Yaki, *supra* note 165; Schroeck, *supra* note 166.

[192] *See, e.g.*, ABEL, *supra* note 29, at 39 (discussing reporters' obligation to "identify [a] leaker's bias" (internal citation omitted)).

[193] *Id.*

information accurately.[194] The same is true of a whistleblower who speaks to congressional staff or an advocacy group—there is always the possibility that the initial recipient will pass the information on to the press. But congressional staffers and advocacy groups can at least promise to keep the disclosure secret as they decide how to use the information in their policy work, whereas a journalist or blog author's central role is to *publicize* the information she receives, and to do so ahead of her competition.[195]

D. SOFT WHISTLEBLOWER INTERVIEWS

These histories establish that soft whistleblowing occurs and illustrate some of its manifestations. To investigate the breadth and contours of the phenomenon in one substantive context (federal regulation of the environment), and to explore whether soft whistleblowers also talk to congressional staff, I conducted a series of interviews with environmental professionals on Capitol Hill and in private lobbying firms and nonprofit advocacy groups. I also spoke with journalists at a national newspaper and at one of the Inside Washington publications.[196] Some of the interviewees self-identified as politically conservative, others as politically liberal. Some had worked in one of the federal environmental agencies[197] before taking their current positions; others merely had contacts in the agencies. All of them had received disclosures from soft whistleblowers and used those disclosures in their policy work.

These interviews are not scientific. Moreover, none of the interviewees wished to be identified by name, and all of them asked that I omit from this Article the particular details of their conversations and relationships with soft whistleblowers. Accordingly, the results of the interviews are reported in general terms. Nevertheless, the results confirm that (1) the stories

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[194] *See, e.g.*, *id.* ("When a reporter accepts a leak and publishes it he is engaging in a transaction based on mutual trust. The reporter must believe that the information he has received is trustworthy, and the leaker must believe that the reporter, in turn, can be trusted to protect the anonymity of his source." (internal citation omitted)).

[195] *Id.* (noting that newsmen strive to be "the first with the story" (internal quotation marks omitted)).

[196] *See* INSIDE WASHINGTON PUBLISHERS (Feb. 3, 2014), http://iwpnews.com/.

[197] I define this term broadly to include the Department of Agriculture (Forest Service), Department of Commerce (National Oceanic and Atmospheric Administration), Department of Energy, Department of Interior, and Environmental Protection Agency.

related above are not unique outliers but examples of a broader phenomenon, and (2) congressional staff do indeed receive considerable information from agency soft whistleblowers.

1. Soft Whistleblowing to Capitol Hill Staffers. I begin with soft whistleblowing from agencies to Capitol Hill. Existing civil service protections are based in part on the understanding that *hard* whistleblowing by agency staff is both common and critical to congressional oversight of agencies. In passing the Civil Service Reform Act of 1978, for example, "Representative Pat Schroeder linked whistleblower protection to the needs of legislative oversight: 'If we in Congress are going to act as effective checks on excesses in the executive branch, we have to hear about such matters.' "[198] One can readily imagine that a back-channel flow of softer, policy-relevant information from agencies to Capitol Hill could likewise help the members of House and Senate committees. For one thing, an agency effort to draft a new rule can encourage and speed (or discourage and slow) development of new legislation on the same subject. Off-the-record information about the pace at which the rulemaking is progressing can, therefore, be helpful to supporters (or opponents) of a corresponding effort to push new legislation.

Access to inside information can also be helpful to oversight committees, which "hold hearings on agency conduct (at which senior agency officials may have to testify) and conduct investigations into agency activities."[199] Suppose, for example, an oversight committee was holding a hearing to investigate an agency's decision not to pursue a particular enforcement action. A soft whistleblower who provided the committee with undisclosed agency documents relevant to his superior's testimony would greatly enhance the committee's ability to ask probing questions and expose holes in the testimony.

According to four congressional staffers,[200] the reality of soft whistleblowing in this context accords with the above expectation.

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[198] LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS 6 (2005).

[199] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2016 n.387 (2011).

[200] All of the below information comes from a series of interviews I conducted with four congressional staffers who wish to remain anonymous on June 29, July 8, and July 14,

Unsanctioned leaks from agency staff to congressional staff are constant and important to the work of legislative and oversight committees.

In these sources' experience, information is usually passed orally to a contact on the Hill with whom the soft whistleblower has a prior relationship of trust.[201] Occasionally, though, a soft whistleblower may also pass documents that the agency had refused to disclose, such as internal emails that suggest agency staff were more divided in their opinion of a new policy than the agency's public statements about the policy would suggest.[202] Indeed, one source suggested that sometimes an agency soft whistleblower will *write* an internal email or document with the sole purpose of later leaking it to congressional staff.[203]

As might be expected, the sources further indicated that the frequency of these leaks varies with changes in administration and other shifts in the politics of power in Washington. In particular, "back channels" of unsanctioned communication between confidential agency sources and congressional staff—that is, both hard and soft whistleblowing channels—are most important when there is a divided government.[204] This is perhaps unsurprising, at least for *soft* whistleblowing, because the usual occasion for such communications is a substantive disagreement over policy development. Suppose, for example, a career employee is a lifelong Republican who disapproves of the policies of the current (Democratic) administration. She might choose to reach out to likeminded (Republican) congressional staff to exert oversight pressure on her agency, in an attempt either to shift the agency's views on a particular issue or simply to "gum up the works" and stall aggressive regulatory action.[205]

The interviewees made the related point that, in their experience, the flow of information is greatest from agencies that

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2010. I will refer to them as "Anonymous Congressional Staffer 1, 2, 3, or 4." Transcripts of these interviews are on file with the author.

[201] Interview with Anonymous Congressional Staffer 1, in Wash., D.C. (June 29, 2010).

[202] Interview with Anonymous Congressional Staffer 4, in Wash., D.C. (July 8, 2010).

[203] Interview with Anonymous Congressional Staffer 1, *supra* note 201.

[204] Interview with Anonymous Congressional Staffer 4, *supra* note 202.

[205] Interview with Anonymous Congressional Staffer 1, *supra* note 201; Interview with Anonymous Congressional Staffers 2, in Wash., D.C. (July 14, 2010); Interview with Anonymous Congressional Staffer 3, in Wash., D.C. (July 14, 2010).

have a substantive "mission," like the EPA or the Civil Rights Division—agencies whose charters imply that they will serve as a bulwark *against* a set of opposing interests or practices.[206] According to the interviewees, career staff at these agencies are quicker than other civil service employees to reach out to outsiders when they believe the current administration has impeded their pursuit of their agency's mission.[207] Some agencies, though, have less of a "mission-oriented" culture, and staff at those agencies are correspondingly less likely to engage in either hard or soft whistleblowing.[208]

Both politics and agency culture are also relevant in determining the direction of agency leaks, at least in these interviewees' experience.[209] For some agencies, and in some administrations, the information tends to flow in a single direction (for example, from agency insiders to environmental advocacy groups, or from agency insiders to industry).[210] In contrast, other agencies serve so many competing interest groups that the channels of information flow are multidirectional and may operate at cross-purposes.[211] Consider, for example, the constituency of the Department of Energy, which includes the coal, oil and gas, nuclear, and solar industries. These industries' interests—and views on issues such as the wisdom of providing subsidies for renewable energy or the benefits of carbon sequestration—may diverge widely. A soft whistleblower inside the agency who leaks to a congressional staffer who supports one of these industries may, therefore, be providing policy-relevant information for Industry *A* at the same time that his colleague down the hall is providing the same information to a staffer who supports competitor Industry *B*.

Finally, and unsurprisingly, information recipients on each side of the political aisle hold mutually-exclusive suspicions that more inside information flows to those on the *other* side. In other words,

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[206] Interview with Anonymous Congressional Staffer 4, *supra* note 202.

[207] *Id.*

[208] Interview with Anonymous Congressional Staffers 1, *supra* note 201; Interview with Anonymous Congressional Staffer 2, *supra* note 205; Interview with Anonymous Congressional Staffer 3, *supra* note 205.

[209] Interview with Anonymous Congressional Staffer 4, *supra* note 202.

[210] Interview with Anonymous Congressional Staffer 1, *supra* note 201.

[211] *Id.*

Democrats seem to believe that Republican staffers receive more information from agency insiders, and vice versa.[212]

The categories of information provided by soft whistleblowers are many and varied. Most commonly, soft whistleblowers provide general background information, such as the current status of a rulemaking that the agency has not yet discussed openly.[213] As noted, this straightforward information can be vitally important to backers or opponents of pending legislation on a related subject.[214]

Additionally, soft whistleblowers often serve the signpost function,[215] pointing congressional staffers to publicly available information hidden in a lengthy public record—the needle in the rulemaking haystack. Imagine, for example, that draft language in a new rule mirrors comments submitted by a private entity that will benefit from the rule.[216] Further imagine, though, that the agency received thousands of pages of comments from interested parties on all sides of the new rule.[217] Congressional opponents of the new rule could use the similarities between the comment and rule language as evidence of agency capture—but first,

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[212] For example, I spoke with several sources on the political right who speculated that most of the leaking from environmental agencies is done by left-leaning policy staffers who wish their agencies were more proactive in protecting the environment. In contrast, at least one theorist cites journalists who claim that leaks are more common from right-leaning officeholders who have a more "cavalier attitude . . . toward traditional government procedures" and "right-wing ideological types, who are fundamentally contemptuous of government." ABEL, *supra* note 29, at 28 (internal quotation marks omitted).

[213] Interview with Anonymous Congressional Staffer 4, *supra* note 202.

[214] Interview with Anonymous Congressional Staffers 2, *supra* note 205; Interview with Anonymous Congressional Staffer 3, *supra* note 205.

[215] *See supra* note 139 and accompanying text; Interview with Anonymous Congressional Staffer 1, *supra* note 201; Interview with Anonymous Congressional Staffer 4, *supra* note 202.

[216] *See, e.g.*, Juliet Eilperin, *EPA Wording Found To Mirror Industry's; Influence on Mercury Proposal Probed*, WASH. POST, Sept. 22, 2004, at A29 (noting that a Bush II administration "proposal for regulating mercury pollution from power plants mirror[ed] almost word for word portions of memos written by a law firm representing coal-fired power plants," and indicating that Sen. James M. Jeffords (I-Vt.), then-ranking member of the Senate Environment and Public Works Committee, had called for the EPA's Inspector General to investigate "whether the industry had an undue influence on the agency's proposed mercury rule").

[217] In contested rulemaking proceedings, "[a]ffected entities with the financial resources to do so submit lengthy briefs containing hundreds and even thousands of pages of information, analysis, and argumentation that can quickly lead to what Professor Wendy Wagner characterizes as 'information excess.' " McGarity, *supra* note 23, at 1703–04 (quoting Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1355 (2010)).

congressional staff must be aware of those similarities. A soft whistleblower can provide the necessary link.[218] Even more helpfully, a soft whistleblower might suggest that a congressional staffer should submit a FOIA request for particular documents: "This is the FOIA request you should submit," or "Ask for these documents."[219]

Another common subject of soft whistleblowing is agency wrangling with OMB or the White House. Soft whistleblowers in this category commonly disclose either (1) tension between the agency and OMB with respect to a developing rule or policy, or (2) discrepancies between the agency's original policy objective and the final policy that emerged from the agency after the required OMB review.[220] Interestingly, one interviewee hypothesized that soft whistleblowers may be more willing to disclose conflicts between their agency and the OMB than internal agency conflicts, despite the higher profile of the former, because the OMB is perceived as an outside actor that occasionally—and illegitimately, from the point of view of the soft whistleblower—blocks the agency's policy choices.[221]

It is also important to note that high-level political personnel at an agency sometimes *allow* or even *engineer* leaks about OMB-agency conflicts. Under my definition, these leaks still qualify as unsanctioned soft whistleblowing, provided they are *not* approved by senior White House officials. One interviewee asserted that this circumstance occurred with some frequency in the George H.W. Bush Administration, because then-EPA Administrator William K. Reilly sometimes disagreed with final policies that the

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[218] *See* Tom Hamburger & Alan C. Miller, *Mercury Emissions Rule Geared to Benefit Industry, Staffers Say; Buffeted by Complaints, EPA Administrator Michael Leavitt Calls For Additional Analysis*, L.A. TIMES, Mar. 16, 2004, http://articles.latimes.com/2004/mar/16/nation/na-mercury16 (citing several unidentified "EPA officials" and noting that the Bush administration's "proposed mercury rule, published in the Federal Register in December [2003], contain[ed] numerous paragraphs of verbatim language supplied by two separate industry advocates").

[219] Interview with Anonymous Congressional Staffer 1, *supra* note 201.

[220] *Id*. For further information about OMB review of major agency actions, see, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (1981) (requiring White House review of agency regulation), and see generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003) (studying White House review of agency rulemaking between 1981–2000, focusing especially on the Clinton administration).

[221] Interview with Anonymous Congressional Staffer 4, *supra* note 202.

EPA adopted at the behest of the White House.[222] According to this source, Reilly encouraged the disclosure of information about the OMB's role to increase White House accountability for the final and politically controversial policy choices.[223]

Finally, several interviewees stated that soft whistleblowers sometimes share background documents relevant to an agency official's upcoming testimony at an issue briefing or oversight hearing.[224] Indeed, one source who personally testified before a congressional committee during the Reagan administration indicated that it quickly became clear to him that the committee members had viewed internal deliberative documents that his agency had chosen *not* to share with Congress.[225] As noted above, this advance notice about the contents of an agency witness's testimony is useful to oversight committee staff, who can prepare probing questions for the witness.[226] The ability to expose holes in a witness's testimony is even more critical, however, for issue briefings, at which agency staff brief legislative aides on issues, agency policies, or draft rules.[227] These sessions are generally not public, so there is no knowledgeable lay audience to help staff recognize inaccurate or biased statements by the agency witness. Information from soft whistleblowers can, therefore, prove invaluable.[228]

2. Soft Whistleblowing to Advocacy Groups and Lobbying Firms. As in the congressional context, sources at public advocacy

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[222] Interview with Anonymous Congressional Staffer 1, *supra* note 201.

[223] *Id.*

[224] *Id.*; Interview with Anonymous Congressional Staffers 2, *supra* note 205; Interview with Anonymous Congressional Staffer 3, *supra* note 205.

[225] Interview with Marshall J. Breger, Professor, Catholic University Columbus School of Law (June 22, 2011) (discussing Professor Breger's time as Solicitor of Labor during the George H.W. Bush Administration, when he appeared before Capitol Hill oversight committees only to realize that the committees had previewed his testimony and the supposedly privileged documents on which it relied).

[226] *See supra* note 199 and accompanying text.

[227] *See, e.g.*, Katie Greenshaw, *Congressional Briefing Debunks Anti-Regulatory Myths Behind "Reform" Bills*, CENTER FOR EFFECTIVE GOVERNMENT (Oct. 30, 2013, 4:31 PM), http://foreffectivegov.org/congressional-briefing-debunks-anti-regulatory-myths-behind-reform-bills (stating that an expert panel "convene[s] to brief congressional staffers, members of the press, and the general public about the complex processes that agencies must navigate before they can issue important health, safety, and environmental protections").

[228] Interview with Anonymous Congressional Staffers 2, *supra* note 205; Interview with Anonymous Congressional Staffer 3, *supra* note 205.

groups and lobbying firms confirm that soft whistleblowing is rampant and vital to their work.[229] Again, the information tends to flow along pre-established lines of communication, between an agency insider and outsiders she trusts. Most of the communications are telephone calls, but there are also emails (to and from personal accounts, of course), and even unlabeled envelopes, as in the OSHA story.[230]

As with leaks to Congress, the pace of leaks to lobbyists varies with changes in administration, with the most information leaking from agencies that are "mission-driven."[231] One source suggested that the pace of leaks may also depend on the interpersonal popularity of agency political staff.[232] According to this source, the more popular the political appointees in an agency, the less the career staff resort to soft whistleblowing, independent of party politics.[233]

In general, these sources suggested that soft whistleblowers work to advance all stages of the recipient groups' issue advocacy.[234] For example, the soft whistleblower might disclose a draft of a possible new agency policy, before the policy has been finalized and approved. The recipient group can then express its concerns about the potential policy by, for example, drafting a public letter, blog post, or op-ed—"If [agency X] were to adopt [policy Y], that new regulatory approach would have the following negative consequences for [the public, our membership, or our group]." This "advance guard" action enables the group to prime the press and the public to react negatively to the policy if and when the agency adopts it.[235]

Soft whistleblowers can also be helpful on the substance of an advocacy group's response to a new policy. For example, suppose a whistleblower believes that her agency's data suggest the benefits

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[229] All of the below information comes from a series of interviews I conducted with three legal advocates at D.C. law firms or advocacy groups on July 13, 14, and 26, 2010. Each of the sources wishes to remain anonymous. I will refer to them as "Anonymous Advocate 1, 2, or 3." Transcripts of these interviews are on file with the author.

[230] Interview with Anonymous Advocate 1, in Wash., D.C. (July 14, 2010).

[231] *Id.*

[232] Interview with Anonymous Advocate 2, in Wash., D.C. (July 13, 2010).

[233] *Id.*

[234] *Id.*; Interview with Anonymous Advocate 1, *supra* note 230; Interview with Anonymous Advocate 3, in Wash., D.C. (July 26, 2010).

[235] Interview with Anonymous Advocate 2, *supra* note 232.

of a proposed rule will be lesser than the agency claims, or the harmful side effects will be greater. Alternatively, suppose that some of the data supporting the new rule came not from agency scientists but from a group with a potential bias, such as a public health group or a regulated industry. If a soft whistleblower provides the advocacy group with the data and its source, the group can then use that information to file negative comments during the rulemaking or to challenge the final rule in court.[236]

One source indicated that agency soft whistleblowers may even request that an outside group file a lawsuit against the requester's employer agency.[237] In one instance, a relatively senior (and politically appointed) soft whistleblower found himself frustrated by a policy that the White House had directed his agency to adopt. He therefore stepped out of the public meeting at which the policy was announced, signaled to an outside advocate to join him in the hallway, asked the advocate to sue the agency, and promised to help the advocate identify potential avenues of legal attack to challenge the new policy as arbitrary and capricious.[238]

3. Soft Whistleblowing to the Press. Lastly, and least surprisingly, soft whistleblowers also talk regularly to the press. Other authors have explored the press's reliance on confidential government sources,[239] even proposing a "typology of leaks" based on the motivation of the news source, from someone who "leaks in order to 'satisfy a sense of self-importance' " (the "ego leak") to someone who "leak[s] with the long-range pragmatic motive of developing good relationships with the press as 'a play for future favor' " (the "goodwill leak").[240] In this typology, soft whistleblowing would be characterized as a "policy leak"—the

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[236] *Id.*

[237] Interview with Anonymous Advocate 1, *supra* note 230.

[238] Interview with Anonymous Advocate 2, *supra* note 232.

[239] *See, e.g.*, Sandra Davidson & David Herrera, *Needed: More than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1284–85 (2012) (explaining the need for a law shielding journalists from prosecution when they refuse to disclose their confidential sources, and proposing language for a model shield law); *see also* RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 367–68 (2009) (reporting the results of an empirical study of media subpoenas and discussing the impacts of those subpoenas on the availability and use of confidential sources).

[240] Levi, *supra* note 7, at 624–27 & nn.53–63 (quoting STEPHEN HESS, THE GOVERNMENT/PRESS CONNECTION 77 (1984)) (setting out a typology of leaks).

provision of inside information "to gain attention for an issue or policy option"; "to force action on an issue"; or "to consolidate support from the public or a constituency outside government."[241]

The two interviews conducted with journalists for this Part reaffirmed many of the observations about soft whistleblowing noted above.[242] Especially interesting was a new observation about the mode of leaking to the press. Sources stated that soft whistleblowers who wish to release information to journalists often use an intermediary, such as a nonprofit group, as their "voice." They disclose their information to a confidante in the advocacy group and the group then passes the information along to appropriate press contacts.[243]

4. Soft Whistleblower Organizations. The practice of using an outside contact as a conduit for leaked information is so well recognized in Washington that several nonprofit organizations exist for the primary purpose of supporting hard and soft agency whistleblowers and relaying the whistleblowers' information to the press or to other audiences. For example, in the environmental context, the group Public Employees for Environmental Responsibility, or PEER, self-identifies as "a service organization [that allows] federal [and] state . . . public employees . . . to work as 'anonymous activists' so that agencies must confront the message, rather than the messenger."[244] PEER's short instruction manual for whistleblowers, *The Art of Anonymous Activism: Serving the Public While Surviving Public Service*, advises prospective hard or soft whistleblowers to find an outside advocate, such as a union, an advocacy group, or a professional society, that is "willing and able to . . . act[ ] as both a shield to protect the identity of [the employee whistleblower] and a conduit

[241] *Id.* at 625 n.56 (adding a gloss to the simpler definition of "policy leak" provided by STEPHEN HESS, THE GOVERNMENT/PRESS CONNECTION 77 (1984), "a straightforward pitch for or against a proposal").

[242] All the below information comes from a series of interviews I conducted with two journalists at nationally circulated papers based in Washington, DC on June 29, 2010. Each of the sources wishes to remain anonymous. I will refer to them as "Anonymous Journalists 1 or 2." Transcripts of these interviews are on file with the author.

[243] Interview with Anonymous Journalist 1, in Washington, DC (June 29, 2010); Interview with Anonymous Journalist 2, in Washington, DC (July 3, 2010).

[244] PEER, http://peer.org/ (last visited Feb. 3, 2014).

to the outside world so that the employee['s] concerns can be known."[245]

PEER's website then advertises that the organization will provide precisely this service for employees of federal and state environmental agencies:

> Public employees can use PEER to address issues inside an agency, while remaining safely anonymous and thereby avoiding agency retaliation. For example:
>
> - PEER can file a Freedom of Information Act (FOIA) request *for the precise documents that the employee directs*, but on PEER letterhead and signed by PEER staff; . . .
> - [PEER can handle p]rotests or appeals of permit or other agency decisions. . . . Using PEER may help ensure that critical information purged from agency files is officially on the record. . . .
>
> PEER edits, prints, distributes and acts as "press agent" for reports and white papers free of charge. The author's identity remains unknown, ensuring that the real messenger—the employee—stays out of harm's way.[246]

Organizations outside the environmental context also advertise that they serve this function of soliciting, re-bundling and releasing leaked information from both hard and soft whistleblowers. For example, the two co-authors of PEER's *Art of Anonymous Activism*, The Project on Government Oversight (POGO) and the Government Accountability Project (GAP), both indicate that they are willing to serve this function for government sources in a variety of contexts.[247]

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[245] PEER, THE ART OF ANONYMOUS ACTIVISM: SERVING THE PUBLIC WHILE SURVIVING PUBLIC SERVICE 9–10, *available at* http://www.peer.org/assets/docs/The%20Art%20of%20Ananymous%20Activism.pdf.

[246] *Membership Benefits*, PEER, http://www.peer.org/take-action/membership-benefits.html (emphasis added) (last visited Feb. 3, 2014).

[247] *Methodology*, POGO, http://www.pogo.org/about/methodology.html (last visited Feb. 3, 2014) ("POGO is an investigative organization with an expertise for working with sources inside the government and whistleblowers to document evidence of corruption, waste, fraud, or abuse. . . . POGO's investigators and journalists take leads and information from insiders and verify the information through investigations using the Freedom Of Information Act,

E. MODES AND CONSEQUENCES OF SOFT WHISTLEBLOWING

These case studies and interviews provide important new information on the widespread phenomenon of soft whistleblowing. The story of Fuentes's involvement with NOW suggests that soft whistleblowing is quite deliberate and cause-oriented, undertaken in spite of ethical rules and professional risks, and flows to outsiders whom the soft whistleblower has reason to trust. Further, soft whistleblowers may be networked (like the feminist underground), and in that configuration, they can be quite powerful in harnessing their inside information to create outside advocacy groups and then to assist those groups in effecting dramatic changes in agency policy.[248]

In accordance with several of these observations, the OSHA soft whistleblower(s) acted deliberately to promote their apparent cause (strengthening OSHA's regulation of ethylene oxide); they were undeterred by the risk of discovery; and they materially assisted Public Citizen's successful litigation efforts. The ethylene oxide story also highlights several further observations about soft whistleblowing. First, soft whistleblowers who pass on physical documents run a significant risk of discovery, and—as a corollary to this—the recipients of such documents must be judicious in their use.[249] Second, the recipients of unsanctioned disclosures always face a validation problem, and that problem is especially severe if the soft whistleblower's identity is unknown.[250] Third, soft whistleblowers do not always pass on non-public information; they sometimes serve the important signpost function of calling an outside entity's attention to noteworthy *public* information that the outsider would otherwise have overlooked.[251] Finally, soft

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interviews, and other fact-finding strategies. We then report on our findings to the media, Congress, and public interest groups through alerts, statements, and studies. At the same time, we protect the identity of our insider partners the way that reporters in the mainstream media do, ensuring that they are not punished for their patriotism."); *Public Health*, GAP, http://www.whistleblower.org/program-areas/public-health (last visited Feb. 3, 2014) ("GAP's Public Health program . . . work[s] with whistleblowers to get their disclosures out to Congress, regulatory bodies, and the media.").

[248] *See* discussion *supra* Part III.A (discussing the formation and operation of NOW).

[249] *See, e.g.*, Vladeck, *supra* note 1, at 201 (noting the challenges Public Citizen faced in using the leaked memorandum without revealing that they had a copy).

[250] *Id.* (noting the difficulties of authenticating the memorandum).

[251] *See supra* note 139 and accompanying text.

whistleblowers may also serve as poker "tells," revealing when an agency is "bluffing" and its strong policy bid masks weak scientific or economic data.[252]

The story of the NBPP soft whistleblowers suggests that soft whistleblowers may sometimes be motivated less by a desire to change an agency's approach to a particular issue than by the desire to tarnish the agency's public image or create broad public support for a change in agency management or even a change in presidential administration. Further, the NBPP story highlights the fact that a soft whistleblower loses control of the information she relays as soon as that information becomes public. A soft whistleblower who seeks to use information to tarnish an agency's public image, for example, may find that same information used to burnish the agency's image with a different audience.[253]

The interview results add still more detail to this picture. They suggest that soft whistleblowing is ubiquitous and important. It is principally founded on strong interpersonal relationships between the source and the recipient. It sometimes reflects internal divisions at the source agency, and originates from staff who feel that their important work has been jeopardized by their superiors. More strikingly, it sometimes reflects divisions between the agency and the White House and originates from agency staff who feel their work has been jeopardized not by their agency superiors, but by the President or his advisors.

IV. AGENCY POLICY DEVELOPMENT AND OVERSIGHT

Clearly, agencies leak. More interesting and surprising is the fact that a large amount of the non-public information that finds its way into the hands of congressional staff, watchdog groups, and the press concerns issues of policy rather than evidence of malfeasance, however broadly defined. The above narratives and interviews provide the materials for initial conclusions about the consequences of soft whistleblowing for agency function and accountability. These results are preliminary. There is much we do not yet know about soft whistleblowing. The case studies and

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[252] *See supra* note 140 and accompanying text.

[253] Markon & Thompson, *supra* note 141.

interviews also raise important questions that call for further research.

A. IMPLICATIONS FOR POLICY DEVELOPMENT

With respect to policy development, soft whistleblowing has two broad types of effects. First, soft whistleblowers may serve a steadying, keel-like function, keeping their employer agencies on a relatively constant policy course as administrations change and political winds shift. Second, soft whistleblowing may subtly shift the balance of power within agencies, from those individuals who, for professional or personal reasons, are less willing to share non-public information to those who are more willing.

1. Course Corrections. Imagine a career employee of a mission-driven agency like the Occupational Safety and Health Administration. That employee likely has a personal view of the mission on which she and her agency are engaged. She may, therefore, be more likely to leak information to sympathetic outsiders when she perceives that her superiors at the agency or in the White House are opposed to her view. Suppose, for example, the employee has been working to develop a new safety regulation for a period of months or years, and then, after a change in administration, she senses a weakening in her superiors' support for her undertaking. She might well choose to reach out to friends on Capitol Hill, at a watchdog group, or in the press, either to encourage those entities to pressure the agency to continue its work on the new policy or to lay the groundwork for a future lawsuit if the agency ultimately releases a watered-down version of the policy she helped to develop. I describe this kind of leak as serving a rudder- or keel-like function because, from the employee's perspective, she is keeping the agency on-mission in the face of shifting political pressures.

The whistleblower(s) in the OSHA/ethylene oxide story fit this paradigm. As described above,[254] in the 1970s, employees at the EPA and the National Institute of Occupational Safety and Health (NIOSH) conducted studies on the carcinogenicity of ethylene oxide, ultimately concluding that hospital employees needed better

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[254] *See* discussion *supra* Part III.A (discussing whistleblowing related to OSHA's workplace standards for ethylene oxide).

protection than OSHA's 1971 workplace standard provided. But then the Reagan administration took office, and OSHA denied Public Citizen's petition to strengthen regulation of the chemical. At that point, one or more of the public employees involved in the EPA or NIOSH research, and/or one or more of those employees' contacts at OSHA, may have felt that their superiors were undermining their diligent work to pave the way for a stricter standard. The frustrated employee(s), therefore, reached out to Public Citizen and assisted the group's efforts to push the agency back onto what the soft whistleblower(s) likely believed was the agency's rightful regulatory course.

From the outside, if one were to chart OSHA's policy course over the 1970s and early 1980s, one would see the soft whistleblowers' interventions in the ethylene oxide rulemaking as course-corrective. OSHA pursued an affirmatively pro-regulatory approach in the 1970s, but "[b]y the late 1970s, rising inflation and the nation's economic situation . . . further[ed] regulatory reform efforts to reduce the costs of compliance with federal [workplace safety] rules. Legislative attempts to limit OSHA also mounted steadily and peaked in 1980,"[255] the same year that Reagan was elected on a decidedly deregulatory platform.[256] The OSHA soft whistleblowers' interventions could thus be seen as an effort—and a successful one, with the help of Public Citizen and the courts—to keep OSHA on its historic, more affirmatively regulatory path, despite the country's newly deregulatory mood.

The evidence that soft whistleblowers generally serve this course-steadying function is decidedly mixed. In the NOW story,[257] Fuentes and her fellow soft whistleblowers charted a *new* course for the EEOC, rather than helping to keep the agency on its preexisting path. These members of the feminist underground grew tired of the agency's quiescence in the face of the sexist workplace status quo, and they used their connections to spark the creation of NOW and to provide the organization with the information and ammunition it needed to give the EEOC a

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[255] OSHA, U.S. DEP'T OF LABOR, REFLECTIONS ON OSHA'S HISTORY 14 (2009), *available at* http://www.osha.gov/history/OSHA_HISTORY_3360s.pdf.

[256] *See, e.g.*, MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 30 (1985) (noting that Reagan ran on a platform of deregulation).

[257] *See* discussion *supra* Part III.A.

significant push in a new direction.[258] To continue (briefly!) the sailing analogy, these soft whistleblowers shifted the wind—or jerked the rudder—and steered the agency *off* its historic course. To account for the role of the soft whistleblowers in this example, therefore, one would have to consider the history of, and Congress's intent in passing, Title VII. The NOW soft whistleblowers surely saw themselves as keeping the EEOC on the *correct* course under Title VII—that is, the course most consistent with legislative text and intent—even though their actions were quite clearly intended to push the agency off of *its* chosen course.

Without considerably more data, it is difficult to gauge which example—the OSHA/ethylene oxide story or the NOW story—best illustrates the function that soft whistleblowers generally serve with respect to policy development. There are reasons to expect that further research would indicate soft whistleblowers more often serve a course-steadying function than a course-charting function. Existing research on hard whistleblowers indicates that they view themselves not as undermining their organization but as "defending the true mission of [the] organization by resisting illicit practices."[259] One might expect that most soft whistleblowers similarly view themselves not as forces of change, but as loyal employees of an agency with an important and longstanding policy mission. This suggests that, in most instances, these soft whistleblowers use their inside information to elicit help from outsiders when they perceive that some actor inside the agency or the administration is threatening that mission. But there are clearly those, like the NOW soft whistleblowers, who instead elicit help from outsiders to vindicate congressional intent when they believe their agency fundamentally misunderstands its mission.

This dichotomy raises a series of questions that deserve further research. For example, one might ask:

- Whether soft whistleblowing is more common from agencies that view themselves as having a particular point of view or mission;

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[258] Fuentes Interview, *supra* note 50.
[259] GLAZER & GLAZER, *supra* note 90, at 6.

- Whether career employees engage in soft whistleblowing more commonly than political appointees;
- Whether soft whistleblowers generally view themselves as dissidents or as loyal to their organization's broader mission;
- Whether soft whistleblowing is most common after the White House changes political hands; and
- Whether the volume of soft whistleblowing is greatest when an incoming administration proposes to shift its policy course (for example, by promising sweeping new regulations on a particular subject, or by adopting a strongly deregulatory stance).

Definitive answers to these questions may be impossible to obtain, given the sensitivity of the subject matter and the selection biases inherent in a voluntary survey. A positive answer to one or more of these questions, however, would tend to substantiate the hypothesis that soft whistleblowers principally serve as course-corrective agency rudders or keels, rather than as course-charting watchdogs of *congressional* intent.

2. Internal Power Shifts. A second hypothesis concerns the implications of soft whistleblowing for agency power dynamics. As described above, soft whistleblowing enables an agency insider to wield her expertise and her inside knowledge of agency politics and policies to create or direct outside pressure on her agency to shift its policy making direction. Soft whistleblowing thus gives an insider some additional power—above and beyond her job description—to affect agency policy development.[260] As such, the agency employees who are willing to engage in soft whistleblowing

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[260] *Cf.* Ralph S. Brower & Mitchel Y. Abolafia, *Bureaucratic Politics: The View from Below*, 7 J. PUB. ADMIN. RES. & THEORY 305, 311 (1997) ("As one informant put it, 'everybody has their mandates and guidelines. If you follow them, most of the time they'll work. Many times they will not. So you take it upon yourself to speed things up a bit.' Those who initiate these actions describe them as *entrepreneurial*, *problem solving*, or *shortcuts*."); Ingber, *supra* note 33, at 10 (discussing how "diverse kinds of catalysts, external and internal," influence the identity of the relevant legal decisionmakers in the executive and empower different players in the decisionmaking process).

may accrete some policymaking power to themselves, and away from those who are unwilling.

The question, then, is whether anything can be said about which kinds of agency employees are more likely to engage in soft whistleblowing, and which kinds are less likely. I suspect that, personal predispositions aside, agency employees with legal training are less likely than some other professional employees to be willing to disclose nonpublic information about their employers' activities. Two observations support this hypothesis. First, the congressional staff, interest group employees, and journalists interviewed indicated that they rarely receive disclosures from agency lawyers.[261] Second, lawyers' professional code of ethics prohibits disclosing client confidences, except in certain narrow circumstances,[262] whereas some other professions' ethical codes—notably the code of ethics for engineers—affirmatively *encourage* disclosure in some circumstances.[263]

The concept of a lawyer-client privilege that protects the confidentiality of client communications is quite familiar. Analyzing the application of this privilege to government lawyers is complicated, however, by the fact that the identity of the lawyer's client is not immediately obvious—the client could be the government as a whole, the executive branch, the specific agency for which the lawyer works, or the public at large. There is some debate in the academic literature on this point,[264] but whatever the answer *should* be, "the ethical rules for the D.C. Bar, the jurisdiction with the most government lawyers, explicitly state that government lawyers should treat the agency for which they work as their client."[265]

Assuming the agency as client, the American Bar Association's Model Rules of Professional Conduct send a clear message regarding the ethics of a government lawyer's soft whistleblowing. Except in a few circumstances, the lawyer is forbidden from

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[261] *See* discussion *supra* Part III.D.*1–3*.

[262] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

[263] NSPE, CODE OF ETHICS FOR ENGINEERS II:1:A; III:2:B (2003).

[264] *See, e.g.*, Morse, *supra* note 27, at 434–35 (discussing the difficulty of defining a government lawyer's client); Clark, *supra* note 40, at 1049–55 (discussing a government lawyer's "wide variety of possible clients").

[265] Morse, *supra* note 27, at 435 (quoting DIST. OF COLUMBIA RULES OF PROF'L CONDUCT R. 1.6(k) (2007)).

"reveal[ing] information relating to the representation of [the agency] unless [the agency] gives informed consent."[266]

There are a few exceptions to this rule, but they are quite narrow and specific, and none of them is generally relevant to soft whistleblowing. A lawyer may disclose client confidences:

> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; [or]
> (6) to comply with other law or a court order.[267]

By definition, a soft whistleblower discloses information that does *not* evince a "crime or fraud," so exceptions (2) and (3) do not apply. Exceptions (4)–(6) allow disclosures when the agency lawyer is concerned about her own legal status, or when the lawyer is forced to disclose, so they too have little to say about a situation in which a lawyer at an agency, who is otherwise in good standing, wishes to *violate* her agency's wishes and disclose non-public information about the agency's conduct in order to generate

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[266] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2012).
[267] *Id.* R. 1.6(b)(1)–(6).

outside pressure on the agency to change its views about a particular substantive issue.

The only one of these exceptions that could relate to some instances of soft whistleblowing, therefore, is the first—a government lawyer may disclose agency confidences when necessary "to prevent reasonably certain death or substantial bodily harm."[268] In some instances, a soft whistleblower might argue that this exception covers her choice to pass on inside information about agency policy development. For example, the OSHA soft whistleblower(s) could attempt to claim that this exception applied to communications with Public Citizen, if the whistleblower believed that strengthening the ethylene oxide rule was necessary to prevent substantial bodily harm to exposed hospital workers. In most instances of soft whistleblowing, including both the NOW and NBPP examples, however, the agency employees' leaks concern more prosaic matters—agency policy choices with which the soft whistleblower disagrees, but which pose no threat to life or limb.

Moreover, even if an agency lawyer is convinced that her client agency's policy choice threatens life or limb, the Model Rules merely permit, but do not require, disclosure.[269] A few states have made disclosure mandatory in narrow and exceptional circumstances, but that is not the majority rule.[270] In other words, exception (1) may *allow* some limited soft whistleblowing, but it certainly does not *encourage* or *require* such conduct. Finally, the Model Rules' commentary clarifies that with respect to government lawyers, while the public interest may override confidentiality responsibilities in certain cases of wrongdoing, the lawyer must first refer the matter to the highest internal agency authority.[271] "Public disclosure is only a last resort to avoid substantial harm to the organization."[272] Overall, therefore, government lawyers are likely to be ethically leery of sharing their agency client's confidences with congressional staff, journalists, or outside watchdog groups.

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[268] *Id.* R. 1.6(b)(1).
[269] Morse, *supra* note 27, at 436.
[270] *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 67 cmt. (b)).
[271] *Id.* at 438 (citing MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. (4)).
[272] *Id.*

Other agency professionals, by contrast, may feel quite differently. For example, engineers' professional code of ethics *promotes* disclosure in some circumstances.[273] Specifically, the National Society of Professional Engineers (NSPE) Code of Ethics for Engineers states that "[e]ngineers shall hold paramount the safety, health, and welfare of the public," and further, engineers whose professional "judgment is overruled under circumstances that endanger life or property . . . *shall* notify their employer or client *and such other authority as may be appropriate*."[274] Note three fundamental differences from the legal code of ethics: the overall tone is quite permissive with respect to disclosure; there are some circumstances in which an engineer is affirmatively instructed, not merely allowed, to disclose; and the considerations that can justify disclosure include potential harm to property, not just to life or to limb. Thus, an engineer who finds herself in a policy disagreement with superiors at her employer agency and believes that her own approach to the problem would protect public safety, health, or welfare better than her superiors' approach, may feel herself entirely at liberty, and perhaps even obligated, to discuss the disagreement with people outside her agency.

The net result of this stark difference between legal and engineering ethics is likely to be a shift of power toward engineers, who one might expect to be more willing to use their inside information to generate external pressure on their employer agencies. This hypothesis, in turn, has at least two potential consequences. First, soft whistleblowing may tend to disempower lawyers within agencies, because their hands are tied in ways that others' hands are not.[275] Second, a lawyer who wishes to create outside pressure on her agency may choose to develop information-sharing relationships with others *inside* her agency, on whom she relies—explicitly or implicitly—to pass her information out to appropriate outsiders when the time is right. Thus, the fact of soft

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[273] DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 35 (2d ed. 2004) (quoting NSPE, CODE OF ETHICS FOR ENGINEERS II:1:A; III:2:B (2003)).

[274] NSPE, CODE OF ETHICS FOR ENGINEERS II:1:A (2007) (emphasis added), *available at* http://www.nspe.org/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf.

[275] *Cf.* Magill & Vermeule, *supra* note 33, at 1046 (making a similar assertion about the effects of the *Chevron* framework).

whistleblowing may lead to the development of horizontal strategic alliances among agency professionals whose differing professional ethics differently constrain their contacts with outsiders.

Such horizontal alliances could, in turn, streamline agency function. Gillian Metzger posits that stratification of agency actors, including division of agency employees into distinct organizational groups, serves as an internal check on activities of the executive branch.[276] Indeed, she argues that such "internal separation of powers" mechanisms may serve as a greater check on executive power than external oversight because internal forces operate continuously during policy formulation, and therefore play a more determinative, rather than reactionary, role.[277] Any horizontal alliances forged as a result of soft whistleblowing, however, would tend to reduce agency stratification, reducing the effect of internal divisions.

B. IMPLICATIONS FOR OVERSIGHT

The case studies and interview results also suggest some conclusions about effects on agency oversight. Many authors have debated the relative efficacy and importance of oversight by Congress, the President, the courts, and the public (or interest groups).[278] Others have identified the specific tools that such

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[276] Metzger, *supra* note 33, at 430.

[277] *Id.* at 439–40.

[278] *See, e.g.*, Beermann, *supra* note 20, at 67 (emphasizing the importance of congressional "oversight of and involvement in the administration of the laws"); Kagan, *supra* note 34, at 2252–55, 2347 (discussing the "backdrop" of "congressional, expert, and [outside] interest group control" of agencies, recounting "the emergence of increased presidential control," and concluding by recognizing the importance of judicial review to prevent presidential administration from "displac[ing] the preferences of a prior . . . Congress by interpreting statutes inconsistently with their drafters' objectives"). Also relevant here are the many papers considering the constitutional limits on Congress's " 'power' to carve up the executive department of the federal government into minifiefdoms independent of presidential control." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544, 549 (1994) (arguing that the "Constitution allocates the power of law execution and administration to the President alone," and evaluating "three means available to the President for exercising control over the executive branch"). For the other side of this debate, see generally, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994), and references cited therein.

entities use to control agencies in particular contexts.[279] Soft whistleblowing has implications for all four sources of accountability. The net effect of soft whistleblowing is to strengthen congressional control, and probably also judicial and public oversight, at the expense of what has come to be known as "presidential administration."[280]

1. Congressional Oversight. Jack M. Beermann has identified numerous formal and informal devices by which Congress controls administration of the law.[281] Formal devices include laws "as general as the Administrative Procedure Act (APA) and as specific as legislation enumerating with particularity the purposes for which appropriated funds may or may not be spent."[282] Informal devices include "the threat of legislative action . . . to control or at least influence the administration of the law in myriad ways, from insisting that the President appoint particular candidates for executive positions to pushing administrative action in the substantive direction favored by members of Congress."[283]

As Beermann recognizes, ex parte communications between members of Congress and agency insiders are one informal mechanism by which Congress can exercise control over agency policy formation.[284] For example, with very few limits, members of Congress can offer an agency off-the-record comments on a pending rule. These "comments are likely to be influential for all the reasons that agencies fear acting contrary to the wishes of those in Congress with power over their budgets and authorizing statutes."[285]

Beermann does not, however, make the converse point: soft whistleblowing disclosures—off-the-record and unsanctioned communications in the opposite direction, *from* agency insiders *to* congressional staff—are equally important to targeted

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[279] *See, e.g.*, Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1885 (2012) (identifying regulatory moratoria as "a means through which executive and legislative actors . . . are either exerting or attempting to exert control over the administrative state").

[280] *See* Kagan, *supra* note 34, at 2246 (defining "presidential administration" as "exercising directive authority over . . . agencies and asserting personal ownership of their regulatory authority").

[281] Beermann, *supra* note 20, at 68.

[282] *Id.*

[283] *Id.*

[284] *Id.* at 130.

[285] *Id.* at 134.

congressional administration. Members of Congress can better tailor oversight hearings, and better use the threat or reality of legislative action, if their staff have advance warning about what an agency plans to do, with which funds, for what reasons, and with what degree of White House support.

Agency heads have every reason to share this kind of information about policy development with Hill staff when they anticipate that the developing policy will enjoy a positive reception in Congress. Sometimes, though, an agency can anticipate a more hostile reception. In that circumstance, the agency may try to keep its work on the policy secret for as long as possible, both to avoid having to mount an administratively-costly public defense of the policy before its final contours are drawn, and also to limit the time congressional opponents have to develop and push through opposing legislation, such as (in the case of a new rule) a joint resolution of disapproval under the Congressional Review Act.[286] Members of Congress and staff who wish to consider and formulate responses to the developing policy must, therefore, rely on whatever information they can glean from well-placed soft whistleblowers in the target agency.

The evidence from interviews with congressional staffers is quite suggestive on this count. Staff members indicated that soft whistleblowing is most common when there is a divided government[287]—precisely what one would expect if soft whistleblowers who disagree with policy developments at their employer agency in fact use their connections with congressional staff on the other side of the aisle from the President to bolster congressional opposition to those developments.

There is one important caveat to the argument that soft whistleblowing enhances congressional oversight of agency action. Soft whistleblowers may be able to jumpstart congressional action with respect to a particular agency policy, but the resulting congressional response may have a targeted, scorched-earth quality, rather than the more objective and measured tone one

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[286] Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868 (1996) (codified at 5 U.S.C. §§ 801–808 (2012)) (providing that Congress has sixty days within which to review and disapprove a major new rule and easing the path by which disapproval legislation could make it to the floor of the House and Senate during this review period).

[287] *See supra* notes 201–12 and accompanying text.

would hope to find in functional interbranch interactions. *Every* agency policy has strengths and weaknesses, benefits and costs, reasons to support it and reasons to oppose it. There is some risk that a soft whistleblower, who at the very least opposes the agency policy and may have additional and more personal bones to pick with her employer agency, will pass on only the most incendiary information about the agency's policy development processes. If so, the congressional "oversight" generated on the soft whistleblower's say-so may be biased and misdirected, though of course the agency will have an opportunity to defend its policies in any resulting hearings.

2. Presidential Administration. If soft whistleblowing does, in fact, improve Congress's ability to tailor its oversight of agency policy development, this raises an important corollary question: Does Congress's increased control over agencies come at the expense of presidential control? I believe so, for several reasons.

First, soft whistleblowing obviously gives a voice to those in the executive branch who disagree with their agencies—or perhaps with the White House itself.[288] All three case studies illustrate this point. Fuentes reached out to Betty Friedan and, later, NOW because Fuentes disagreed with the EEOC's interpretation of Title VII; the OSHA soft whistleblower disclosed the scientists' memorandum because he or she disagreed with OSHA's decision not to release the document, and also (presumably) with the agency's decision not to tighten regulation of ethylene oxide; and the NBPP soft whistleblowers talked to the press because they disagreed with their agency's handling of the voter intimidation lawsuits. In each case, the agency, and in turn the White House, lost the ability to control both the development of the underlying policy and the agency's public image.

As the NBPP story illustrates, the damage to a President, and to the overall notion of presidential administration, can run deep. The soft whistleblowers who informed the *Washington Post* that "deep divisions" in the Voting Rights Section "persist today over whether the agency should focus on protecting historically

[288] *But see* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 32–36 (Harvard Univ. Press 2010) (arguing that the increasingly politicized institutional framework of the executive branch is making it less likely that internal actors will speak out against executive policy).

oppressed minorities or enforce laws without regard to race"[289] left lingering doubts in readers' minds, not just about the Voting Rights Section's handling of the four voter-intimidation lawsuits, but also about the Section's ability to do its work neutrally and professionally, and about the Obama Administration's ability to create a spirit of unity[290] in the executive branch.

It is also possible that the damage a soft whistleblower can cause to an administration's public image will have downstream effects on the administration's approach to governance. An administration that has been tarnished on the Hill or in the press thanks to the disclosures of a soft whistleblower may find itself taking a slower, more cautious, and perhaps more conservative approach in subsequent debates about related policies. And, as every recent administration illustrates, it may attempt to crack down on press and public access to agency personnel and information.[291] There may also be personnel effects, if the publicity is sufficiently negative that it encourages others at the now-tarnished agency to leave their posts, or dissuades job candidates from applying for open agency positions.

Further, soft whistleblowing plainly reduces a President's ability to control the flow of information, both within and from the executive branch. Consider, for example, the Clinton-era Executive Order, E.O. 12,866, which aimed to "reform and make more efficient the regulatory process" by, among other things,

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[289] Markon & Thompson, *supra* note 141.

[290] *Cf.* President Barack Obama, Weekly Address: Observes 9/11 with National Service (Aug. 27, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/08/27/weekly-address-coming-together-remember (calling on Americans to return to the "spirit of unity" that characterized the U.S. response to the September 11 terrorist attacks).

[291] *Cf.* Carolyn Carlson, David Cuillier & Lindsey Tulkoff, *Mediated Access: Journalists' Perceptions of Federal Public Information Officer Media Control*, SOC'Y OF PROF'L JOURNALISTS, Mar. 12, 2012, http://spj.org/pdf/reporters-survey-on-federal-PAOs.pdf (surveying "146 reporters who cover federal agencies," and concluding that "public information officers often require pre-approval for interviews" or "monitor interviews"); Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395, 2415 & n.122 (2011) (noting that some agencies in the Obama Administration "require scientists to pre-clear even unofficial public communications relevant to their work with public affairs officers"); Interview with Anonymous Congressional Staffer 1, *supra* note 201 (indicating that the Obama White House maintains a restricted list of which agency personnel are allowed to attend meetings with outside groups, including congressional staff); ABEL, *supra* note 29, at 41–42 (discussing similar measures taken by President Reagan).

"enhanc[ing] planning and coordination with respect to both new and existing regulations," and "mak[ing] the [regulatory] process more accessible and open to the public.[292] According to then-Professor Elena Kagan:

> Perhaps the most heralded changes [in E.O. 12,866] related to ex parte contacts and disclosure issues. Under the order, only the Administrator of [the White House Office of Information and Regulatory Affairs (OIRA)] could receive oral communications from persons outside the executive branch. . . . The order further required OIRA to forward to the relevant agency all written communications from outsiders and to maintain a log, available to the public, of both written and oral communications involving these parties. And after publication of the regulatory action (or a decision not to go forward with it), OIRA was required to disclose all written communications between itself and the agency. Taken together, these provisions substantially opened the review process to public view and comment.[293]

Soft whistleblowing thoroughly undermines regulatory reform efforts of this sort, because it involves unsanctioned, off-the-record information exchange between agency insiders and interested outsiders, with no centralized White House or OIRA oversight. Thus, soft whistleblowing deprives the White House of the ability either to control the subject matter of off-the-record communications with outsiders, or to mandate disclosure of such communications. In other words, soft whistleblowing can hamstring a President's efforts to centralize on- and off-the-record communications between the executive branch and outsiders. In turn, the White House loses the ability to limit agency capture and increase accountability by publicizing any communications between particular interest groups and the agency.

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[292] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 802 (2012).

[293] Kagan, *supra* note 34, at 2286–87.

There is at least one other way in which soft whistleblowers can affect presidential administration, though it is difficult to say whether the net effect is to strengthen or weaken presidential control. As noted above, soft whistleblowers regularly disclose presidential or OMB influence over policy developments at their employer agencies.[294] The result, of course, is to limit the President's ability to blame an agency for unpopular policies that in fact originated in the White House. This seems, at least superficially, to weaken presidential control; the flip side is that the exposure serves in part to *legitimize* the President's involvement, because thanks to the soft whistleblower, the public can accurately attribute the policy to the current administration and vote accordingly.

3. Judicial Review. Soft whistleblowers also affect judicial oversight of agency action, as is evident from the OSHA/ethylene oxide example, in which one or more whistleblowers twice provided Public Citizen with information critical to its ongoing litigation against OSHA.[295]

Whether the consequence of such litigation-relevant leaks is to improve judicial review depends, in part, on one's definition of the goal. On the one hand, one might assume that a court is likely to reach a fairer and more accurate assessment of the lawfulness of a particular agency action if the court has access to the full record of the agency's decisionmaking process.[296] In that case, a well-placed soft whistleblower who passes information, insights, and perhaps even decisional documents to outside litigants helps bring us closer to that goal. Likewise, such a source may also be in a position to expose any White House influence over the shape of the final agency policy, thereby squarely presenting to the court the issue of whether to defer to a policy produced not by the supposedly expert agency, but instead by the overtly political White House.[297]

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[294] *See supra* notes 127–30 and accompanying text.

[295] *See supra* notes 109–12, 118–19 and accompanying text.

[296] Coming full circle, the litigation may ultimately affect the policy goals that first motivated the soft whistleblower to make her disclosures. *Cf.* Ingber, *supra* note 33, at 378 (arguing that defensive litigation can prompt policy change or "force the executive branch to crystallize" its public stance on existing policy).

[297] See *supra* note 130 for articles on the merits of deferring to a rule or policy that was developed with heavy White House influence.

On the other hand, there are also reasons to be concerned about soft whistleblowers' passing information, including privileged documents, to the opposing party in ongoing litigation against their employer agencies. Rampant soft whistleblowing of this sort may chill thorough discussion of alternative policy approaches, because everyone inside the agency might become concerned about expressing unpopular or controversial views lest those views be disclosed to outsiders.[298] "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process."[299]

Worse yet, our judicial review system is ill-designed to discover this kind of flaw in an agency's decisionmaking. Whatever the standard of review in a particular case, courts basically review an agency's action for reasonableness,[300] and agency action appears more reasonable when there are few voices of dissent in the rulemaking record. Thus, the long-term effect of prolific soft whistleblowing may not be to shore up judicial review of agency action, but instead to chill dissent inside the agency, making what might otherwise have been divisive, hard-fought, and judicially vulnerable agency decisions appear unanimous and, consequently, reasonable.

Then, too, there is a risk that soft whistleblowing could drive, and perhaps skew, the litigation agendas for outside groups that regularly challenge agency action. Suppose, for example, Public Citizen developed a long term and mutually beneficial relationship with the OSHA/ethylene oxide soft whistleblower(s). If Public Citizen began to premise much of its OSHA-related litigation agenda on that soft whistleblower's information, the soft whistleblower could effectively use Public Citizen as a mouthpiece for his or her concerns about OSHA—perhaps co-opting a broader

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[298] As the Supreme Court has recognized, the purpose of FOIA's deliberative process privilege, which protects decisional documents, "is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (quoting S. Rep. No. 813, at 9).

[299] United States v. Nixon, 418 U.S. 683, 705 (1974).

[300] David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 530 (2011) (arguing that courts "are increasingly sneaking reasonableness standards into their reviews in lieu of making the difficult distinctions required by contemporary standard of review doctrine").

and more considered litigation agenda in favor of the soft whistleblower's concerns. In the face of such a threat, the continued efficacy of judicial review of agency action depends in part on outside litigants' exercising independent judgment about whether particular agency transgressions, identified by soft whistleblowers, are worthy of pursuit in court.

Overall, therefore, it is difficult to say whether soft whistleblowers serve to enhance or undermine judicial review of agency action. In the OSHA case, one can argue that the disclosure of the OSHA scientists' memorandum led to a sounder outcome—the agency indeed acted arbitrarily when it ignored the advice of its top scientists in refusing to strengthen the ethylene oxide standard. But for the reasons noted above, the long-term effect of significant soft whistleblowing at a particular agency may be to undermine the agency's decisionmaking, and to do so in ways that subsequent judicial review cannot discern and correct.

4. Democratic Accountability. Related to the issue of judicial review is the question of public or interest group accountability—what does soft whistleblowing mean for an agency's public image, and for interest groups' ability to participate in agency decisionmaking and to challenge agency decisions in court?

To begin with, it is important to note that soft whistleblowing can catalyze the formation of outside interest groups, as the feminist underground catalyzed formation of NOW. After its founding, NOW waged a very public campaign to push the EEOC and other federal agencies to expand their reading of Title VII.[301] And, as documented above, Fuentes and her fellow soft whistleblowers assisted in that campaign.[302] It is clear, therefore, that soft whistleblowers can expose agencies to new avenues of accountability.

But what of the information that soft whistleblowers provide? Simplistically, one might assume that all information that leaks from agencies promotes transparency and, in turn, democratic accountability. After all, as President Obama reminded us shortly after his inauguration, "[i]nformation maintained by the Federal Government is a national asset," and "[t]ransparency promotes

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[301] *Highlights from NOW's Forty Fearless Years*, NOW, http://www.now.org/history/timeline.html (last visited Feb. 3, 2014).

[302] *See* discussion *supra* Part III.A.

accountability and provides information for citizens about what their Government is doing."[303]

Further, one might view soft whistleblowing as part of the solution to problems of agency capture. As noted earlier[304] that term is a shorthand for the oft-expressed concern that "well-organized groups ha[ve] the potential to exercise disproportionate influence over agency policymaking by virtue of the resources they command[ ], the information they possess[ ], and the long-term relations they maintain[ ] with agency officials."[305] Perhaps soft whistleblowers help to correct that imbalance by providing information, expertise, and access to smaller or less well-organized groups.

Both arguments, however, rely on contestable premises. First, they presuppose that the soft whistleblowers are neutral and even-handed in the information they choose to disclose and the manner in which they disclose it. If, instead, a soft whistleblower has a political agenda, or a personal axe to grind with her employer agency, the picture the soft whistleblower paints of decisionmaking activities at that agency may not be fair and accurate—and thus the agency may be called to account for activities or decisions that would appear entirely reasonable in a fairer light.

Second, the idea that soft whistleblowing can help to correct information imbalances, and thus reduce agency capture, relies on the notion that soft whistleblowers, as a group, are equally or more likely to disclose their information to smaller, information-challenged outside entities as they are to the larger, better-organized groups that are routinely suspected of engaging in capture. In fact, the opposite is far more likely. Both the stories and my interviews suggest that soft whistleblowers generally share their information with individuals or entities with whom they have a prior connection. As a result, the same groups that "ha[ve] the potential to exercise disproportionate influence over agency policymaking by virtue of . . . the long-term relations they

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[303] Memorandum on Transparency and Open Government to the Heads of Executive Departments and Agencies, 74 Fed. Reg. 15,4685 (Jan. 21, 2009).

[304] *See supra* note 25 and accompanying text.

[305] Kagan, *supra* note 34, at 2265.

maintain[ ] with agency officials,"[306] are also likely to have stronger ties to soft whistleblowers. Moreover, as noted above, soft whistleblowers may undermine White House efforts, like that embodied in E.O. 12,866, to limit capture and increase administrative accountability by centralizing and publicizing ex parte communications with outside interest groups.[307] In short, the consequences of soft whistleblowing for "interest group control"[308] depend closely on the nature, scope, and directionality of this kind of information flow.

C. FURTHER QUESTIONS

The above discussion offers testable hypotheses about the consequences of soft whistleblowing for agency governance, policy development, and oversight. Several additional questions about the phenomenon also merit mention. For example, the interviewees indicated that soft whistleblowing occurs not only between agency insiders and outside entities, but also *between agencies*—that is, within the executive branch. If those communications are common, they have significant implications for coordination of policymaking efforts among agencies that share regulatory authority in particular areas.[309] Another important question is whether soft whistleblowing is directional—that is, whether the information flows more abundantly to groups on one side of the political aisle, or on one side of particular policy issues, than to those on other sides.

Other questions concern appropriate organizational responses to soft whistleblowing. Many entities behave in ways that suggest they recognize the advantages and risks of this kind of off-the-record information exchange. For example, incoming presidents often implement policies to limit unsanctioned leaks in an attempt to ensure that staff participate only in *approved* off-the-record

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[306] *Id.*

[307] *See supra* notes 292–94 and accompanying text (discussing how soft whistleblowing undermines regulatory reform efforts).

[308] Kagan, *supra* note 34, at 2264.

[309] *Cf.* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1135 (2012) (discussing the redundancies, inefficiencies, gaps, and coordination challenges that arise when two or more agencies share regulatory authority over a policy area).

conversations with outsiders.[310] Outgoing administrations, for their part, may "engage in significant personnel entrenchment," moving political appointees to "civil service position[s] with tenure in the same agency."[311] One goal of these personnel shifts may be to "ensur[e] that the outgoing administration's viewpoints and priorities remain represented within the agency,"[312] but a significant additional benefit is that outgoing political personnel who are returning to jobs in the private sector will continue to have close contacts in government. Relatedly, lobbying firms and agency watchdog groups frequently hire former agency employees, no doubt in part because a former insider is likely to have personal connections to—and contact information for—staff who remain at the agency. These and other tactical moves may be important to control the flow of nonpublic information from agencies, and to increase outside entities' ability to recognize whether the information coming from particular soft whistleblowers is sound and reliable.

V. CONCLUSION

The existence of off-the-record information exchange between agency employees and interested groups outside the agency is neither new nor surprising. This Article has attempted to expand and add nuance to our understanding of that information exchange, however, by documenting (1) that a significant amount of the information flows *outward*, from agency employees to Hill staff, journalists, and agency watchdog groups, (2) that the outward flow often relates to issues of policy rather than agency malfeasance, and (3) that agency employees strategically leak information in this way, in an effort to create outside pressure on their agency to shift its policymaking direction.

I have suggested a name for these policy-relevant disclosures by agency employees—soft whistleblowing. Further, I have offered three histories and a series of interviews to demonstrate that soft

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[310] *See supra* note 291 and accompanying text (discussing various methods presidents have utilized to restrict agency personnel access to outside groups).

[311] Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 563 (2003).

[312] *Id.* at 564.

whistleblowing is real and common. This evidence paints a picture of the phenomenon and supports my argument that the resulting high-volume, employee-directed flow of information out of agencies has significant effects on agency structure and function, and on outside entities' ability to oversee agency policymaking and limit agency overreach.

On a more theoretical level, soft whistleblowing likely serves a steadying, course-corrective function, insulating agencies from shifting political winds. Further, the phenomenon may disempower agency lawyers relative to other agency professionals, such as engineers, because differences in professional ethics rules may render the latter more willing to use their expertise and inside information to manipulate outside oversight of their agencies.

Finally, I have argued that soft whistleblowing assists Congress in tailoring its oversight of agency action. The phenomenon may also enhance both judicial review of agency action and public accountability, though the evidence on these points is more mixed. In any case, the strengthening of congressional oversight likely comes at the expense of presidential administration, because soft whistleblowing gives voice to those in an agency who disagree with their agency superiors or with the White House.